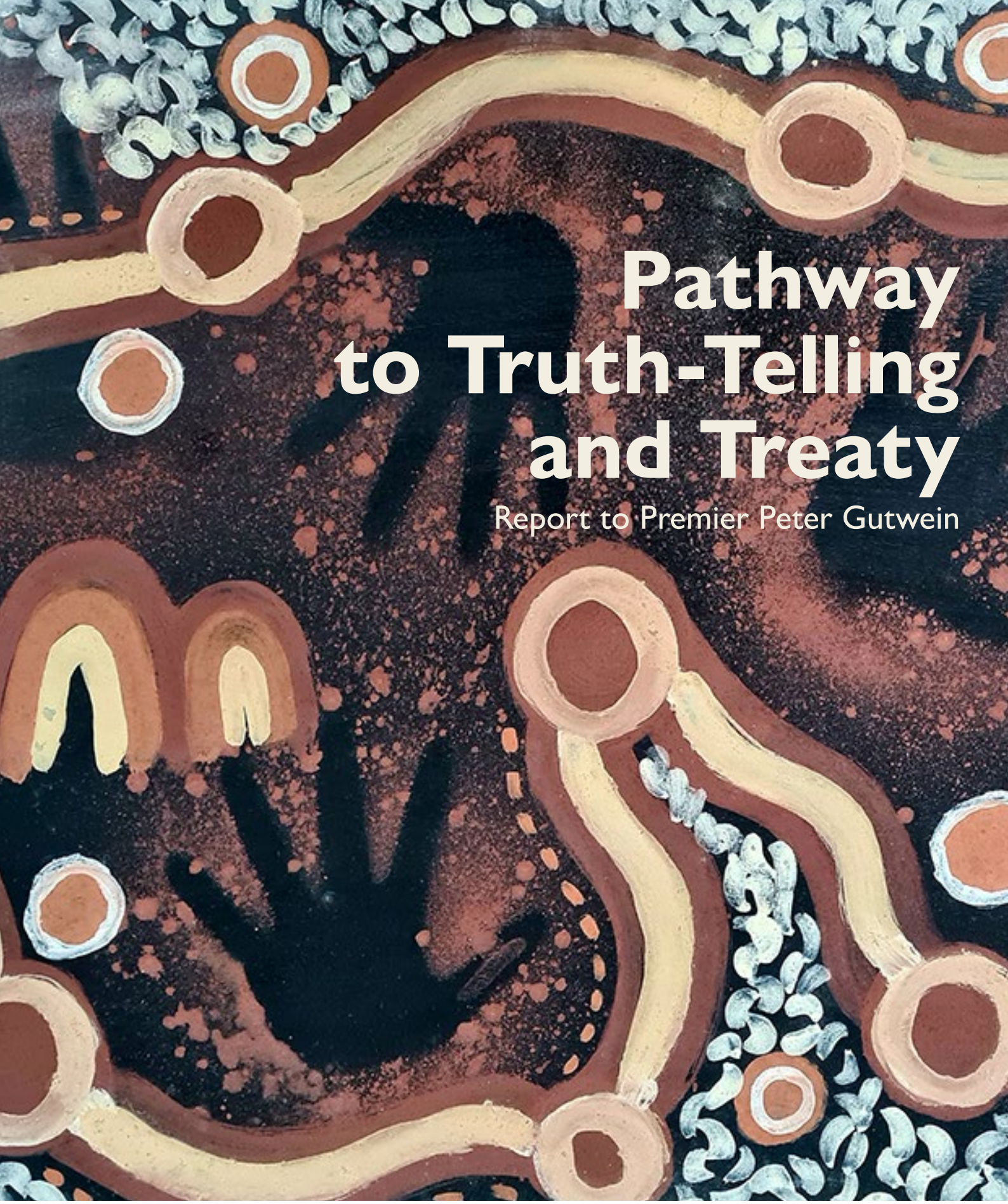

Pathway to Truth-Telling and Treaty

Report to Premier Peter Gutwein

Prepared by
Professor Kate Warner, Professor Tim McCormack and Ms Fauve Kurnadi

November 2021

ARTIST'S STATEMENT – LUANA TOWNEY

My artwork is black acrylic paint on stretched canvas.

The rest of the painting is painted with different types of natural ochre sourced from all over lutruwita, ground up on country on truwana/ Cape Barren Island, and mixed with fresh rain water, mixed together in abalone shells, and painted by myself.

The black background represents our black heart, our Country and our identity as Palawa / pakana people.

The picture is made up of nine larger circles which represent our nine tribes of long ago. As we move forward, we always remember the old people of long ago, their continuation on country for over 60,000 years, how they lived with the land, sustainably and healthily. We would not be here today if it weren't for them, their strength and resilience.

The lines joining the main circles represents the pathways to truth-telling. We remember our truths, and we speak our truths, and we encourage others to listen and learn.

The hand prints represent our continuation of culture, our pride and our resilience. We always were here, and we always will be here, and we leave our handprints to show future generations our story. This story, pathways to truth-telling, treaty and reconciliation.

The smaller circles represent the different groups of people who have voiced their opinions and concerns in relation to this new pathway, and we all play an important role in deciding our future.

The two arches represent our shelter. It provides us with safety, with warmth, and a place to connect to our families, just as hopefully this pathway to truth-telling will provide us. They are made of different shades of ochre, just as our skin is made up of different shades.

The brown shorter lines surrounding the pathways, represent the children who will be walking this journey with us, for they are the future. They may not be present the whole journey, but they are with us, and we are walking this journey, for their future and their children's future.

The white curves on the outside of the painting represent the wider community. They are here, they will always be here and we must be able to form relationships that are to the benefit of our community. This painting shows, that we can still have a healthy relationship with the wider community, while still being culturally strong and culturally healthy, telling our stories and keeping our culture safe.

I am a Palawa Wiradjuri woman, currently living on Cape Barren Island. My great, great, great grandmother on my mother's side, is Fanny Cochrane Smith, daughter of Tanganutura. Fanny was born on Flinders Island. My biological father is a Wiradjuri man from Central West NSW. My Wiradjuri family include the Towneys, Nadens and Goolagongs and many more.

My children are also pakana people whose family comes from Cape Barren Island, they are the grandchildren of the great Chief Manarlagenna.

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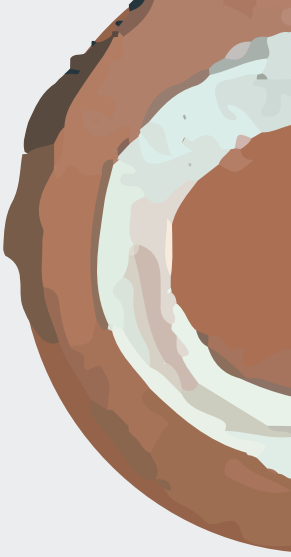
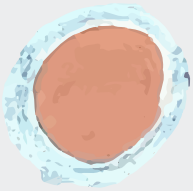
ACKNOWLEDGEMENTS

We acknowledge the Aboriginal people of lutruwita / trouwunna as the traditional owners and custodians of the land, the waters and the sea of this place we are privileged to now also call our home. Your ancient sovereignty, with its deep cultural and spiritual connections to Country, has been passed on faithfully for more than one thousand five hundred generations and was never ceded nor extinguished. Neither violent dispossession nor the pronouncement of the legal fiction of terra nullius annulled your sovereignty and we long for it to shine through as a fuller expression of what it means to be Tasmanian. We pay our deep respects to your Elders past, present and emerging and note with sadness the recent passing of the dearly loved and much respected Elder Aunty Phyllis Pitchford whom we had the pleasure to meet in her home in Latrobe just a few months ago.

One of the outstanding features of our interactions with Aboriginal people around the State has consistently involved the showering upon us of grace and generosity of spirit, personal warmth, and hospitality. We have experienced this in large community gatherings, in smaller community groups, in meetings with family groups and in meetings with individuals. We have been welcomed into personal homes, into community spaces and onto Country and we have regularly reflected together on how wonderful this aspect of our shared experience has been. We could understand an altogether different response given the repetitive experience of yet more white fellas coming to consult with Aboriginal people around the State. But we never once experienced scepticism like that. We tried to approach our task with open minds, open eyes, open ears and open hearts and we are truly grateful for the way in which we were received as well as for the open, honest and heartfelt sharing we were pleased to participate in. We take this opportunity to thank all the Aboriginal people we met with over the months of our project. We understand your recurrent refrain that your expectations have been raised by the Premier's appointment of us to this project and we join with you in expressing the view that the worst that could happen out of all of this is nothing.





We love the artwork we commissioned for the Report and take this opportunity to thank Luana Towney for her reflections on the brief, her conceptualisation of her artwork and her creativity in bringing the painting into reality. We are proud to show the work of such a talented Tasmanian Aboriginal artist. We also thank Tanya Harding, Bonnie Starick, Denise Robinson and Karin McCormack for their support in calling for artistic submissions and selecting the winning entry.

We are grateful to Premier Gutwein for his commitment to this project and for his faith in appointing us to undertake it. We believe that the Premier is completely genuine in his desire to see significant benefits flow to Tasmanian Aboriginal people and have only been encouraged in all our dealings with him to act independently and to make the recommendations we see fit. We have also received wonderful support from the Department of Premier and Cabinet, the Secretary of the Department, Jenny Gale, and many of the staff who have provided an array of support. We particularly thank Heike Schmidt for her wonderful work digitising Luana's artwork and undertaking the layout of our Report.

We are also grateful to the Minister for Aboriginal Affairs, Roger Jaensch, and also the past Ministers for Aboriginal Affairs who took time to meet with us and generously shared insights and experiences. Many other public servants provided outstanding support and assistance to us and some of them went way above any reasonable expectations to do all they could to help. There are too many of them to name individually but they know who they are and we express our gratitude to each of them.

We thank Professor Henry Reynolds for his advice on our timeline and also Professor Greg Lehman for his insights and wise counsel. Julia Flint did an excellent job of proofreading our report, and we thank her for this.

Our consultations literally took us all over the State with many hours on the road. We were so fortunate to have Dick Warner as driver on almost all of those trips – providing outstanding company and freeing us up from the additional drain of concentration on the road.

The one other person who has been involved with us from the inception of our project is Fauve Kurnadi, who kindly negotiated leave from her job as Legal Adviser – International Humanitarian Law at Australian Red Cross to provide administrative and logistical support to us. Fauve has undertaken extensive research tasks, recorded meticulous notes from meetings, travelled on all our consultations, collated materials, assisted in the preparation of our Final Report and provided invaluable support throughout the entire project. We are both incredibly blessed to have worked with Fauve. She shares our heart for beneficial outcomes for Tasmania's Aboriginal people, she has always been willing to undertake any task we set and has consistently demonstrated resourcefulness, professionalism and integrity. We could not have undertaken our consultations or prepared our Report without her and we are indebted to her for her many contributions.

In expressing our gratitude for all those who have contributed to our work, we of course accept full responsibility for all that this Report contains, including any shortcomings or inaccuracies.

Kate Warner and Tim McCormack
November 2021

LIST OF ACRONYMS

AAT	Administrative Appeals Tribunal
AEO	Aboriginal Education Officer
AES	Aboriginal Education Services
AEW	Aboriginal Education Worker
AEYEW	Aboriginal Early Years Education Worker
AHC	Aboriginal Heritage Council
AHT	Aboriginal Heritage Tasmania
ALCT	Aboriginal Land Council of Tasmania
APCA	Arthur-Pieman Conservation Area
ATSIC	Aboriginal and Torres Strait Islander Commission
ATSIHP	*Aboriginal and Torres Strait Islander Heritage Protection Act 1984*
CBIAAI	Cape Barren Island Aboriginal Association Incorporated
CHAC	Circular Head Aboriginal Corporation
DPAC	Department of Premier and Cabinet
DPIPWE	Department of Primary Industries, Parks, Water and Environment
EPBC	*Environment Protection and Biodiversity Conservation Act 1999*
FIAAI	Flinders Island Aboriginal Association Incorporated
FPPFL	Future Potential Production Forest Land
FRDC	Fisheries Research Development Corporation
IIAC	Independent Indigenous Advisory Committee
ILC	Indigenous Land Corporation
ILSC	Indigenous Land and Sea Corporation
ILUA	Indigenous Land Use Agreement
IPA	Indigenous Protected Area
IRG	Indigenous Reference Group
LSACT	Land and Sea Aboriginal Corporation of Tasmania
mtwAC	melythina tiakana warrana Aboriginal Corporation
OAA	Office of Aboriginal Affairs
ORIC	Office of the Registrar of Indigenous Corporations
PPAC	Parradarrama Pungenna Aboriginal Corporation
PTPZ	Permanent Timber Production Zone

PWS	Parks and Wildlife Service
QVMAG	Queen Victoria Museum & Art Gallery
SETAC	South East Tasmanian Aboriginal Corporation
TAC	Tasmanian Aboriginal Centre
TALSCAC	Tasmania Aboriginal Land and Sea Council Aboriginal Corporation
TLC	Tasmanian Land Conservancy
TMAG	Tasmanian Museum and Art Gallery
TRACA	Tasmanian Regional Aboriginal Communities Alliance
TWWHA	Tasmanian Wilderness World Heritage Area
UNDRIP	United Nations Declaration on the Rights of Indigenous peoples
UNESCO	United Nations Educational, Scientific, Cultural Organisation
WoC	Working on Country

EXECUTIVE SUMMARY

Our consultations with Tasmanian Aboriginal people began in NAIDOC week on 9 July and continued through the following four months with a total of more than 100 meetings.

Key themes that emerged

The primary objective of these consultations was to learn from Tasmanian Aboriginal people their thoughts on and aspirations for treaty, truth-telling and reconciliation and to identify possible pathways towards these goals. However, in almost all cases, discussions encompassed a much broader range of topics. The following key themes arose in the majority of our consultations:

- **Truth-telling**, including possible format, purpose and content;
- **Treaty**, including readiness for treaty, identity of parties, possible models, purpose, content and legal status;
- **Identity and lateral violence**;
- **Land and sea**, including the return, protection and management of land and waterways, and cultural fisheries;
- **Cultural heritage and practices**;
- **Education and capacity building**;
- **Language**, particularly language retrieval;
- **History**, including colonisation, dispossession, assimilation and government policies;
- **Intergenerational trauma**, including the past, present and future impacts of colonisation and dispossession on Tasmanian Aboriginal people; and
- **Terminology**, for example with respect to 'reconciliation' and Aboriginal/Indigenous/First Nations/First Peoples.

Our consultations with Tasmanian Aboriginal people have led us to make 24 recommendations in this Report, summaries of which are outlined below.

TRUTH-TELLING

Recommendation 1: A Truth-Telling Commission

Taking into account truth-telling processes in other countries and States, and prioritising the views we heard from Aboriginal people, we recommend the creation of a Truth-Telling Commission as a tool for acknowledging, recording and healing. This could be either a commission directly established under the *Commissions of Inquiry Act 1995*, or established under separate pathway to treaty and truth-telling legislation, which authorises a Truth-Telling Commission with the powers (or selected powers) of a commission of inquiry. An important benefit of adopting the Commission structure is that it would give *gravitas* to the body while also ensuring that it is adequately resourced.

The Truth-Telling Commission should have the following functions:

- to create a permanent and official historical record of the past, which includes clarifying the historical record, quashing the extinction myth and recording and explaining the resilience and survival of the Aboriginal people;
- to provide the opportunity for story-telling and preserving the memories of Elders and Aboriginal people;
- to educate the public about the past abuses and injustices committed against Tasmanian Aboriginal people as well as the intergenerational and ongoing effects of colonisation;
- to make recommendations for healing, system reform and practical changes to laws, policy and education, and specific matters to be included in treaty negotiations; and
- to deal with the question of Aboriginality, in so far as it relates to eligibility to determine representatives of the Aboriginal people for treaty negotiations with the State and for registration to vote in Aboriginal Land Council of Tasmania (ALCT) elections (see Recommendations 8 and 9).

Recommendation 2: Composition of the Truth-Telling Commission

A majority of the Truth-Telling Commission should be Tasmanian Aboriginal people and it should either be chaired by an eminent Tasmanian Aboriginal person, or co-chaired by an eminent Tasmanian Aboriginal woman and eminent Tasmanian Aboriginal man, of State-wide standing. The possibility of including an eminent Aboriginal person from outside the State should be considered, as well as an eminent respected non-Aboriginal person with experience of similar bodies. The Aboriginal membership must be broadly representative and should be determined by expressions of interest.

Recommendation 3: Flexible procedures and processes

We recommend that the Truth-Telling Commission adopt a flexible approach in terms of where it sits and how it conducts hearings and story-telling sessions. There must also be culturally appropriate psychological and emotional support provided to participants including observers to ensure that the truth-telling process is a healing and cathartic one and not re-traumatising. The Commission will need to decide which procedures to use for the purposes of dealing with its mandate.

Recommendation 4: The Truth-Telling Commission should produce interim publications and outputs in a range of formats

To fulfill its purpose, the Commission should employ different ways of engaging a broad cross-section of Tasmanian society and the media. Interim outputs should be published through a range of media, including online, video and print. Engagement with creative arts should also play an important role in this.

TREATY

Recommendation 5: Treaty and truth-telling advancement legislation

In the light of the difficulty of determining who should negotiate treaty on the Aboriginal side (they must be representatives freely chosen by Aboriginal people through their own representative structures),[1] we recommend that as a preliminary first step, the Government formulate a broad framework which is enacted in legislation - the 'Treaty and Truth-Telling Framework Act' or similar.

In addition to creating the framework for a truth-telling process, and a commitment to begin a treaty process and to provide the resources to make this happen, the framework should include:

- without prejudice to the actual content to be negotiated, an indicative list of the components of treaty such as a recognition that Aboriginal sovereignty has not been extinguished but that it coexists with that of the Crown; an acknowledgment of past injustices; reparations for colonisation and protection for Indigenous rights; and
- a code of conduct to ensure that Aboriginal participants are protected from lateral violence.

The UN Declaration on the Right of Indigenous Peoples (UNDRIP), endorsed by Australia in 2009, provides an influential guide for the minimum standards for treaty negotiations with themes of self-determination, participation in decision-making and respect for protection of culture.

1 Permanent Forum on Indigenous Issues, Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, 4th sess, Agenda Item 4, UN Doc E/C.19/2005/3 (17–19 January 2005) [46] [47].

Recommendation 6: Treaty should not wait for the completion of truth-telling

There has been considerable debate about the most appropriate sequencing for Voice, Treaty and Truth. Informed by the meetings we had with Aboriginal people, our view is that in the Tasmanian context, the best way forward is for the Government to show its commitment to meaningful change by legislating a framework which allows for both truth-telling and treaty work and for them to be done concurrently. However, the Truth-Telling Commission will need to first to determine eligibility for the purposes of selecting the parties to negotiate treaty.

Recommendation 7: Whole-of-Government Aboriginal Consultative Body

Without prejudice to a future treaty-negotiated Aboriginal Voice to the Tasmanian Parliament, which may result in designated Aboriginal seats in Parliament or other structural reforms, we recommend that the Government establish an Aboriginal Consultative Body to engage with whole-of-Government policy of interest to the Aboriginal people.

THE VEXED QUESTION OF ABORIGINALITY

Recommendation 8: Truth-Telling Commission to decide test for eligibility

We recommend that the government-appointed Truth-Telling Commission, with its majority Aboriginal members, be empowered to deal with the question of Aboriginality in so far as it relates to eligibility to determine representatives of the Aboriginal people to negotiate treaty with the State.

It should be for the Panel members to determine the test they will apply for the determination of ancestry and communal recognition and whether or not growing up in culture is essential.

Recommendation 9: The same test for eligibility to determine representatives to treaty negotiations be applied to ALCT elections

We recommend that the test developed by the Truth-Telling Commissioners to determine eligibility to elect representatives of the Tasmanian Aboriginal people to negotiate a treaty with the Tasmanian Government should also be used for registration to vote for ALCT elections.

LAND

Clearly there is an impasse with respect to return of public land to Aboriginal people, with no significant land returns since 2005. This is despite repeated commitments by the Government to return land. There are two major obstacles to returning public land: first, the way the Act works in practice with respect to management and input from local Aboriginal groups and secondly the vexed issue of identity. We have also learnt that despite efforts to facilitate joint management in the Tasmanian Wilderness World Heritage Area (TWWHA), joint management with Tasmanian Aboriginal people does not exist in Tasmania with respect to our State reserved lands.

Recommendation 10: The process for registering to vote for ALCT elections be changed

It is clear that there is a problem with the ALCT roll in that too few Aboriginal people register to vote and even fewer vote. In discussions with the Electoral Commissioner, it was suggested that the process could be improved by having a more substantial initial process which may:

- remove the need for an objection process;
- provide a more consistent and fair process;
- enable enrolments to take place throughout the three-year cycle rather than only prior to a main election (midterm by-elections can occur).

We recommend a change in procedure and that, as recommended in Recommendation 9, the Truth-Telling Commission's test of eligibility to register on the Roll be the same as eligibility to vote for representatives for treaty negotiations.

Recommendation 11: A statutory framework for Aboriginal Protected Areas

We recommend that either a new category of reserve land tenure be created under the *Nature Conservation Act 2002*, namely 'Aboriginal Protected Area' with appropriate values and reservation purposes; or that at least some of the classes of reserved land have an Aboriginal overlay which picks up appropriate values and purposes; or a separate statutory framework for Aboriginal Protected Areas could be created. In each case, title in the Aboriginal Protected Area could be vested in ALCT or another Aboriginal organisation with flexibility for permanent or interim leasehold or lease-back arrangements and funded healthy Country plans/ management plans a requirement.

Recommendation 12: Creation of the kooparoona niara Aboriginal Protected Area

Together with the enabling legislation, the first Aboriginal Protected Area, the kooparoona niara Aboriginal Protected Area in the Western Tiers including the Future Potential Production Forest Land (FPPFL) on the boundary of the TWWHA should be declared. This first Aboriginal Protected Area could serve as a model and would serve as a test of local management and access.

Recommendation 13: Consider creation of kunanyi / Mt Wellington an Aboriginal Protected Area

For many years the possibility of declaring kunanyi / Mt Wellington a national park has been considered for reasons which include properly resourcing it so that there are funds for conserving and managing the land and tracks. We recommend that the Government seriously explore the possibility of doing this using the recommended statutory framework for Aboriginal Protected Areas but there is a need to first consult with Aboriginal people.

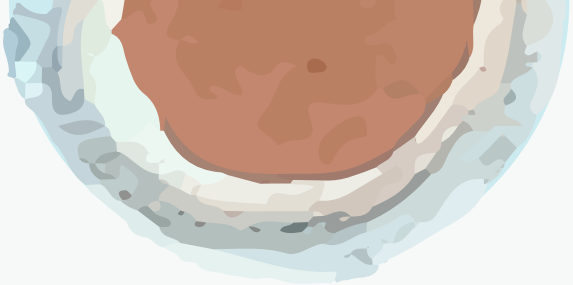
Recommendation 14: Increased resources for ALCT and land management

It is clear to us that ALCT is grossly under-resourced. Its lands are in remote locations and difficult to access. One option for helping supporting the land management functions of ALCT is the possibility of using park fees from kunanyi to fund the management of lands returned to the Aboriginal people.

To assist in building the capacity of the Aboriginal community to manage its land, the Government should establish an Aboriginal land and sea ranger funding program, and could consider looking to the Queensland model to do this.

Recommendation 15: Increasing the joint management of Crown land, parks and reserves

Joint management in Tasmania remains an aspiration rather than a reality. We understand that while some Aboriginal people have resisted the concept of joint management because they considered that this conflicted with their claim not to have relinquished sovereignty, there is now a greater willingness to engage in the interests of capacity building and as a step towards return of title to land. We recommend that the Government look at ways to engage in joint management including by using the existing provisions in the *Crown Lands Act 1976* and the *National Parks Reserves Management Act 2002* to facilitate this (with amendments if necessary).



SEA AND WATER RIGHTS

Recommendation 16: Amend the *Aboriginal Lands Act 1995* to include water

The Tasmanian *Constitution Act 1934* acknowledges Tasmanian Aboriginal people as the traditional and original owners of *Tasmanian Lands and Waters* and recognises the enduring spiritual, social, cultural and economic importance of *Tasmanian Lands and Waters* to the Aboriginal people (emphasis added). The inclusion of Aboriginal water rights and the return of sea and freshwater country into a legislative/treaty framework is strongly supported by Tasmanian Aboriginal people and it is our recommendation that this be progressed to give substance to the words in the preamble.

Recommendation 17: Support and investment for commercial cultural fisheries

The development of a commercial cultural fishery in Tasmania presents a wonderful opportunity which can benefit the whole of the State through food tourism and hospitality when the catch is sold to local restaurants. The vision is that profits will fund new Aboriginal youth justice diversion programs and train young Aboriginal abalone divers, giving them jobs.

The planned lease of 40 abalone quota units to the Land and Sea Aboriginal Corporation of Tasmania (LSACT) is an important first step towards creating a commercial cultural fishery and should serve as a foundation for further Aboriginal stewardship over marine resources.

Recommendation 18: Granting titles to low water mark and exclusive fishing zones

We received a strong message about the importance of using the coast, beaches and seas for food and cultural practices such as shell-gathering for necklaces and collecting kelp for basket-making - activities which are means of maintaining and reviving links to culture. To facilitate this, we recommend that the Government explore the options for extending title to coastal Aboriginal land and land owned by Aboriginal organisations to the low water mark.

HERITAGE

Recommendation 19: Reform of the *Aboriginal Heritage Act 1975* (Tas) as a matter of urgency

There is an urgent need for reform of the *Aboriginal Heritage Act 1975* (Tas). We recommend that reform should not wait for a truth-telling or treaty process. There is also merit in proceeding immediately with the measures mentioned in the report tabled by Minister Jaensch in July 2021 as interim steps, independently of the introduction of the new legislation.

Recommendation 20: Establishment of a Tasmanian Aboriginal Art and Cultural Centre

We strongly recommend the creation of an Aboriginal-owned, run and managed art and cultural centre at Macquarie Point. This is an ambitious project but with enormous potential and benefits, not only for Aboriginal people but for other Tasmanians and Australians. While not a 'solution' to reconciliation or an end in itself, a cultural centre such as this could have numerous dimensions. It could create space for coming together, healing, truth-telling, ceremony, celebration, research, learning and the keeping of sacred objects and repatriated cultural heritage.

A facility like this could also have global significance. International visitors wonder at our failure to celebrate and advertise the fact that Aboriginal culture in Tasmania dates back more than 40,000 years. A world class Aboriginal art and cultural centre would help fill that gap.

LANGUAGE

Recommendation 21: Reconstitute the Aboriginal and Dual Naming Reference Group

It is recommended that the Aboriginal and Dual Naming Reference Group be reconstituted with the inclusion of an external expert in linguistics and a respected Tasmanian Aboriginal person so that input into Aboriginal place names can proceed in an inclusive way.

There is also the possibility that while there can be an official Aboriginal or dual name that local communities be able to use their own name for a feature.

Recommendation 22: Funding to Aboriginal organisations for word lists

We recommend that support be given to Aboriginal organisations to assist with projects to compile word lists. Rather than reconstructing the local language, we suggest that these word lists be used in combination with palawa kani as the base language and that the TAC be encouraged to allow this to happen. In our view, this approach with concessions from both the Tasmanian Aboriginal Centre (TAC) and other Aboriginal organisations would offer the best hope of the revival and broad acceptance of an Aboriginal spoken and written language.

EDUCATION AND CAPACITY BUILDING

Recommendation 23: Strengthening capacity of the Aboriginal Education Services

We recommend that the Government strengthen the capacity of the Aboriginal Education Services (AES) to ensure it has the resources and the personnel to be able to develop the required professional learning material, develop a strategic plan for the comprehensive delivery of the material and have the personnel to deliver the professional learning material around the State.

Recommendation 24: Establishment of a Tasmanian Indigenous Education Consultative Body

We recommend that the Government establish a Tasmanian Indigenous Education Consultative Body (IECB) and that the Government consider establishing such a body as a portfolio committee of a broader whole-of-Government Aboriginal Consultative Council.

TIMELINE OF EVENTS

It is important to note that the timeline below is not exhaustive. It does however provide a useful summary of some key moments and events in our shared Tasmanian history, many of which are referred to throughout this report.[2]

40,000 – 12,500 years	Sea levels fall and Aboriginal people move across the vast area of land that once connected Victoria and Tasmania, bringing with them different languages and cultural practices.
15,000 – 10,000 years	The climate warms and sea levels rise, and the area that is now known as the Bass Strait is flooded. People retreat to either side to reside in what is now Victoria and Tasmania respectively.
c. 1775	The great warrior and leader, Mannalargenna is born.
From 1797	Sealers settle on small islands in Bass Strait and make contact with Aboriginal clans along the northeast coast.
1803	First British 'settlers' arrive at Risdon Cove.
1824	The Black War commences.
1828	Lieutenant George Arthur declares Martial Law.
1829	George Augustus Robinson begins his 'Friendly Mission'.

2 We have drawn from the following sources to inform this timeline: Lyndall Ryan, *Tasmanian Aborigines* (Allen & Unwin, 2012, 2nd edition); Reconciliation Tasmania, *Historical Timeline* (2020) <https://rectas.com.au/timeline>; National Museum of Australia, 'The Black Line', *Defining Moments in Australian History* (31 August 2021) <https://www.nma.gov.au/defining-moments/resources/the-black-line>; Flinders Council, 'Tasmanian Aboriginal History in the Furneaux Region', *Furneaux History* <https://www.flinders.tas.gov.au/aboriginal-history>; Dennis W. Daniels, 'The Assertion of Tasmanian Aboriginality from the 1967 Referendum to *Mabo*' (MHum Thesis, The University of Tasmania, 1995) 30 <https://eprints.utas.edu.au/3585/2/Daniels_whole_Thesis.pdf>.

1830	The ‘Black Line’ of soldiers and settlers moves south towards the Tasman Peninsula, forcing the Oyster Bay and Big River nations from their lands.
1831	On 6 August, a promise, or treaty, is made at Little Musselroe Bay between George Augustus Robinson and Chief Mannalargenna.
1832	George Augustus Robinson brings remaining Oyster Bay and Big River people to Hobart to meet the Governor after making further promises.
1833	Wybalenna, intended as a permanent place of exile, is established at Settlement Point.
1846	A petition is sent to Queen Victoria asking that agreements made with Robinson and Arthur be honoured.
1847	49 people survive Wybalenna and are relocated to Oyster Cove on the Tasmanian mainland. Wybalenna is closed.
1876	Truganini dies, sparking a myth about the extinction of Tasmanian Aboriginal people.
1881	A reserve for Aboriginal families living in the Furneaux Group is established on Cape Barren Island.
1891	The Census shows 139 people of Aboriginal descent in Tasmania.
1951	The Cape Barren Island Reserve is dissolved and many families are forced off the island.
1973	The Aboriginal Information Service is established as the first Aboriginal organisation in Tasmania.
1975	The *Aboriginal Relics Act 1975* (now the *Aboriginal Heritage Act 1975*) is passed.
1976	Truganini’s remains are returned and cremated. Roy Nichols scatters her ashes in the D’Entrecasteaux Channel.

1977	Michael Mansell and others set up an Aboriginal Parliament outside Parliament House and presents a petition demanding the return of land.
1978	The Tasmanian Government establishes the Aboriginal Affairs Study Group to investigate 'land rights, the mutton bird industry and social development of the Tasmanian Aboriginal community'.
1983	*Tasmanian Dam Case* – the Tasmanian Government claims that the kuti kina Cave could not be of special significance to Aboriginal people because Tasmanian Aborigines were extinct.
1984	The *Museums (Aboriginal Remains) Act 1984* is passed to facilitate the return of TMAG's Crowther Collection to Tasmanian Aboriginal people.
1989	The Aboriginal and Torres Strait Islander Commission (ATSIC) is established by the federal government and regional councils elected, including the Tasmanian Regional Aboriginal Council (TRAC).
1991	The Council for Aboriginal Reconciliation is established by the Commonwealth Parliament in 1991. Elder, Alma Stackhouse, is appointed as the Council's Tasmanian member.
1995	12 parcels of land are returned under the *Aboriginal Lands Act 1995*, including islands in the Furneaux Group, historic sites and sacred cave sites. The Aboriginal Land Council of Tasmania (ALCT) is established under the *Aboriginal Lands Act 1995.*
1996	The *Treaty of Whitemark* is signed. First ALCT elections held (1996/97).
1997	The report on the Stolen Generations, based on the inquiry by the Human Rights and Equal Opportunity Commission is released. The Tasmanian Parliament issues a public apology to the Stolen Generations, becoming the first in Australia to do so.
1999	Title to Wybalenna is transferred to ALCT under the *Aboriginal Lands Amendment (Wybalenna) Act 1999*.
2000	Over 10,000 people walk across the Tasman Bridge in support of the Stolen Generation and Reconciliation.
2002	Trial electoral roll is set up by ATSIC for the 2002 ATSIC Regional Council elections.
2004	Prime Minister John Howard announces the Government's intention to abolish ATSIC.

2005	The *Aboriginal Lands Amendment Act 2005* is passed, allowing for the transfer of title to Clarke Island and over 40,000 hectares on Cape Barren Island to Aboriginal title.
2006	The *Stolen Generations of Aboriginal Children Act 2006* is passed, setting aside $5 million for the compensation of surviving members of Tasmania's Stolen Generations. Tasmania becomes the first State to compensate victims of the policy.
2009	The Tasmanian Aboriginal Centre (TAC) lobbies for the proposed Brighton Bypass to be rerouted.
2015	The Tasmanian Government announces a policy to 'reset the relationship' with Tasmanian Aboriginal people. The Tasmanian Regional Aboriginal Communities Alliance (TRACA) is established with membership from seven incorporated organisations.
2016	The preamble of the Tasmanian Constitution is amended to acknowledge the Tasmanian Aboriginal people as Tasmania's First People and the traditional and original owners of Tasmanian land and waters.
2017	The Aboriginal Heritage Council is established by the *Aboriginal Heritage Act 1975.*
2019	Part of a 220-hectare property *Wind Song* is given to ALCT by private landholders Jane and Tom Teniswood. The Governor of Tasmania flies the Aboriginal flag at Government House on a permanent basis.
2021	The *Tasmanian Implementation Plan for Closing the Gap (2021-2023)* is tabled at a meeting of the Joint Council on Closing the Gap.

BACKGROUND

OUR APPOINTMENT

For several years we have shared a vision for a new Tasmania – where our Aboriginal people's profoundly long and deep connections to Country are respected, where our unique Aboriginal heritage is cherished, where we properly understand what it really means for all of us to be Tasmanian and to gather together in peace, in pride and without shame. Throughout her term as Governor, Kate committed herself to advancing relations with Aboriginal people, looked for opportunities to acknowledge the truths of our history and proactively took initiatives to demonstrate recognition of and respect for Aboriginal people. During Tim's tenure as Dean of the University of Tasmania Law School he led a more public commitment of the School to acknowledging the injustices of past treatment of our Aboriginal people and to promoting respect for their unique place as the traditional owners and custodians of lutruwita / trouwunna. Kate and Tim worked together on a number of initiatives during this time.

When the Premier invited Kate to facilitate this project – to consult with Tasmania's Aboriginal people and to map out a pathway to truth-telling and treaty – she knew she could not refuse. Kate asked the Premier if she could work with Tim on the project and so our joint appointment came to be. We are acutely aware that we are both white and privileged and, like so many in similar positions in the past, have agreed to work on yet another project about the future of Tasmania's Aboriginal people. We informed the Premier we would commit to this preliminary phase of the project but that the subsequent, substantive phases must be led by Aboriginal people. Our joint desire is that our work helps facilitate tangible and beneficial outcomes for the Aboriginal people of the magnificent group of islands we are privileged to call our home. We firmly believe that tangible and beneficial outcomes for them will ultimately benefit all of us.

TERMS OF REFERENCE

On 22 June 2021, at the opening of the 50th Parliament of Tasmania, Her Excellency, the Honourable Barbara Baker AC, outlined in her speech that the Premier has requested that Professor Emerita Kate Warner AC, consult with our First Nations people to find an agreed pathway to reconciliation so we can all share in the potential that exists from a truly meaningful, reconciled relationship.

The Governor outlined that Professor Warner will be supported by Professor Tim McCormack and will deliver a report to the Premier by October 2021.[3]

The Premier has requested that Professor Warner provide in her report recommendations that will outline a proposed way forward towards reconciliation, as well as the view of the Tasmanian Aboriginal people on a Truth-Telling process and on what a pathway to Treaty would consist of.

When engaging with Tasmanian Aboriginal people and conducting this work, the Finding an Agreed Pathway to Reconciliation will be guided by:

- Respect
- Recognition
- Acknowledgement
- Aspiration

The scope of work includes:

1. Engaging with Tasmanian Aboriginal people to listen, receive feedback and gain clarity on their views on what a pathway to reconciliation could be.
2. Interjurisdictional analysis to understand and learn from existing models to support best practice.
3. Engagement and collaboration with relevant non-Aboriginal people.
4. Provision of a final report to the Premier by 31 October 2021 which will provide both findings and recommendations.

Findings will include but not be limited to:

- The actions taken towards reconciliation to date and analysis of the impact of those actions for Tasmanian Aboriginal people and the broader Tasmanian community;
- The views of Tasmanian Aboriginal people on what they believe a pathway to reconciliation would include;
- The views of Tasmanian Aboriginal people on Truth-Telling;
- The views of Tasmanian Aboriginal people on what a pathway to Treaty would be.

Recommendations will include but not be limited to:

- What the pathway to reconciliation could include;
- What next steps and a timeframe towards reconciliation could be;
- What matters need to be considered to deliver a truly reconciled Tasmanian community;
- Any other matters considered relevant to developing a pathway towards further reconciliation with Tasmanian Aboriginal people.

Governance

The Finding an Agreed Pathway to Reconciliation will be led by Professor Warner who will be supported by Professor Tim McCormack, and research assistants as required.

Secretariat support

Department of Premier and Cabinet

3 The Premier granted an extension until 5 November 2021.

OUR APPROACH

The guiding principles

Throughout the *Finding an Agreed Pathway to Reconciliation* project, we were guided by the following principles in conducting our work:

- Respect for the rich culture, knowledges and history of Tasmanian Aboriginal people;
- Recognition that further and genuine reconciliation can only be achieved through a working partnership that gives Tasmanian Aboriginal people their own voice in determining what genuine reconciliation, treaty and truth-telling looks like;
- Commitment to deep listening to Tasmanian Aboriginal people and their views;
- Acknowledgement of the work achieved to date, such as statements of sorry and constitutional change, whilst recognising there is much more to be done;
- Responsibility to be informed by evidence and expertise;
- Commitment to the aim of achieving better outcomes for Tasmanian Aboriginal people, including a truly reconciled community.

UN Declaration on the Rights of Indigenous Peoples

Several people spoke to us about the importance of applying a human rights lens to truth-telling and treaty. Those who raised this issue were particularly keen to see the principles of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) included in treaty negotiations and enshrined in treaty. The details about how this could be achieved – whether the Declaration should be adopted in its entirety or whether certain rights should be adopted – were not discussed in community consultations. However, as a minimum, we decided the following should inform our own process and also the substantive processes to follow:

- The right to self-determination;
- The right to autonomy or self-government;
- The right to practice and revitalise cultural traditions and customs; and
- The right to participate in a manner informed by free, prior and informed consent.

One person told us they would like to see the enactment of a Tasmanian Human Rights Act and the incorporation of UNDRIP principles into this legislation, further commenting, 'how can we have justice until we are formally recognised as people?'.

The UNDRIP, adopted by the UN General Assembly on 13 September 2007, is the preeminent and most comprehensive international instrument on the rights of Indigenous peoples. The Declaration defines minimum standards for the survival, dignity, security and well-being of First Peoples worldwide. The Declaration builds on existing human rights and freedoms enshrined in international human rights law, particularly the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, for specific application to the situation of First Peoples. However, the Declaration, while adopted by Australia, is not legally binding and cannot override domestic law. It creates no new rights and does not receive ratification through Australia's treaty-making process, so has no effect in domestic law. Despite this, the Declaration carries significant political, moral and educational force for the Australian Aboriginal and non-Aboriginal community. It also 'provides a framework that States can adopt to underpin their relationship with indigenous peoples and may guide them in the development of domestic law and policy'.[4]

Australia's relationship with the UNDRIP remains complicated. In 2007, Australia was one of four countries (along with Canada, New Zealand and the United States) that voted against the adoption of the Declaration, citing dissatisfaction with the references to self-determination, the right to land, the right to free, prior and informed consent, and third-party rights.[5] Since 2007, Australia has reversed its decision and has committed to take actions towards implementation. However, to date, the Government has not yet developed a plan to implement UNDRIP into law, policy and practice.[6]

4 Megan Davis, 'Indigenous Struggles in Standard-Setting: The *United Nations Declaration on the Rights of Indigenous peoples*' (2008) 9 *Melbourne Journal of International Law*, 439, 465.

5 *General Assembly adopts Declaration on rights of Indigenous peoples; 'Major step forward' towards human rights for all, says President* (Press Release, 13 September 2007) GA/10612, 61st session, 107th and 108th plenary meetings.

6 June Oscar AO, *Incorporating UNDRIP into Australian law would kickstart important progress* (13 September 2021) Australian Human Rights Commission <https://humanrights.gov.au/about/news/opinions/incorporating-undrip-australian-law-would-kickstart-important-progress>.

Treaty negotiations have commenced in States and Territories around Australia, including in Victoria. While the Victorian Government has publicly recognised the importance of the UNDRIP in the treaty process,[7] it is too early to know whether the Declaration is successfully being used as a framework for these negotiations. Developments in Victoria may have lessons for treaty negotiation processes in Tasmania, as explained by Harry Hobbs in his article on the UNDRIP and treaty making:

> A state's rhetorical commitment to the Declaration or ritual public incantation of its terms will not automatically lead to meaningful reform. In the absence of enforceable standards holding the state to account, asymmetrical power relations will affect the process and outcomes of any negotiation. To challenge this, Indigenous peoples could publicly use the UNDRIP and seek to embed its values within state actors. Critically, norm internationalisation will not occur if those advocating for structural reform fail to articulate their aspirations in the language of the Declaration.[8]

TERMINOLOGY

Reconciliation

During the course of our work, it became apparent that the terminology of 'finding an agreed pathway to reconciliation' was divisive. The word reconciliation means different things to different people, communities and organisations, both Aboriginal and non-Aboriginal. For some, reconciling suggests a return to a previous relationship of harmony and respect that for most countries living with the legacy of colonisation never existed in the first place. One Victorian colleague involved in the Yoo-rrook Justice Commission challenged us on this terminology and indicated that the framing of our project around the concept of reconciliation would be unacceptable in the current process in Victoria.

Consistent with our commitment to bringing a human rights lens to our work, we understood and readily accepted these concerns. The term 'reconciliation' not only presumes a previous healthy and respectful relationship but it is also presupposes a particular outcome – an outcome that Aboriginal people may not want.

The Truth and Reconciliation Commission of Canada grappled with this terminology in its final report:

> To some people, reconciliation is the re-establishment of a conciliatory state. However, this is a state that many Aboriginal people assert never has existed between Aboriginal and non-Aboriginal people. To others, reconciliation, in the context of Indian residential schools, is similar to dealing with a situation of family violence. It's about coming to terms with events of the past in a manner that overcomes conflict and establishes a respectful and healthy relationship among people, going forward. It is in the latter context that the Truth and Reconciliation Commission of Canada has approached the question of reconciliation.[9]

Young Aboriginal woman, Aria Ritz, speaking at a forum recently organised by Reconciliation Tasmania said, 'It's a white person's word … you can't reconcile if you were never together'.[10] Similar sentiments were raised in our consultations. One person told us that 'Aboriginal people don't have anything to reconcile with white people – truth, justice and recognition, but not reconciliation'. A respected Elder stated that 'reconciliation shouldn't be about Aboriginal people giving and compromising to meet non-Indigenous people, but rather a mutual coming together'.

7 *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic), preamble.

8 Harry Hobbs, 'Treaty making and the UN Declaration on the Rights of Indigenous peoples: lessons from emerging negotiations in Australia' (2019) 23:1-2 *The International Journal of Human Rights*, 174, 187.

9 Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary Report of the Final Report of the Truth and Reconciliation Commission of Canada* (2015) 6.

10 Aria Ritz, Reconciliation Collective Annual Forum 2021 (29 October 2021).

Others suggested 'inclusiveness', rather than 'reconciliation', was a more appropriate term as this not only encapsulated the inclusion of Aboriginal people in society, but also the inclusion of non-Aboriginal people in culture.

People also expressed genuine concern and scepticism about promises of reconciliation. One person felt that words like self-determination and reconciliation were 'empty promises', stressing that commitments need to be about actions, not words. Others spoke about this terminology being 'government speak' or 'the Premier's words', and not reflective of Aboriginal people's views.

In one conversation, we heard that truth-telling and treaty shouldn't be confused with reconciliation, as one does not necessarily facilitate the other. However, another person spoke about the difference between the informal process of reconciliation and the formal processes of treaty and similar mechanisms, asserting that 'if people in Tasmania want a treaty, they're going to have to bring the population with them – isn't this the reconciliation process?'.

There were some people in favour of this terminology though, maintaining that 'the term reconciliation is a process to heal and move forward together, with Aboriginal and non-Aboriginal people'. There was also a proposition from several people that fiddling with terminology is 'playing the political game' and 'a distraction to avoid progress', suggesting that we wouldn't be having discussions about truth-telling and treaty if it wasn't for the reconciliation movement in Australia.

From the outset, we decided not to change the title of our project and, instead, we define reconciliation broadly. A pathway to reconciliation should be inclusive of the elements raised above – truth, healing, inclusiveness, respect, empowerment and self-determination – because reconciliation is multifaceted. It is about taking responsibility for our violent past, acknowledging the ongoing impacts of oppression and dispossession, recognising the need to build a positive relationship based on mutual respect, and taking positive action towards the empowerment and self-determination of Tasmanian Aboriginal people. In recognition of the sensitivity of the term to many Aboriginal people, however, we have removed the word reconciliation from the title of our report, which now reads 'A Pathway to Truth-Telling and Treaty'.

Aboriginal or Indigenous?

As expected, there were differing opinions about the terminology of self-identification. Across our consultations, people identified using a wide range of terms, including palawa, pakana, Pallawah, Aboriginal, Aborigine, Indigenous, Traditional Owners, First Nations and First Peoples. We were informed by one group that, collectively, Tasmanian Aboriginal people 'rarely identify as Indigenous, sometimes as First Nations, but mostly as Aboriginal'. The same group also pointed out the offensiveness of the acronym 'A&TSI'. A respected Elder rejected the term Indigenous in favour of Aboriginal, as did a young Aboriginal person, who went one step further, highlighting the importance of 'understanding and conveying who your family and Country is' and acknowledging that this is 'broader than Aboriginal'. In one community gathering, people thought First Nations and First Peoples of Australia, rather than Aboriginal or Indigenous, was the more appropriate terminology.

There was also disagreement about how to refer to non-Aboriginal people, with 'white fellas/people', 'non-Aboriginal people' and 'other Tasmanians' being used synonymously. One person we spoke to felt strongly that we shouldn't talk about 'black' and 'white', but rather Aboriginal and non-Aboriginal. Similarly, another person thought 'other Tasmanians' was a useful term to capture non-Caucasian, non-Aboriginal people in Tasmania. We did, however, hear from several people that the language of 'us and them' was not helpful in this discourse, though one person did accept that 'there does need to be some distinction between Australian and palawa'.

Early on in the process, we were made aware of an extract in the second edition of Lyndall Ryan's *The Aboriginal Tasmanians*, which quotes Michael Mansell on the politics of naming. Mansell says:

> Are we Aboriginal Australians or are we in fact Australian Aborigines? The former suggests that our lot is chucked in with the lot of Australians. We are Australian citizens, albeit we happen to be Aboriginal, therefore our rights are determined by the rights which accrue to Australians except for some special considerations because we happen to be Aboriginal. However, if we are Australian Aborigines, the emphasis is upon us being Aboriginal people who happen to live in this country called Australia and our indigenous rights flow from that separate and different description of us … if we are Australian Aborigines, we are aiming to get the best possible deal from the world, which includes the nation of Australia, to which we are not subordinate...[11]

11 Michael Mansell in Lyndall Ryan, *The Aboriginal Tasmanians* (Allen & Unwin, 2nd edition, 1997) xx.

Throughout this report, we have adopted the terminology of Tasmanian Aboriginal people, Tasmanian Aborigines or Tasmanian Aboriginal community, and First Nations or First Peoples when referring to global Indigenous populations. It is not for us to determine which terminology is more appropriate, or how Aboriginal or even non-Aboriginal people ought to refer to themselves. However, for the purposes of this report we have chosen to follow the reasoning outlined above, as well as the general global movement towards the terminology of First Nations and First Peoples.

ANALYSIS OF INTERJURISDICTIONAL MODELS

[T]reaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States.[12]

The truth can be, and often is, divisive.
However, it is only on the basis of truth that true reconciliation can take place.[13]

In accordance with the Terms of Reference, we conducted an analysis of international and other Australian models of treaty and truth-telling. We recognised that it would not be possible to simply modify and apply these models to Tasmania, given the unique nature of the Tasmanian experience. Treaty and truth-telling must be designed for Tasmanian Aboriginal people, by Tasmanian Aboriginal people. However, this analysis helped us understand and learn from these existing models and examples of best practice, which has informed our perspective on treaty and truth-telling in Tasmania.

A brief reflection on our findings can be found in 'Treaty' and in 'Truth-Telling' below.

12 *UN Declaration on the Rights of Indigenous peoples*, Preamble.
13 Truth and Reconciliation Commission of South Africa, *Final Report*, 29 October 1998, vol 1, 18.

HOW WE LISTENED TO ABORIGINAL PEOPLE

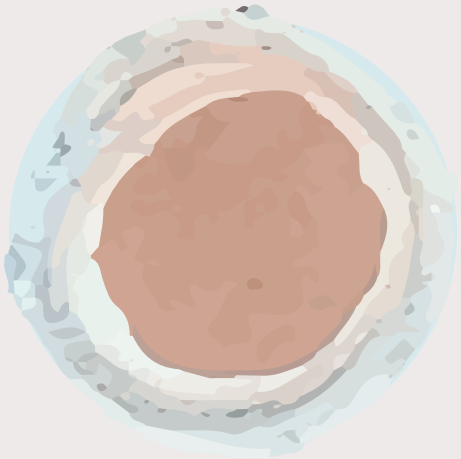
Our consultations with Tasmanian Aboriginal people commenced in NAIDOC week at piyura kitina / Risdon Cove on 9 July 2021. Since then, we have held over 100 meetings and engaged with more than 420 individuals throughout Tasmania and, in several cases, via videoconference with people living on mainland Australia and overseas. Of these meetings, there were 62 community consultations[14] with approximately 370 people who identified as Tasmanian Aborigines.

Total meetings held:

Aboriginal community groups (incorporated and non-incorporated bodies)	= 30
Aboriginal individuals outside of community groups	= 32
Non-Aboriginal subject matter experts	= 22
Non-Aboriginal private sector	= 1
Government (current departments and current/former representatives)	= 23

Though we did not seek formal submissions, we also received seven written statements from individuals and groups wishing to convey their perspectives in writing.

14 "Community consultations" refers to meetings with Aboriginal community groups and individuals who identified as Aboriginal.



CONNECTING WITH COMMUNITY

We were conscious before we even started our consultations that the issue of Aboriginality in Tasmania is contested and divisive. We decided at the outset that not only could we not solve the issue ourselves in a few short months, but also that it would be inappropriate for us to do so. As a consequence of our consultations and our research we have learnt a great deal more about just how contested this issue really is and we discuss our reflections in more detail below in the section on 'The Vexed Question of Aboriginality'. We agreed at the start of our work that we were willing to engage with anyone claiming to be an Aboriginal person without deciding for ourselves to exclude particular individuals, family or other community groups, or organisations.

Throughout the course of our work, our sole intention was to engage with Tasmanian Aboriginal people, not with organisations. However, it was helpful to rely on the wider networks of these organisations to locate and connect with members of community and to promote and facilitate meetings. To this end, we contacted each of the community corporations registered on the Register of Aboriginal Community Organisations, held by the Department of Primary Industries, Parks, Water and Environment (DPIPWE), and the federal Office of the Registrar of Indigenous Corporations (ORIC). We received positive responses from almost all corporations.

In addition to these consultations, we met with non-incorporated Aboriginal community groups in a number of locations around the State, in order to hear the voices of those that are not connected with an organisation or the local community around that organisation. We also consulted with Aboriginal individuals, including a number of respected Elders, who wished to share their views with us in a more private setting.

We met with a number of Aboriginal and non-Aboriginal subject matter experts, in order to gain deeper insights into certain issues, for example with respect to land management, Aboriginal affairs, language, fisheries, history and genetics. We also sought meetings with relevant and interested government and non-governmental bodies, such as the Aboriginal Heritage Council of Tasmania (AHCT), ALCT, AES, the Tasmanian Electoral Commission (TEC), the Office of Aboriginal Affairs (OAA), and the Tasmanian Archives and Heritage Office (Tasmanian Archives).

The meetings with non-Aboriginal subject matter experts need to be distinguished from our consultations with Tasmanian Aboriginal people. Any comments in this report that purport to reflect the perspectives and opinions of Tasmanian Aboriginal people on truth-telling, treaty and reconciliation have been taken from our engagement with people who identify as Tasmanian Aborigines and not from meetings with non-Aboriginal individuals. Where comments about these issues have come from non-Aboriginal people, this has been clearly identified.

In the majority of cases, we reached out to individuals and groups directly to arrange meetings. However, there were instances where individuals and groups reached out to us, either to request a meeting or to recommend that we meet with someone from their community.

With the exception of 12 virtual engagements, all meetings and consultations were held face-to-face in the following locations around the State:

- Arthur River
- Bedlam Walls
- Bruny Island
- Burnie
- truwana / Cape Barren Island
- Kennaook / Cape Grim
- Cygnet
- Deloraine
- Devonport
- Flinders Island
- George Town
- Hobart
- Huonville
- Interview River
- Latrobe
- Launceston
- Tebrakunna / Little Musselroe Bay
- Nubeena
- panatana
- piyura kitina / Risdon Cove
- Queenstown
- Rebecca Creek
- Richmond
- Riverside
- Smithton
- Snug
- Stanley
- St Helens
- Tomahawk

FORMAT OF CONSULTATIONS

In wanting to ensure the format of our engagements were suitable, respectful and culturally appropriate wherever possible, community consultations took a variety of forms. In almost all cases, we gave people the option to determine for themselves how they would like to engage with us. Most consultations were held in meeting and Board rooms and more than a dozen meetings were held via videoconference. We were also welcomed into the homes of some people, including Aboriginal Elders, for private conversations.

In Deloraine, our conversation with the local community took place around the yarning circle on the kooparoona niara Cultural Trail along the banks of the Meander River. This was special for us, and the first and only time we sat around a fire to yarn. We were touched to be welcomed to Country in this way.

On truwana / Cape Barren Island (CBI), a number of community members generously gave their time to show us around parts of the island. This allowed us to have conversations with people individually and in small groups, as well as to participate in a larger community-led meeting. Our tour of the school, led by several remarkable young people and the CBI school teachers was a highlight of our visit.

While, intentionally, engagements were not scheduled for a certain length of time, consultations tended to last between one and three hours. The majority of engagements followed an open forum format, allowing all participants an opportunity to speak and to share their thoughts in a free and non-judgmental way. Occasionally these engagements took on a more structured format, and included presentations or submissions delivered by one or two members of the group.

In all meetings, lengthy notes were taken as a way of faithfully recording what was heard and to ensure participants' views would be accurately captured and reflected in this report. In most cases, contributions have been anonymised and de-identified, except where express permission was sought.

It is important to note that, although we have made every effort to ensure that the comments included in this report have been reflected accurately and within the right context, we have not investigated or passed our own judgment on the truth of what we have been told. Our role was to listen and report faithfully on what we have been told by people who identify as Tasmanian Aborigines and this is what we have ultimately sought to do.

WALKING ON COUNTRY

Walking on Country contributed greatly to our understanding of what connection to Country means for Aboriginal people. The lands and waterways that make up this place we call lutruwita / trouwanna / Tasmania have been cared for by Tasmanian Aboriginal people for more than 40,000 years, and the community continues to protect and care for Country in myriad ways. It wasn't until we were taken on Country by Elders and other Tasmanian Aboriginal people that we began to appreciate the transcendent depth of this connection.

We feel incredibly privileged to have been taken on Country several times over the past four months, including at Tebrakunna / Little Musselroe Bay, Bedlam Walls, Kenaook / Cape Grim, Murrayfield, panatana, Interview River and Rebecca Creek. The way in which Country continues to be cared for is a gift to all of us that share in the beauty of this place.

Many of those we accompanied shared personal stories, experiences and knowledges. We are grateful to you for the time you spent walking with us, talking to us about Country and showing us these unique and culturally significant places. There are memories and special experiences from these visits that will stay with us forever, and for that we are deeply grateful.

THE KEY ISSUES

TRUTH-TELLING

The issue is more than past dispossession, it's about ongoing intergenerational trauma from a range of past and current white Australian assimilation policies.

Fiona Maher

The analysis of contested histories and abandoned places is most akin to detective work and forensic analysis.

Dr Julie Gough

I believe we cannot move forward together without knowing and understanding why a chapter of our history continues to cast a shadow over our island state, while it remains the unfinished business between successive governments. Only when we collectively have the courage and compassion to reconcile past injustices, will we walk together as proud Tasmanians.

Dr Patsy Cameron[15]

15 Dr Patsy Cameron, The Peter Underwood Memorial Lecture, 29 April 2021 <https://www.friends.tas.edu.au/2021/05/19/the-peter-underwood-peace-justice-lecture/>.

Background

Societies that ignore violent pasts characterised by egregious injustices perpetuate the lack of resolution for future generations. Denial, indifference and societal blindness create a dead weight that persists indefinitely in the absence of change. There are many examples around the world of the consequences of unresolved injustices adversely affecting societies for generation after generation. Some countries have, however, established processes to challenge past wrongs, to facilitate societal acknowledgement of those wrongs and to enable a collective response to them.

Often called truth commissions or truth and reconciliation commissions, countries across Africa and North, Central and South America have used truth-telling as a tool for acknowledging, recording and healing from periods of conflict, mass atrocities and historical injustices. In Africa, the South African Truth and Reconciliation Commission, Rwanda's *gacaca* courts and the Tunisian Truth and Dignity Commission, for example, offered survivors and perpetrators a platform for people to speak, be heard and take a collective step towards reconciliation. Similarly in Latin America, Guatemala's Commission for Historical Clarification and Argentina's National Commission on the Disappeared, are examples of similar mechanisms that provided an opportunity for historical analysis and education. While not a comprehensive list, and although varied in degrees of effectiveness and societal acceptance, these examples demonstrate how truth-telling and truth-listening can inspire reconciliation.

The South African Truth and Reconciliation Commission is perhaps the best-known international model of truth-telling. While there are mixed reports about its success in achieving reconciliation, it is widely considered one of the most effective attempts at institutionalised restorative and transitional justice around the world. It is generally acknowledged that the process of uncovering and recording the truth of the past helped to facilitate collective agreement and acceptance among South Africans about their shared history. The Commission, along with its three committees,[16] was established under the *Promotion of National Unity and Reconciliation Act of 1995*. It was charged with the responsibility to investigate and reflect on the nature, causes and extent of gross human rights violations committed in South Africa under apartheid. In an effort to empower victims and to contribute to long-term healing rather than renewed traumatisation, those testifying were accompanied by volunteers trained in psychosocial support. Proceedings were also televised, allowing individuals to share their truth publicly, while promoting a pathway for national healing.

The Truth and Reconciliation Commission of Canada was constituted and created in 2008 under the Indian Residential Schools Settlement Agreement. It was established to: hear and record the stories of those affected by Canada's Indian Residential Schools system, which operated between 1878-1996; educate the public about the intergenerational impacts of residential schools; and inspire a process of healing and reconciliation. The Indigenous-led Commission had a budget of more than $70 million and spent six years engaging with more than 6,000 witnesses around the country before issuing 94 calls to action in its final report, the majority of which await implementation. Unlike other international mechanisms, which focus on transitional justice and are often established to help a country move from, for example, a dictatorship to a democracy, the Canadian model focused on giving space to victims and their experiences and creating a permanent historical record for Canadians to acknowledge as part of their history.

16 This includes the Human Rights Violations Committee, the Reparation and Rehabilitation Committee and the Amnesty Committee.

Most recently, the governments of Sweden and Finland have announced the creation of truth-telling commissions to address the historical abuses and injustices committed by the States against the indigenous Sami people and redressing societal ignorance about this history. In Sweden, the commission will be tasked with 'charting and investigating the policies affecting Sami and their implementation'.[17] In Finland, the independent five-person panel – whose members were appointed by both the government and Sami representatives – will 'collect Sami people's experiences of the actions of the Finnish State'[18] and work towards increasing the wider community's awareness of Sami history and the ongoing impacts of this on Sami people today.

Truth-telling is not only about recording evidence of past atrocities, it is also an opportunity to preserve memories, celebrate culture and contribute to healing. Around the world, culturally sensitive mechanisms are being used to complement truth-telling processes. In Rwanda, the Kigali Genocide Memorial stands as a powerful tribute to the victims and survivors of the Rwandan genocide. Unlike other places of mourning and remembrance, a large part of this memorial is dedicated to learning, prevention and even reconciliation, while also providing a space for storytelling, where survivors can offer testimony of their experiences. Similarly, the First Americans Museum, which opened in Oklahoma this year, places First American story-tellers at the centre of the museum – sharing honest accounts of genocide, removal and relocation, and land allotment, as well as stories about creation, ingenuity and resilience – as a way of fostering truth-telling and educating the public. The Museum is housed on First American land and is owned, managed and staffed by First Americans. Other Americans and international visitors are guests in that space – an important manifestation of self-determination and empowerment.

17 ABC News, 'Scandinavian nations creating commissions to review crimes against Indigenous people' (4 November 2021) <https://www.abc.net.au/news/2021-11-04/sweden-finland-truth-commissions-indigenous-sami-crimes/100592660>.

18 Ibid.

Australian progress

The journey to Voice, Treaty and Truth in Australia has been long and fraught. In the absence of a national truth-telling process and treaty between Aboriginal and Torres Strait Islander peoples and the Commonwealth, States and Territories are forging their own paths forward. Importantly, these developments are happening alongside, and not instead of, the efforts that continue to be made at a national level, including the *Uluru Statement from the Heart*.

In the Northern Territory, Australian Capital Territory, Queensland and Victoria, State Governments have committed to actively progressing treaty with local First Peoples and many are taking positive strides towards this commitment. Treaty-making in South Australia has stagnated in recent years, although a commitment has been made to implement an Aboriginal Affairs Action Plan, and in New South Wales there remains no commitment to treaty from the State Government.

In 2015, the Liberal government in Western Australia signed a landmark native title agreement with the Noongar people. The Noongar Settlement, although not negotiated through a traditional treaty-making process, has been referred to as Australia's first treaty.[19] The agreement comprises six Indigenous Land Use Agreements across approximately 200,000 km^2 and involves 30,000 Noongar people. It is valued at approximately $1.3 billion and incorporates rights, obligations and opportunities in relation to land, resources, governance, financial and cultural heritage.[20] In exchange for this package, the Noongar people agreed to forfeit any current and future native title claims in the area under the agreement.

The example in Victoria is the most developed in its progress towards truth and justice. In 2018, the Victorian Parliament enacted the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) – Australia's first treaty law – committing the State Government to 'advance the process of treaty making between traditional owners and Aboriginal Victorians, and the State'.[21] After a period of community consultation, the First Peoples' Assembly of Victoria ('the Assembly') was established to act as a voice for Victorian Traditional Owners and Aboriginal Victorians throughout the treaty negotiation process. The Assembly comprises 31 Members, elected by their communities as representatives, and is led by a board of nine representatives chosen by the Members. They are charged with the responsibility of laying the foundations for treaty-making and ensuring Victorian First Peoples have the resources and capacity to

19 Harry Hobbs and George Williams, 'The Noongar Settlement: Australia's First Treaty' (2018) 40:1 *Sydney Law Review*, 1.

20 Ibid 31.

21 *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic), s 1(a).

join the State Government at the treaty negotiation table as equal partners. To progress their mandate, the Assembly has also established a series of Committees, as well as the Yoo-rrook Justice Commission ('Yoo-rrook'), which will lead six significant pieces of work: cultural governance, the Elders' voice, a self-determination fund, a treaty authority and interim dispute resolution process, a treaty negotiation framework and truth-telling.

A fundamental question in Victoria's treaty negotiations concerns the form or model a treaty will take. Community feedback indicates that there are at least three possibilities: a single State-wide treaty, multiple treaties between the State and different groups, and both a State-wide treaty and localised treaties. This decision will be one of the first for the Assembly and will be influenced by the benefits each model brings about for Victorian Aboriginal people.

Yoo-rrook was established in May 2021 as part of, but independent from, the framework of the Assembly. It is the result of generations of activism and calls for truth and justice to form a fundamental part of the treaty process.[22] The State-based truth commission is the first of its kind in Australia and joins scores of similar commissions around the world. While each of these global truth-telling bodies were established in the pursuit of truth and healing, Yoo-rrook will specifically interrogate the past, present and future consequences of colonisation on First Peoples. It is therefore one of the few mechanisms of its kind that will conduct truth-telling through the lens of colonisation and the experience of First Peoples. Established with the powers of a Royal Commission, Yoo-rrook is mandated to:

- Establish an official record of the impact of colonisation on Traditional Owners and First Peoples in Victoria;
- Develop a shared understanding among all Victorians of the impact of colonisation, as well as the diversity, strength and resilience of First Peoples' cultures; and
- Make recommendations for healing, system reform and practical changes to laws, policy and education, as well as to matters to be included in future treaties.[23]

The Victorian model for treaty negotiations and truth-telling sets an important precedent for other Australian States and Territories – not only on how to conduct culturally relevant and sensitive conversations about the harm, loss and trauma suffered by First Peoples since the beginning of colonisation, but also how to develop a deeper understanding of the courage and resilience of Aboriginal and Torres Strait Islander peoples in our shared history.

What we heard

Truth-telling was an issue discussed in all meetings, with unanimous agreement that this was necessary and desirable, but that there were varying opinions on form, content and leadership. It was also agreed that truth-telling could not be an end in itself, but that it must result in tangible outcomes. Nonetheless, there was consensus that a better understanding of the historical record, as well as a better appreciation of the contemporary and ongoing challenges for Aboriginal people, would be a huge achievement.

For those Aboriginal people comfortable with the terminology of reconciliation, truth-telling was seen to be at the heart of reconciliation. For those who reject the framework of reconciliation as a pathway forward, it was still seen as essential to achieving autonomy and self-determination.

The point was made that it is important to remember we are already doing truth-telling and we shouldn't ignore the efforts already being made, for example truth-telling through the arts and through academia and scholarship. However, those making the point were not suggesting that current efforts are a substitute for a more systematic process. A truth-telling commission would add a formal lens over what is already being achieved. It was also pointed out that some libraries and institutions are increasingly appreciating the need to do their own truth-telling – 'when the frontier sits in the heart of the collection'. We heard how some Aboriginal festivals have been used as a forum for truth-telling, as was done at the 2019 Ballawinne Festival at Fanny Cochrane's church in Nicholls Rivulet. Here, six Aboriginal people, including two from the stolen generation, spoke about their lives to a large Aboriginal and non-Aboriginal audience. Responses from the audience were overwhelmingly positive and were said to be indicative of what might be achieved across the entire State through a truth-telling commission.

22 First Peoples' Assembly of Victoria, 'Tyerri Yoo-rrook (Seed of Truth)' (Report to the Yoo-rrook Justice Commission from the First Peoples' Assembly of Victoria, June 2021) 12.

23 Yoo-rrook Justice Commission, *Overview* (2021) <https://yoorrookjusticecommission.org.au/overview/>.

Form and methodology

Truth-Telling Commission

There was wide support for the creation of an official Truth-Telling Commission. Some suggested that this should be a commission of inquiry (the Tasmanian statutory equivalent of a Royal Commission) with the benefits of authoritative outcomes which could be issued sequentially rather than waiting until the process was completed. As a government-backed process it was suggested it would carry more weight than other truth-telling options.

Others advised that while a commission is a way forward, there needs to be culturally appropriate and respectful ways of inviting people to tell their stories, such as yarning circles while shell stringing or weaving. One person suggested auto-ethnography as an appropriate methodology for truth-telling for First Peoples. The truth-telling approach shouldn't be about the subject and the researcher, but rather a process that immerses the subject in the process as a co-researcher.[24] We also head about 'World Café' methodology as an appropriate format for hosting large group dialogue.

Greg Lehman suggested that any truth-telling methodology that is adopted must be one that fosters an engaged and highly visible relationship with the media as champions and partners in the process. Similarly, in the 2021 Japanangka errol West Lecture, Michael Mansell asserted that findings from the truth-telling process should be shared widely and publicly throughout the process, particularly by the popular media.[25] Outputs from a truth-telling commission should not be limited to a final report.

The potentially re-traumatising effect of truth-telling, and the need for it to occur in a safe place for participants, was a recurring theme in discussions. Or, as one person put it, truth-telling needs to be done with a 'trauma-informed lens'. There were a number of dimensions to this. First, it needs to protect participants from the 'lateral violence'[26] that has been experienced at other meetings and events, such as the Closing the Gap consultations. Secondly, the process must be able to protect the well-being of those who come forward because telling their stories will be painful. The need to provide people with emotional and psychological support was frequently mentioned.

In relation to the concerns raised about the possibility of lateral violence in a truth-telling forum, it was suggested there could be a power to dismiss or remove a commissioner if they did not comply with a code of conduct. Similarly, we heard a comment about the need for built-in safety mechanisms to ensure that all voices are heard. Ray Groom envisaged a truth-telling commission to be an open process of listening and recording, allowing people to have their say without challenge or interruption. He considered this preferable to a fact-finding approach. These disparate views indicate that there will need to be considerable flexibility in the approach of any Truth-Telling Commission.

Other models of truth-telling

As well as a formal approach to truth-telling through a body such as a commission, there were other suggestions for truth and story-telling using the arts. As alluded to above, some of this is already happening, for example the historical awareness-raising being done by artists such as Julie Gough. Video was also mentioned as a possible medium. One example given was the 1992 documentary *Black Man's Houses,* about the search for ancestral graves at Wybalenna and the efforts of Tasmanian Aboriginal people in challenging the notion that 'only black-skinned people are real Aborigines'.

This island is a crime scene. Film of places interspersed with notes and images renders denied stories credible for the dubious. These are experiments in enacting returns of spectres. These children might not all be found, but their journeys can be charted, so they resurface where they lived or were last recorded, and in doing so implicate local colonists, to this day, in this history.

Dr Julie Gough

Truth-telling should also be done and encouraged by building Aboriginal interpretation into tourist operations and sites, for example at Woolmers and Brickenden, Pennicott Tours, the Museum of Old and New Art and the MONA ferry. However, it is important to be conscious of the issue of 'black washing' – that is, corporates using Aboriginal people and culture to appear more inclusive. As one person pointed out, there is a challenge in 'doing truth-telling and story-telling without compromising ourselves and our values'.

24 Former Tasmanian MP Jennifer Houston has written about this: Jennifer Houston, 'Indigenous Autoethnography: Formulating Our Knowledge, Our Way' (2007) 36(S1) *The Australian Journal of Indigenous Education*, 45-50.

25 Michael Mansell, 'Truth-Telling and Treaty' (Japanangka errol West Lecture, The University of Tasmania, 8 July 2021) <**https://www.youtube.com/watch?v=etBAEFmMGzU**>.

26 Jacinta Vanderfeen, 'Black panopticon: who wins with lateral violence?' in tebrakunna country and Emma Less & Jennifer Evans (eds.) *Indigenous women's voices: 20 years on from Linda Tuhiwai Smith's* Decolonizing Methodologies (Zed Books, Bloomsbury, forthcoming).

Education in schools and tertiary institutions was also seen as a way of disseminating the truth, including revising history books to address the falsity of the extinction myth. Christopher Riley at the Aboriginal Education Services suggested that Aboriginal history should be included in the Year 11/12 legal studies curriculum. It was also asserted that this history should not only be told through the lens of white historians, nor should details of the horrors of colonialism be diluted to spare white feelings. See also the section on 'Education and Capacity Building'.

Content

There was general agreement that truth-telling should be about the past, the present and the future. As one person told us, we ought not be thinking about truth-telling only in relation to the past or to the present but rather, for example, as the present impacts of the past. However, there were different views about truth-telling and the past. One perspective suggested that this was the Government's responsibility and should not involve Aboriginal people. Weariness about endless recounting of the Black War by white historians was reflected in a number of comments. One person said they were not interested in more accounts of the 'truth of the past' by historians. Instead, they want to see 'the truth of today', which includes the fact the Government continues to pit Aboriginal people and organisations against each other. Many people linked the past with the present and future, asserting that as part of truth-telling the Government should admit that all land and sea was stolen after invasion. Others urged that Aboriginal people should be entitled to a proportion of the GDP as a result.

It was also suggested that the issue of identity and ancestry should be resolved through the truth-telling process. One person said to us, 'who are the Aboriginal people of Tasmania?'. Truth-telling could provide a means of establishing the relevant parties to treaty. Truth-telling in relation to Aboriginal identity was also seen as a means to either 'shake the tree to get rid of the possums' and 'eliminate the impostors' or to reverse what some believe amounts to modern day genocide – that is, not recognising the existence of certain Aboriginal families. See also section on 'The Vexed Question of Aboriginality'.

The Past

Truth-telling about the past was said to be an important process to educate everyone (Aboriginal and non-Aboriginal people) about the trauma of colonisation, the Black War and the strength and resilience of Aboriginal people; how Aboriginal resilience has led to the survival of Tasmanian Aboriginal people; and the loss of cultural practices that should never have been lost, such as boat building and farming. It is about what is known, what is not and what is contested.

Tied to this notion of correcting the historical record is the issue of non-Aboriginal people benefiting from recounting Aboriginal history and influencing our measurement and understanding of it. Some people lamented that when Aboriginal people want to tell their own stories they won't be able to because those stories have already been told by white historians. The importance of Aboriginal people telling Aboriginal history was mentioned by many. Others contested the very concept of what a historian is, arguing that this is a white construct and one should not need a university degree to talk about Aboriginal culture, knowledges and history.

Truth-telling about the past should not be limited to 250 years ago. It was suggested that truth-telling should also include the more immediate past, including an account of the Aboriginal activism that led to reclaiming rights, identity and land – broader than what has already been told by Lyndall Ryan in her book, *Tasmanian Aborigines*.[27]

Many expressed a wish to tell their family stories of the stolen generations, the fear of being stolen as a child and its impact, as well as experiences of racist attacks, abuse and discrimination, and concealment of Aboriginality by authorities in birth certificates and/or adoption papers.

We heard several personal stories of traumatic experiences – all of them convincing us of the importance of a truth-telling process that creates a safe, supportive and culturally appropriate space for Aboriginal people who want to tell their story. With the permission of the anonymised teller of this story, we offer the following as illustrative of the importance of the sort of structure and process we recommend.

27 Lyndall Ryan, *Tasmanian Aborigines: A History Since 1803* (Allen & Unwin, 2012).

Truth and Courage Heals

Please note that the following story contains an account of harrowing personal experiences which may be deeply distressing for some readers.

AA was born in the north of the State to an Aboriginal father from the islands and a teenage non-Aboriginal mother who was unable to take care of AA and so relinquished her into government care. AA was placed into a white family in the south of the State, who had adopted an Aboriginal boy already (both were related) and also wanted to adopt AA. The adoptive parents had two children of their own.

We were deeply moved by AA's openness and willingness to share her harrowing story and so impressed by her triumph over overwhelming adversity. We met her supportive partner and were also joined in our conversation by a very caring Aboriginal support person and were encouraged to see she is now surrounded by loving relationships that she thoroughly deserves. We are also grateful for timely intervention of a skilled and sensitive professional trauma therapist at a critical time in AA's life and that that support has enabled her to cope, rebuild and go on to make such a significant contribution in the lives of others around her.

AA told us that she would be interested in returning to Tasmania to tell her truth to a Commission established to hear it. She explained to us that such an experience would be cathartic for her own healing as well as one way to expose communal and systemic complicity in, and responsibility for, her trauma. AA also believes that it will be important for a truth-telling process to produce positive results and that it will be essential to put measures in place that adequately support the wellbeing of those who come to tell their stories as well as for those who listen to them.

'My biological mother came from a violent background. My biological grandmother and government authorities encouraged her to relinquish care. As an adult, upon meeting said biological grandmother, she informed me that I wasn't 'really her grandchild' as I hadn't grown up with her. I have consequently concluded that this is due to my Aboriginality, as she had actively sought out another grandchild who had been adopted but was white.

Once my white parents were approved by the department, my adoption was then finalised a year and a half after my placement. My white parents had severe mental health issues and their two biological children had special medical needs, while my adopted Aboriginal brother had Fetal Alcohol Spectrum Disorder. They were also active members in a small unknown religious organisation.

I was bullied at school for being Aboriginal, adopted, a 'weird' religion and for being poor. My earliest memory of school is having no children wanting to play with me in case my colour came off on them. Most of my school life was lonely and filled with racism and discrimination.

My adopted parents divorced when I was approximately five or six, after which my adopted mother married a convicted child sex offender who was violent to all of us children. I became pregnant from the sex offender and consequently miscarried in my bedroom when I was approximately 12. No one ever knew. I was also sexually abused by multiple others.

At age 19 I became involved in a domestically violent relationship. Upon leaving that relationship, I met and married my first husband. Just before I was married, my Aboriginal brother committed suicide at the age of 23. Prior to his suicide he travelled, ended up homeless and was beaten up by police who told him to 'fuck off back to where he came from, they had enough blackfellas there', and they 'don't need another one'. He was found dead in his homeless shelter-bed. He remains buried in another State, where his grave is unmarked and no family members have visited him.

It was after his death I went looking for my Aboriginal family. I met the man who was listed as my birth father, but isn't. He spent three hours running down my biological mother and father. It was after this meeting I was so traumatised that I wanted to peel of my skin off.

I then met my grandmother who completely embraced me within the family. Soon after her death, I negotiated a highly painful, traumatic, and often lonely space within my Aboriginal family and community. At first, my relationship with my Aboriginal father was good. However, things changed when I disclosed too much information about my life. My relationship with him has never been the same.

I have two Aboriginal siblings, one of whom doesn't acknowledge me and hasn't spoken to me in over twenty years. The other doesn't engage very often.

After engaging with an old school friend in my thirties, we both made complaints to the police regarding the abuse she and I experienced at the hands of the convicted child sex offender. The investigation took over two years, despite my pleas for quicker processing due to his failing health. Once the case was ready to go to the Department of Public Prosecutions, it was not pursued due to his incapacity to defend himself.

I did receive the maximum Victims of Crime payout, which was also a re-traumatising experience.

When it comes to community I feel as though I live between two worlds, belonging to neither, but identified as 'other'. It is the double-edged sword of not growing up with mob or community. The constant feeling of not being good enough, black enough, white enough, connected to country enough etc. It is only through relationships with Aboriginal people from other mobs/ States and my current husband, who is Aboriginal, that I am starting to move through this. That being so, I still tiptoe through the bias, discrimination, white privilege and fragility on a daily basis, always hyper alert to people, police, mobs. It is a multi-layered world in which I must negotiate. More often than not this leaves me exhausted. That's not to mention the constant cultural insensitivities that happen on a daily basis in my work environments. To be a First Nations Person is to be constantly judged and asked to justify why we identify, when the reality is we are as we are due to the assimilation processes of a couple of hundred years.

It has only been since talking to Kate and Tim that I realise now, I cannot and will not get validation from my Aboriginal family due to their own trauma and intergenerational trauma. They are unable to give to themselves, so how can it be expected that they can give to me.

It is only due to extensive pyscho-therapy that I am alive today.

I believe the Aboriginal community needs healing centres throughout the State, which don't cater to the political nature of the Tasmanian Aboriginal community. Centres that are holistic with highly skilled trauma specialists, open to all mob on country.

I currently work in the foster care field, educating white people who wish to foster Aboriginal and Torres Strait Islander children and youth. It is an exhausting job, which requires me to relive my trauma almost on a daily basis. It must be told, though, as this is part of the truth-telling process and education of white people in order to not repeat the stolen generations and displacement of Aboriginal people today.

I believe a truth-telling committee needs to be representative of the wider community, including those from differing social and economic backgrounds. It also has to include white people. As I said to Tim and Kate, 'it is white people who did this to me'.'

The Present

It was agreed that truth-telling about the present would be important for remedying the lack of understanding in the broader community about intergenerational trauma and the effects dispossession and government policies of discrimination, oppression, denial and assimilation continue to have. These are ongoing issues, which manifest in crime and substance abuse. Racism and discrimination also continue today and a number of people shared their stories about this with us.

It was suggested truth-telling should include, as well as stories of the impact on today's Aboriginal people of policies that led to the 'stolen generation', stories from the 'hidden generation', namely those whose Aboriginality was denied or hidden because of racism and fear of losing their children. Similarly, there are stories from families who made the decision to disconnect from their culture due to racism and the effect of this on their descendants today. Whether it was fear or indeed shame that led to disconnection was questioned by others who were less sympathetic to the hidden generation.

The Future

Truth-telling must also 'look into the future'. A recurring theme was that Aboriginal people want truth-telling to lead to tangible outcomes: actions not just words. Tangible outcomes include land returns, changes to the education curriculum and also to the ways in which Aboriginal history is disseminated, such as through tourism interpretations and the names of certain landmarks, including the Batman Bridge.

Participants

Most people we spoke to felt they would take up an opportunity to share their personal stories if a formal truth-telling system was established.

It was also asserted that input should be sought from the non-Aboriginal community – it is 'not just up to Aboriginal people to have to push the truth'. We heard calls for non-Aboriginal leaders in society to use their positions, platforms and influence to talk about the truth as well.

Leadership of a Truth-Telling Commission

There was broad agreement that a Truth-Telling Commission should be Aboriginal-led and run and that the mechanism should be in the form of a government-supported and well-resourced body. There was also support for including one or more highly respected non-Aboriginal representatives as commissioners, both as a means of demonstrating empathy and commitment to the process from the non-Aboriginal community, and to convince sceptical non-Aboriginal members of society of the value, importance and objectivity of the process. Others suggested that non-Aboriginal involvement could instead be in the form of special advisors to the body where they have relevant expertise, for example historians and anthropologists.

In terms of Aboriginal commissioners, it was suggested that representatives should be drawn from a mix of demographic backgrounds, including age, and should not be confined to those that have received a 'Western' education. A variety of suggestions were made as to how commissioners should be selected. Some favoured election by Aboriginal people but others expressly rejected election and preferred an expression of interest process as used in Victoria. Other preferences included nominations from each of the families without involving the politics of organisations; nomination by each of the registered organisations, or one representative from the TAC and one from the TRACA. Including a well-respected Aboriginal leader from the mainland was also raised and discussed. The need for the commissioners to be fair-minded and respectful was raised to ensure that everyone has the opportunity to be heard.

A prominent Tasmanian Aboriginal leader argued the powers of the Commission must go further than the Yoo-rrook Commission's power to enquire, report and make recommendations. It should also include the power to decide rights and liabilities.

Place and resources

The need for any truth-telling body to be well-resourced was emphasised in a number of meetings, and it was anticipated that it would perhaps need to run over a number of years. Comparisons were drawn with the Victorian Yoo-rrook Justice Commission, which has been allocated significant funding.

The venue for truth-telling was considered important by some. One suggestion was for a special, purpose-built structure at Macquarie Point, which could also operate as an Aboriginal cultural centre (see Recommendation 20).

Purpose and advantages

Truth-telling was seen to have a range of purposes, but at its core was the importance of giving Aboriginal people a safe space to share their stories as part of a journey towards healing. It was also seen as a way of holding an entire society and system to account for the role they continue to play in inflicting ongoing trauma.

Healing was frequently mentioned as an outcome of truth-telling. Some saw it as an essential step in working through intergenerational trauma; others saw it as a means of demonstrating pride in their Aboriginality; there were suggestions that a formal truth-telling process might encourage and empower Aboriginal people to come forward and tell their story; and for others it was seen as a means of tackling the extinction myth. Some people expressed hope that quashing the extinction myth would also have a positive impact on how Tasmanian Aboriginal people are perceived by mainland Aboriginal communities – that Tasmanian Aboriginal people would 'be taken seriously' and that pale-skinned Aboriginal people would not be faced with scepticism in the face of their claims of Aboriginality. Linked with this is the expectation that truth-telling would solve the pervasive issue of identity.

People felt strongly that the truth of intergenerational trauma must be known in order to understand what a treaty should ameliorate and for non-Aboriginal people to accept the need for ameliorating measures. In other words, it would provide an evidence-base for the Government to act upon in negotiating treaty.

For many, truth-telling was discussed as a possible means for bringing about the end of racism in schools, extended family and the community. Some reports indicated an increase in racism in recent years and community education via truth-telling was seen as a potential solution to this.

Truth-telling was also seen as a means of honouring the ancestors by telling and preserving their stories.

Finally, some thought an authoritative document, detailing the effects of settlement and its ongoing impact, would be an important outcome.

The order of things

There has been considerable debate at a national level about whether Treaty should precede truth-telling or come after it. Michael Mansell has publicly argued that the negotiation of a treaty should not have to wait for truth-telling. Instead, there could be concurrent processes, with a truth-telling commission established immediately and treaty negotiation to follow soon after.

Ray Groom thought that, politically, it would make sense for a treaty to be negotiated first, as other positive benefits would then flow from this (for example, land hand-backs, truth, education, and language). However, he added that if Tasmanian Aboriginal people would like truth-telling to come first, then we should honour that.

In the majority of consultations, we heard that truth-telling must come before treaty.

Recommendations

Recommendation 1: A Truth-Telling Commission

Taking into account truth-telling processes in other countries and States, and prioritising the views we heard from Aboriginal people, we recommend the creation of a Truth-Telling Commission as a tool for acknowledging, recording and healing. This could be either a commission directly established under the *Commissions of Inquiry Act 1995*, or established under separate pathway to treaty and truth-telling legislation, which authorises a Truth-Telling Commission with the powers (or selected powers) of a commission of inquiry. An important benefit of adopting the Commission structure is that it would give *gravitas* to the body while also ensuring that it is adequately resourced.

The Truth-Telling Commission should have the following functions:

- to create a permanent and official historical record of the past, which includes clarifying the historical record, quashing the extinction myth and recording and explaining the resilience and survival of the Aboriginal people;
- to provide the opportunity for story-telling and preserving the memories of Elders and Aboriginal people;
- to educate the public about the past abuses and injustices committed against Tasmanian Aboriginal people as well as the intergenerational and ongoing effects of colonisation;
- to make recommendations for healing, system reform and practical changes to laws, policy and education, and specific matters to be included in treaty negotiations; and
- to deal with the question of Aboriginality, in so far as it relates to eligibility to determine representatives of the Aboriginal people for treaty negotiations with the State and for registration to vote in ALCT elections (see Recommendations 8 and 9).

Recommendation 2: Composition of the Truth-Telling Commission

A majority of the Truth-Telling Commission should be Tasmanian Aboriginal people and it should either be chaired by an eminent Tasmanian Aboriginal person, or co-chaired by an eminent Tasmanian Aboriginal woman and eminent Tasmanian Aboriginal man, of State-wide standing. As has been done with the Yoo-rrook Commission, the possibility of including an eminent Aboriginal person from outside the State should be considered, as well as an eminent respected non-Aboriginal person with experience of similar bodies. The Aboriginal membership must be broadly representative and should be determined by expressions of interest.

Recommendation 3: Flexible procedures and processes

We recommend that the Truth-Telling Commission adopt a flexible approach in terms of where it sits and how it conducts hearings and story-telling sessions. The provisions of the *Commission of Inquiry Act 1995* allow considerable latitude in relation to the manner in which hearings are held; whether hearings are public or private hearings; and whether appearances are in person or written submissions may be made. Creating an official record of the past with the input from historians will require fact finding and a more formal process of inquiry than is the case with personal story-telling by Aboriginal people. To aid the process, a Commission has the power to appoint persons to assist, including experts such as cultural knowledge holders, historians and reporters.

The forum for personal and family story-telling should be much more flexible, using yarning circles on Country or any way of conducting culturally sensitive conversations about harm, loss and trauma. As recommended in our meetings, there must also be culturally appropriate psychological and emotional support provided to participants, including observers, to ensure that the truth-telling process is a healing and cathartic one and not re-traumatising.

The Commission will need to decide which procedures to use for the purposes of dealing with its mandate.

Recommendation 4: The Truth-Telling Commission should produce interim publications and outputs in a range of formats

To fulfill its purpose, the Commission should employ different ways of engaging a broad cross-section of Tasmanian society and the media. Interim outputs should be published through a range of media, including online, video and print. Engagement with creative arts should also play an important role in this.

TREATY

Until the sovereign rights of Aboriginals are properly dealt with, Australia will remain a tarnished nation, built on invasion, dispossession, discrimination and oppression.[28]

There is no doubt that a treaty was made in 1831. A treaty that was never rescinded; a treaty that recognised that this island was never terra nullius; a treaty that was never honoured. We can lament, but we cannot change the past. Our lives are intrinsically linked to the past for it shapes the future … Treaty is an important part of Tasmania's unfinished business and a moral imperative.[29]

I say, that while truth-telling is vital to our future freedoms, we will only be free when we have a treaty based on the principles of self-determination.[30]

Fuck your constitutional recognition, I want a treaty … Symbolism does matter but it needs to be coupled with something real and tangible.[31]

Background

In countries like New Zealand, Canada and the United States of America, treaty is the obvious mechanism of agreement between governments and First Peoples. These legally binding instruments are invariably predicated upon a ready acknowledgement of a pre-existing sovereignty that could only be ceded by negotiated agreement. These treaties are generally used to acknowledge past injustices, make reparations for colonisation and protect Indigenous rights. Unlike the situation in those countries, neither the British Colonial authorities nor the Australian Government has ever entered into a treaty with Aboriginal and Torres Strait Islander peoples. This is despite significant efforts at the national level in Australia, including the Yirrkala Bark petitions in 1963, the Larrakia Petition in 1972 and the Barunga Statement in 1988, as well as repeated Commonwealth commitments.

What is a treaty?

A treaty is a written agreement between equal sovereigns. It is fallacious to assume that treaties can only be negotiated between sovereign nation states. Treaties can be negotiated between a sovereign nation state and its First Peoples such as, for example, New Zealand's Waitangi Treaty and the Canadian treaties (more on these below).[32] In Australia we seem to have been fixated with the notion that sovereignty is indivisible and can only be exercised by one entity – despite the fact that our federal system of government involves the sharing of powers between the Commonwealth and State/Territory Governments. Each of New Zealand, Canada and the USA accept the notion of concurrent or shared sovereignty between the national government and First Peoples. Even then President George Bush, for example, claimed in 2001 that: 'My Administration will continue to work with tribal governments on a sovereign to sovereign basis … We will protect and honour tribal sovereignty and help to stimulate economic development in reservation communities.'.[33]

A treaty is more than a binding agreement, more than a contract.[34] A treaty has a political aspect to it, in that it contains a recognition of sovereignty of the parties and is an accepted 'way of reaching settlement between Indigenous people and those who have colonised their land'.[35] A treaty with colonised First Peoples has the moral dimension of recognition of rights to compensation flowing from dispossession and colonisation. It is both a relationship-building instrument and a rights-defining instrument.[36]

28 Michael Mansell, *Treaty and Statehood: Aboriginal Self-Determination* (The Federation Press, 2016), 84.
29 Cameron, above n 15.
30 Emeritus Professor Mick Dodson, 'We Dare to Hope: Treaty-Making in Australia' in Harry Hobbs, Alison Whittaker and Lindon Coombes (eds.) *Treaty-Making: 250 Years Later* (The Federation Press, 2021) 203, 207.
31 Nayuka Gorrie, 'Fuck Your Constitutional Recognition, I Want a Treaty' *Vice* (*online*) <https://www.vice.com/en/article/qb5zdp/fuck-your-recognition>.
32 Hobbs and Williams, above n 19.
33 Quoted in Mansell, above n 28, 85.
34 Matthew Palmer, 'Constitutional Realism about Constitutional Protection: Indigenous rights under a Judicialised and a Politicised Constitution' (2007) 29 *Dalhousie Law Journal* 1, 29.
35 Dodson, above n 30, 205.
36 Julie Jai, 'Bargains Made in Bad Times: How Principles from Modern Treaties can Reinvigorate Historic Treaties' in John Borrows and Michael Coyle (eds), *The Right Relationship: Reimagining the Implementation of Historic Treaties* (University of Toronto Press, 2017) 105, 139.

There are three essential criteria that constitute a treaty between a State and First Peoples:

1. There is an acknowledgment by the State that the First Peoples were the prior owners and occupiers of the land and recognition of the deep and continuing injustice that results from colonisation;
2. It is concluded by way of negotiation between the State and First Peoples with representatives freely chosen by them through their own representative structures; and
3. There are substantive outcomes, which must include some level of self-government or decision-making power.[37]

Exactly what a treaty is, is not well understood by the general Australian (or Tasmanian) public. The term 'treaty' has a number of meanings, about which even academics disagree. It is no doubt much better understood by Aboriginal people, as is the fact that the British Government failed to negotiate a formally recognised treaty when deciding to set up colonies in New South Wales, Van Diemen's Land and later (in 1831) in Western Australia. This is despite the fact that the British made treaties in other countries that they colonised, notably with the Maori in New Zealand in 1840. The Uluru Statement from the Heart has also brought the concepts of Voice, Treaty and Truth into the national consciousness and has no doubt created a greater awareness among Aboriginal people around the country.

New Zealand

New Zealand's Treaty of Waitangi is often cited as a successful example of a treaty with First Peoples. It was signed in 1840 by Māori chiefs and representatives of the British Crown following a period of conflict and Henry Reynolds asserts that Governor Arthur's lessons learned from the failure to conclude a treaty in Van Diemen's Land influenced his advice to the Colonial Office that led to negotiation of the Waitangi Treaty.[38] Though not entrenched in the country's Constitution, the Treaty of Waitangi is considered a founding document of New Zealand. It establishes a foundation for biculturalism in New Zealand that recognises the country's shared history, promotes Māori culture and language, and provides a framework for reasonable and good faith negotiations.

Giving effect to the Treaty is a permanent Commission of Inquiry established under the *Treaty of Waitangi Act 1975*, the Waitangi Tribunal. The Tribunal makes non-binding recommendations on Māori claims relating to alleged breaches of the Treaty by the Crown. The Tribunal also plays an important role in interrogating the truth of the past and providing a safe space for Māori to tell their story. Complementing the Tribunal is Te Arawhiti – the Office for Māori/Crown Relations – which safeguards Treaty settlement commitments made by the Crown as redress for historical wrongs. To date, treaty settlements have included a formal apology from the Crown, financial, cultural and environmental redress, land return and the joint management of conservation land, and the restoration of traditional place names.

37 Hobbs and Williams, above n 19.

38 Henry Reynolds quotes Arthur's advice to Lord Glenelg, then Secretary of State on Arthur's return to London after 12 years in Van Diemen's Land: 'On the first occupation of the colony it was a great oversight that a treaty was not, at that time made with the natives, and such compensation given to the chiefs as they would have deemed a fair equivalent for what they surrendered'. Reynolds goes on to say that: 'There seems little doubt that Arthur's advice was a significant influence on the decision of the Colonial Office to initiate the settlement of New Zealand with the Treaty of Waitangi. If a small Tasmanian nation could bring the British colony to a standstill and kill more than 250 settlers, what might the Māori do?', Henry Reynolds and Nicholas Clements, *Tongerlongeter* (NewSouth Publishing, 2021), 214.

Canada

In Canada, a series of historic and modern treaties (also called comprehensive land claim agreements) forms the basis of the relationship between First Peoples and the Crown. Historic treaties, which were negotiated by British colonial authorities as early as 1701, are an early recognition of sovereignty and affirm certain rights, obligations and benefits that are recognised in the Constitution. The modern treaty era began in 1973 and has resulted in an additional 25 treaties between 97 Indigenous communities and the provincial or territorial and federal governments. These more recent treaties are based on traditional use and occupancy of land and can include provisions for self-government. The treaty-making process continues throughout Canada, but negotiations have resulted in a range of settlements to date, including ownership of over 600,000 km^2 of land, the transfer of over CAD$3.2 billion, resource development opportunities, and self-government rights and political recognition.[39]

Limitations to treaty

There are limitations and challenges to treaties that can adversely impact their efficacy and ability to advance relations between First Peoples and the colonisers. In the case of New Zealand, critics of the Treaty claims settlement process suggest that many of the hundreds of claims made by Māori against the Crown have resulted in extinguished legal rights, limited return of land and the traumatisation of claimants.[40] The New Zealand Human Rights Commission has also criticised the process, stating that 'New Zealand's history since the signing of the Treaty has been marked by repeated failures to honour these founding promises.'[41]

Regardless of these assessments, the existence of a treaty helps to shift political and societal mindsets. In certain cases, including in New Zealand, this has led to greater respect and autonomy for First Peoples, the achievement of political recognition and participation, and a deeper understanding among indigenous and non-indigenous people of a nation's shared history.[42]

39 Government of Canada, *Treaties and Agreements* (July 2020) <https://www.rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231>.

40 See for example, Margaret Mutu, 'The Treaty Claims Settlement Process in New Zealand and Its Impact on Māori', (2019) 8(10) *Land*, 152.

41 New Zealand Human Rights Commission, *Human Rights in New Zealand* (2010) 39.

42 Cape York Institute for Policy and Leadership, August 2014, 'What Can We Learn from New Zealand for Constitutional Recognition of Indigenous peoples in Australia?' 6 <https://www.aph.gov.au/DocumentStore.ashx?id=764fe11f-9cab-4a6f-8c9a-6f8d92bba731&subId=301030>.

What we heard

When we introduced the topic of treaty at community consultations, we did not attempt to explain it at length. Instead, if asked, we simply described it as an agreement between the Government and Aboriginal people, which would be arrived at by negotiation as to its content. We considered that this was all that was needed to begin a conversation about treaty.

Are we ready for treaty?

While there was almost unanimous support for a treaty, we heard conflicting views from Aboriginal people about whether they and other Tasmanians were ready for one. At large community meetings in Hobart, Launceston and Burnie, there was consensus that a treaty should be negotiated now and there were clear ideas about what that treaty should include. However, the more widely supported view was that a treaty was premature and that a quickly implemented treaty would create increased lateral violence and division. It was also asserted that 'action' and 'justice' were needed before treaty.

The main reasons for asserting that a treaty was premature were:

- there could be no treaty without first identifying the Aboriginal parties to a treaty;
- there could be no treaty until there was truth-telling; and
- there was need for a better understanding of what a treaty is and its effects.

That there could be no treaty, or at least no single treaty, before the issue of identity is resolved was the consensus view in the majority of community consultations. For example, we heard that 'we need our Aboriginal people recognised before we can contemplate a treaty'; that a treaty was 'far too premature'; and that a treaty would never work while division existed among the State's Aboriginal population.

A common view was that there can be no treaty until there is truth-telling. Truth-telling was seen as a means of helping to resolve the issue of identity – as one person put it, 'having your identity questioned all the time destroys the soul'– but also as a means of providing 'the information' for treaty.

People expressed a need for further education on what a treaty is and what a treaty ought to include. This issue was singled out as a necessary preliminary step before the treaty process could be progressed.

Similar to the view that a treaty was premature, some people dismissed talk of a treaty because there were more pressing issues to deal with, such as housing for homeless Aboriginal people. Others were concerned about spending too much time on creating structures and processes without progressing issues that make a difference to people's lives now.

We heard from some people who expressed a mistrust of treaties, as this has been the experience of some First Peoples around the world, particularly when First Peoples have entered into treaty arrangements in good faith only to discover that the 'fine print' allows the Government to grant extractive or farming licenses over 'returned' land. There were also concerns that a treaty could be overturned or unilaterally changed by a future government. Those that held this concern felt a 'fail safe' was needed, so that changes could not happen without agreement from the Aboriginal people.

Another perspective we heard, albeit an isolated one, was from someone who identified as Aboriginal and is enrolled to vote in ALCT elections, but believed it was too late for treaty because this was something that should have been done at the time of colonisation.

One treaty or multiple treaties

There were contrasting views about whether one treaty or multiple treaties are necessary. Again, this was tied to the issue of identity and whether or not a treaty was premature. Those who thought treaty negotiations could begin immediately envisaged one treaty with the Aboriginal people of Tasmania or with the palawa/pakana people. Those who thought it premature, instead tended to support the concept of multiple treaties with different organisations or relating to different geographic regions.

Michael Mansell has publicly argued that the notion of multiple treaties with multiple organisations is highly problematic because a 'treaty' is inherently about negotiations at the heads of state level, so more than one treaty with more than one group undermines this sovereignty.

The concept of multiple treaties with different groups was seen as a way around the issue of determining who Aboriginal parties to a treaty would be. Another suggestion was to negotiate one overarching treaty to deal with State-wide issues and multiple subordinate treaties to cover more localised matters.

The parties

Those who envisaged one treaty suggested that the parties should include representatives of the original nations or nominees or representatives from Aboriginal organisations. Others said representation should be based on the fact that there is more than one survival line. The contrary view was that, as a result of colonisation, there are no longer representatives from the original nations and we should instead focus on the family groups. A number of people opposed the idea of having nominees from organisations act as parties to treaty, on the grounds that Aboriginal organisations did not exist at the time when Aboriginal people were dispossessed of their lands.

Many were adamant that the TAC and ALCT should not be the only bodies representing Aboriginal people. Those expressing this view included a number of people on the TAC membership list. Others suggested the TAC should be excluded from the process altogether. There were fears of an uneven playing field when it comes to treaty negotiations and concerns that it will be 'the squeaky wheel that gets oiled'. In some meetings it was acknowledged that 'we're never going to be able to come together, so we have to find a process that all parties can adapt to'. It was also said that it is an unrealistic expectation for all Aboriginal people to agree to something as significant as a treaty with the State, and that other Tasmanians are not expected to do so on any major policy issue.

Content

At each of the community meetings organised by the TAC, there was a discussion about treaties and what should be included in a Tasmanian treaty. We heard about five core elements: return of land; ownership and control of Aboriginal heritage and practices; compensation; sharing of power; and sharing of wealth. There was also discussion about a treaty being a working document. That is, a treaty need not be set in concrete once it has been adopted; flexibility is needed to ensure changes can be negotiated by Aboriginal people in the future. In other meetings, even if there was agreement that a treaty was premature, there was a similar discussion about the sorts of elements that should be included in one.

Land hand-back and sea and water rights

Land hand-back was the most commonly mentioned component of a treaty. Michael Mansell pointed out that it would be inconsistent with the Constitutional recognition of Aboriginal people as the Traditional Owners of the land to not commit to significant land returns.[43] The need for land hand-backs to include adequate resources for the management of that land was also mentioned as a necessary matter for inclusion in a treaty.

Sea rights, fishing rights and exclusive fishing zones were also frequently mentioned for inclusion in any treaty. A role in, and profits from, the allocation of fresh water rights was also raised.

This is discussed in further detail below in 'Land' and 'Sea and Water Rights'.

Ownership of Aboriginal cultural heritage

Ownership of Aboriginal cultural heritage, return of cultural artefacts from museums and respectful repatriation of remains as well as an acknowledgment in a treaty of the importance of cultural heritage were raised in multiple meetings. Cultural rights to traditional burial and cremation practices were also nominated for inclusion. This is discussed in detail in 'Heritage'.

Compensation and wealth sharing

Compensation and wealth sharing was a common theme. For example, in one Riawunna meeting, we heard an idea about redirecting a proportion of taxes (such as land tax, as happens in NSW) and royalties from natural resources and land sales to Aboriginal people. It was suggested this could be a means of providing a sustainable revenue stream – one that could be community-controlled not only for wealth building activities, but also as a means of facilitating self-determination over the use of those funds. The importance of viewing this as compensation or 'rent' and not welfare was also highlighted. Others mentioned that the revenue from National Parks and Crown Land should be allocated to Aboriginal people.

There was also strong support for affirmative action by way of scholarships, internships and graduate positions. This is discussed in detail in 'Education and Capacity-Building'

Voice/sharing of power

The topic of 'voice' and power sharing was raised in many meetings. Although suggestions in relation to this were not necessarily made in the context of what should be included in a treaty, this is a convenient place in the report to discuss this issue.

Two dedicated seats in State Parliament for Aboriginal members elected by the Tasmanian Aboriginal population were raised in the TAC organised meetings and appeared to be well supported by those attending. The idea was echoed in other meetings including by those not aligned with the TAC. However, reservations were expressed in relation to dedicated seats such as querying which party the Aboriginal members would be aligned with and the risk of Aboriginal members being frustrated by the difficulty of achieving anything in the House of Assembly. Instead, it was suggested that Aboriginal members could be more effective in the Legislative Council.

Others envisaged the holders of the designated seats having portfolio responsibility for Aboriginal affairs, including Aboriginal Heritage Tasmania, the OAA and the Parks and Wildlife Service (PWS). It was also seen as a means of ensuring the Government adhered to the terms of a treaty and as a way of enabling Aboriginal people to make decisions about their own future.

If not dedicated seats, an increase in the number of Aboriginal Members of Parliament was raised in some meetings, as was the need for the Minister for Aboriginal Affairs to be Aboriginal. Increased Aboriginal representation in local government was also advocated with the suggestion that each Local Government Council be required to have an Aboriginal councillor.

A perceived advantage of Aboriginal representation in Parliament was that this would enable a two-way exchange – providing Aboriginal people with a voice but also providing the opportunity for Aboriginal people to be informed about legislation and issues that are of relevance to them to improve understanding of these issues among Aboriginal people.

However, dedicated seats were by no means universally accepted for reasons including that non-Aboriginal people claiming to be Aboriginal would 'buy votes in an election' and because a proposal for dedicated seats would not be accepted by Parliament or the wider community. An alternative suggestion was the creation of an Aboriginal Council, which could provide advice to Government on a range of issues including heritage, but which would also serve as a vehicle to feed into the national voice. Another suggestion was to create a State-based structure similar to the Aboriginal and Torres Strait Islander Commission (ATSIC) with members elected by Tasmanian Aboriginal people to help move a range of issues forward, including land management, cultural burning and ranger recruitment and training.

43 Mansell, above n 25.

The need for a way of bypassing the gate-keepers and directly accessing the decision makers, namely party leaders and senior bureaucrats, was raised by some with current or previous leadership roles in organisations. It was claimed that access to ministers had become more difficult in recent years rather than easier. One observer attributed this change to events surrounding the campaign in 2009-2011 to stop construction of the Brighton bypass over kutalayna, the Jordan River levee Aboriginal living site.

The need for the voice of all Aboriginal people to be heard by government departments and external agencies was raised and examples given of fairness in decision making on selection panels for employment and in grant assessment processes for projects.

Increasing the number of Aboriginal people in senior management roles, such as departmental secretaries and deputy secretaries, was raised as a means of ensuring Aboriginal people are at the centre of decision making. There was also discussion about the need to avoid an illusion of power sharing through the appointment of Aboriginal people to identified roles. Some referred to this as 'black washing'. Such positions can lack real power if they sit within a highly bureaucratic organisation that trumps the possibility of achieving any real change or genuine outcomes. For some individuals, appointment into a designated position means being isolated and unsupported in their role, particularly when the designation has been tokenistic rather than reflective of a genuine commitment to create a culturally sensitive environment and build effective capacity.

In addition, key welfare issues such as drug abuse, Aboriginal incarceration, kinship care and child protection were suggested as necessary topics to be included in treaty negotiation.

The order of things

Michael Mansell has advocated a concurrent process for treaty making and truth-telling. Delivering the 2021 Japanangka errol West lecture in the first week of our project, he said:

> We have two elements to an historical moment. That is, truth-telling about what really happened in Tasmania to Aboriginal people and, in parallel, working towards a Treaty. Now, the reason I say in parallel is because some people may say that you can't have a treaty until you've finished the truth-telling component, but I disagree. They can both operate concurrently. There's no reason why a treaty needs to be stalled because we're talking about truth-telling, and there's no reason why – if a treaty has been signed and made a matter of Tasmanian law – we have to suddenly say … we don't have to do truth-telling. Truth-telling seems to me to be an essential component of Tasmanian society for the long-term future rather than a once-off agreement.[44]

Ray Groom (who was Premier at the time of the 1995 land hand-backs) said that, politically, it would make sense for a treaty to be negotiated first, and then other things flow from this (land hand-backs, truth-telling, education, language etc.). In other words, it would not be necessary for detailed outcomes to be included in the treaty.

Matthew Groom, a former Minister for Aboriginal Affairs, talked about a two-stage process – a 'pathway treaty' followed by a 'substantive treaty'. The Aboriginal participants in the first stage should be those with respected, Elder status including (but not exclusively) from TAC.

44 Ibid.

Recommendations

As the description of the comments made in our meetings shows, there was a division among Aboriginal people between those who considered that they were ready to negotiate a treaty which could be done concurrently with truth-telling and those who thought that it was premature to attempt to negotiate a single treaty with Aboriginal people, which could not happen until truth-telling and the issue of identity was resolved. At the same time, there was a concern that truth-telling and determining the issue of identity should not stall progress on land return, protection of Aboriginal heritage reform, resolving language disputes, capacity building and other significant changes needed to facilitate self-determination and build autonomy for Aboriginal people.

Early in the process of immersing ourselves in understanding the issues through reading, observing and listening, we realised that the worst outcome of our process would be that nothing would emerge other than yet another report, or a recommendation for yet another round of consultations on the recommendations. While a truth-telling process is a central recommendation and has the benefits we have outlined, it is not enough. And without more it carries with it the risk of disillusionment about a lack of constructive outcomes and progress towards self-determination. For this reason, we do not believe a treaty process should be delayed until after truth-telling. We also believe that a treaty or treaties is not simply an aspiration of Aboriginal people; a treaty should also be embraced by non-Indigenous Tasmanians. Despite well-meaning efforts nationally to bridge the social and economic gaps between Indigenous and non-Indigenous Australians these efforts have been inadequate. As Pat Dodson has explained:

> More than 10 years on, the Prime Minister's 2019 report [on the Closing the Gap agenda] advises that only two of the seven targets are 'on track'. The recently signed 'National Agreement on Closing the Gap' between the Coalition of Aboriginal and Torres Strait Islander Peak Organisations and all Australian Governments to progress the next phase of Closing the Gap is a good start in doing things differently and travelling a different path. However, improving service delivery is only one part of a different way of doing things and making a sustainable difference. A more comprehensive approach is to look at a treaty or treaties.[45]

As explained, the States and Territories have taken the lead on this and the nation cannot wait for the Commonwealth to respond.

45 Dodson, above n 30, 204.

Recommendation 5: Treaty and truth-telling advancement legislation

In the light of the difficulty of determining who should negotiate treaty on the Aboriginal side (they must be representatives freely chosen by Aboriginal people through their own representative structures),[46] we recommend that as a preliminary first step, the Government formulate a broad framework which is enacted in legislation – the 'Treaty and Truth-Telling Framework Act' or similar.

In addition to creating the framework for a truth-telling process, and a commitment to begin a treaty process and to provide the resources to make this happen, the framework should include:

- without prejudice to the actual content to be negotiated, an indicative list of the components of the treaty such as a recognition that Aboriginal sovereignty has not been extinguished but that it coexists with that of the Crown; an acknowledgment of past injustices; reparations for colonisation and protection for Indigenous rights; and
- a code of conduct to ensure that Aboriginal participants are protected from lateral violence.

A commitment of resources is important because the fact that no budget for progressing the Government's 'pathway to reconciliation' was announced in the last budget has raised doubts about the Government's genuine commitment to meaningful outcomes.

The UNDRIP, endorsed by Australia in 2009, provides an influential guide for the minimum standards for treaty negotiations with themes of self-determination, participation in decision-making and respect for protection of culture. The framework should adopt the principles of the UNDRIP.

46 Permanent Forum on Indigenous Issues, Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, 4th sess, Agenda Item 4, UN Doc E/C.19/2005/3 (17–19 January 2005) [46] [47].

Recommendation 6: Treaty should not wait for the completion of truth-telling

The Uluru Statement anticipates a sequencing of reforms: first Voice, then Treaty, and finally Truth for the reason that without an Aboriginal representative body, there is the risk that the design and powers of the Makarrata Commission, whether it sits in a treaty or truth-telling function, will not reflect the priorities or interests of the Aboriginal and Torres Strait Islander people.[47] There has been considerable debate about the most appropriate sequencing for Voice, Treaty and Truth.[48] Informed by the meetings we had with Aboriginal people, our view is that in the Tasmanian context, the best way forward is for the Government to show its commitment to meaningful change by legislating a framework which allows for both truth-telling and treaty work and for truth-telling and treaty work to be done concurrently. However, the Truth-Telling Commission will need first to determine eligibility for the purposes of selecting the parties to negotiate treaty (see Recommendation 8).

Recommendation 7: Whole-of-Government Aboriginal Consultative Body

Without prejudice to a future treaty-negotiated Aboriginal Voice to the Tasmanian Parliament, which may result in designated Aboriginal seats in Parliament or other structural reforms, we recommend that the Government establish an Aboriginal Consultative Body to engage with whole of Government policy of interest to the Aboriginal people. At present no such body exists. We recommend below the creation of a Tasmanian Indigenous Education Consultative Body (see Recommendation 24) but we explain that creating a body such as that runs the risk of siloing consultation with Aboriginal people to the narrow but important portfolio of education. A broader group to engage across relevant Government policy and involving all relevant departments and agencies will not need to meet more than once or twice a year but it will: avoid a lack of engagement or sight of whole-of-government developments; and provide an umbrella body for sectoral or portfolio issues such as education, housing, land management etc.

47 Megan Davis, 'Voice, Treaty, Truth', *The Monthly* (online, July 2018) <https://www.themonthly.com.au/issue/2018/july/1530367200/megan-davis/voice-treaty-truth#mtr>.

48 See for example: Dani Larkin and Amy Maguire, 'Lidia Thorpe wants to shift course on Indigenous recognition: Here's why we must respect the Uluru Statement', *The Conversation* (online, 8 July 2020) <https://theconversation.com/lidia-thorpe-wants-to-shift-course-on-indigenous-recognition-heres-why-we-must-respect-the-uluru-statement-141609>.

THE VEXED QUESTION OF ABORIGINALITY

If we're going to talk about treaties and recognition of rights, the question of who's in and who's out is going to be the most important issue facing indigenous Australians. If that isn't resolved, you run the risk of having the parameters stretched to the ludicrous point where someone can say: 'Seven generations ago there was an Aboriginal person in my family, therefore I am Aboriginal'.[49]

In no countries is identification of indigeneity a cut-and-dried process resulting in an all pervasive all-purpose-serving identity. Whoever would attempt to define ethnicity confronts the reality that an individual's ethnic identity is always to some degree fluid, multiple, differing in degrees, and constructed. … If part of the problem is Aboriginal people not having the power themselves to determine who is and who is not Aboriginal, who should have the power to decide? In Tasmania the TAC believes it is themselves (or at least the newly constituted IIAC) while others say the TAC has no right to have the final say and that it stacked the IIAC.[50]

A truth-telling exercise could help shine a light on who is Aboriginal (and it is up to Aboriginal people to determine that question). We acknowledge that it is a messy conversation but it is one that needs to happen.[51]

Putting identity to one side is putting off the inevitable. Who is and who is not Aboriginal is a big issue that needs to be addressed. It is not up to you to solve but also not up to you to ignore.[52]

Background

Throughout the entire duration of our project and in every single meeting and consultation we held there was one overwhelming and omnipresent topic: the vexed, controversial and hotly contested question of who and who is not Aboriginal. We lost count of the number of people who said to us words to the effect of 'good luck with that one'. The issue is so ubiquitous, so all-pervasive and, in many cases, so all-consuming that we cannot ignore it and pretend that it will eventually sort itself out. It has become apparent to us that the core of so many contested issues in intra-communal relations in Tasmania is the disputed question of Aboriginal identity. This single issue is front and centre for the overwhelming majority of those who identify as Aboriginal here.

The complex politics of Aboriginal identity has presented challenges around Australia but it has been and remains particularly intense in Tasmania. There are essentially two polarised views:

1. The 'conservative', narrower, more restrictive, less inclusive view is that due to the disastrous combination of death, communicable disease, low fertility rates and the 'round-up' of remaining Aborigines by George Augustus Robinson, by the middle of the 19th century there were no longer any Aborigines on the Tasmanian mainland except the small community at Oyster Cove, members of which were clearly identified. Aside from Fanny Cochrane who left Oyster Cove, married a European named Smith and settled in the Huon Valley, and Dalrymple (Dolly) Briggs who married a convict named Johnson and settled in the north west of the State, members of the mainland Tasmanian Aboriginal community had no offspring. The only other Aboriginal people were living in the sealing communities on the islands. Therefore, in order to claim Tasmanian Aboriginal ancestry, it is necessary to trace ancestry to one of Fanny Cochrane Smith or Dalrymple (Dolly) Briggs, or to the Aboriginal families originating from the sealing communities of the Furneaux Islands;
2. The 'liberal', broader, less restrictive, more inclusive view is that there are other lines of Tasmanian Aboriginal survival in addition to the three core family mobs. Children born of relationships between Aboriginal and non-Aboriginal people were raised on mainland Tasmania. Some Aboriginal children were adopted by non-Aboriginal people and their Aboriginal ancestry was 'hidden' in the documentary records for a variety of reasons. Descendants of these Aboriginal ancestors are also entitled to identify as Tasmanian Aborigines.

49 Larissa Behrendt in the Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC Report 96, May 2003) <https://www.alrc.gov.au/publication/essentially-yours-the-protection-of-human-genetic-information-in-australia-alrc-report-96/36-kinship-and-identity/legal-definitions-of-aboriginality/>.

50 John Gardiner-Garden, *Defining Aboriginality in Australia*, (Current Issues Brief No 10 2002-03, Department of the Parliamentary Library, 2003) 22-23 <https://www.aph.gov.au/binaries/library/pubs/cib/2002-03/03cib10.pdf>.

51 Tasmanian Aboriginal leader, community meeting, August 2021.

52 Tasmanian Aboriginal leader, community meeting, July 2021.

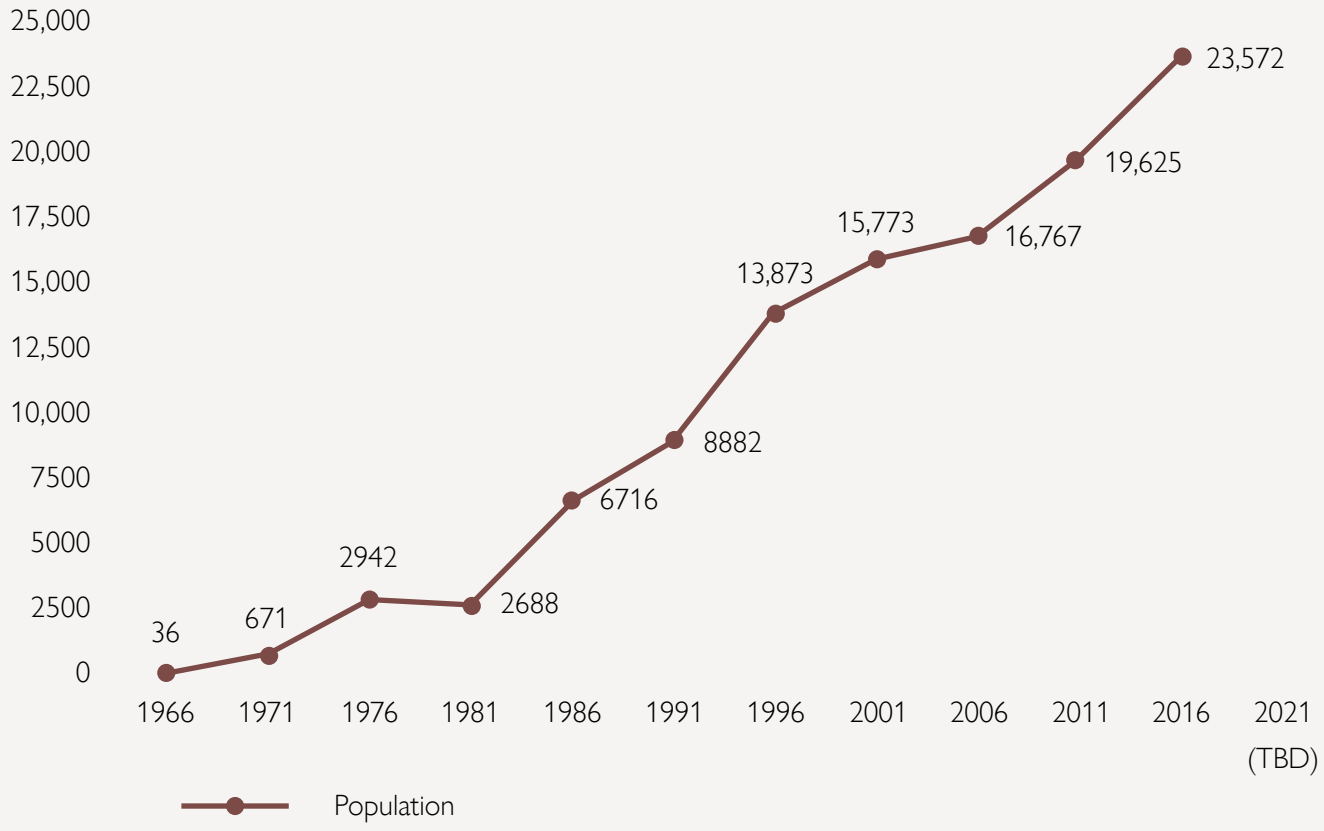
Proponents of either view accept that there are undoubtedly Aboriginal people in Tasmania from mainland Australia (born on the mainland or descendant from mainland ancestors) and, while those people are Aboriginal (and so usually welcomed into community here and entitled to apply for employment positions designated for Aboriginal and Torres Strait Islanders), they are not Tasmanian Aborigines and cannot speak for or on behalf of the local Aboriginal people. We heard from several Aboriginal people from mainland mobs all of whom expressed both their gratitude to be in Tasmania and accepted by the community here but also that they would never claim to speak for Tasmanian Aboriginal people. There appear to be two principal categories of exception to this general proposition: (1) Aboriginal people who trace their descent to both palawa and mainland ancestors (although we heard from one person who had been threatened by Tasmanian Aboriginal people for claiming 'dual' heritage); and (2) descendants of Tasmanian Aboriginal people who went to mainland Australia, for example Tasmanian Aboriginal women who were taken by sealers to Kangaroo Island in South Australia and who may have come back to live in Tasmania.

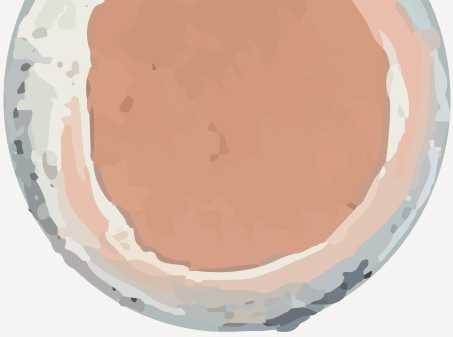
What we heard

Importance of the issue

There is palpable resentment, anger and frustration amongst many Aboriginal people about the burgeoning numbers of Tasmanians claiming Aboriginality and of allegations of Government facilitation of this phenomenon. We received a written submission from ALCT, for example, in which the Australian Bureau of Statistics (ABS) results from Census data were summarised to demonstrate the spectacular growth in the numbers of Tasmanians identifying as Aboriginal (and some explanations offered as to why the numbers shifted as and when they did). The graph below demonstrates the spectacular increase in numbers of those identifying as Aboriginal in each successive census and one wonders what the ABS figures from the 2021 Census will reveal.

Self-Identifying Aboriginal Population - Tasmania (Australian Bureau of Statistics)





One person described the identity issue as the 'elephant in the room' and expressed concerns that white people claiming Aboriginality and accepted by the Government may 'reap the rewards of our treaty'. A number of people were critical of the 'box-tickers' who now claim Aboriginality but are unknown to their community. Particular frustration was focused on Circular Head and the perception of a number of residents who now identify as Aboriginal. One person claimed that there are '5,000 white people who claim Aboriginality in Smithton' and another alleged that the Circular Head Aboriginal Corporation (CHAC) are 'selling memberships for people who want to identify as Aboriginal'. We heard that some believe CHAC's membership numbers mean that the organisation has a more influential voice than, for example, the community on Cape Barren, even though CHAC members have not previously been involved in community and were not 'marching on the streets for as long as us'.

Many people deride claims to Aboriginality by those believed to have no Aboriginal ancestry. Michael Mansell, for example, has called upon CHAC to identify their Aboriginal ancestors in open letters published in the *Circular Head Chronicle*. Fears were expressed that, in our decision to approach registered organisations to facilitate community meetings, we would engage with people who are not Aboriginal and we might be influenced by their views which do not reflect the views of 'the community'. The view was expressed that the Premier needs to be mindful of the 'tick a box' issue and stop engaging with pretend Aborigines – that is causing too many problems on both sides of the divide.

Michael Mansell went further than simply dismissing those he believes are not Aboriginal from the right to identify. He claimed that Aboriginal ancestry alone is insufficient to claim Tasmanian Aboriginality – generations of people have been raised as non-Aboriginal but have only recently discovered their Aboriginal heritage. It may be sufficient for such people to claim TAC services but that does not make them Aboriginal. For many involved in the TAC, growing up in culture, identifying as Aboriginal early in life, participating in the struggle for recognition and for rights and sharing in the collective experience of vilification and racism are all important components of the right to be identified as Aboriginal. Even in the 1970s when the TAC was first established, this issue was recognised as fundamental. Dennis Daniels made the following observations:

> The term Aboriginal descendant seemed to many, including the government, satisfactory enough. But it was Mansell who first saw the problem this posed in terms of unifying the community and the Aboriginal cause. One could be a descendant, even taking out any benefits which might be provided, without being committed to each other or the struggle. [53]

Michael Mansell called for unity on use of the term Aboriginal and other leaders endorsed that call. The willingness to stand up and be counted, to be subjected to public derision, was evidence of real commitment to Aboriginality. Dennis Daniels quoted Michael Mansell and Rodney Gibbons on this issue:

> 'It is our white blood', he said, 'which is used to call us descendants; half-castes, descendants, part Aborigines are all white man's terms'. 'If we want to call ourselves Aborigines, let's do it and be proud. … However, some leaders recognised the problem this caused for light skinned members of their community, and sought to encourage them. 'By identifying' said Rodney Gibbons, 'they are standing up for something they can hide if they want to and showing they are prepared to take all the ridicule'.[54]

Some people we spoke to agree with this view and told us that there is a big difference between having an ancestral link and doing the work to go on the journey of immersion in culture and to be recognised as a member of a unified community. One person we spoke to was critical of that view but explained that it is the widely held perception of the TAC position. Michael Mansell, in his capacity as Chair of ALCT, claimed that only certain members of the Aboriginal community have endured the experience of their ancestors suffering the consequences of invasion and dispossession and that we were wrong to consult beyond that group:

> The survey of Aboriginal opinion should have been limited to those people whose identity as Aborigines is not in question. That way, the people whose grand-parents and ancestors suffered the consequences of the white invasion could feel that the process towards a treaty was itself a genuine acknowledgement of the wrongs committed against them, not others, and could reasonably anticipate a treaty would address issues that affected those families.[55]

53 Dennis W Daniels, 'The Assertion of Tasmanian Aboriginality From the 1967 Referendum to *Mabo*' (MHum Thesis, University of Tasmania, 1995) 36 <https://eprints.utas.edu.au/3585/2/Daniels_whole_Thesis.pdf>.

54 Ibid.

55 Written submission from ALCT. Copy on file with the authors.

No-one we listened to tried to suggest that it was acceptable to identify as Aboriginal with no Aboriginal ancestry. Unanimous agreement for that proposition does not mean that there are no examples of fraudulent claims to Aboriginality to gain benefits. One person told us that there are well-known cases of people claiming funding for legal services and housing which they are not entitled to and that those stories rightly and understandably upset many people. There are some well-known cases, and undoubtedly many other cases, of people genuinely but mistakenly believing they have Tasmanian Aboriginal ancestry when they do not. For example, we heard of one person tracing their descent to a sister of Dalrymple (Dolly) Briggs whom the Elders of the relevant local Aboriginal organisation believe did not have children.

Others were critical of the ready dismissal of Aboriginality, despite an ancestral link, unless the would-be identifier grew up in culture – particularly where the experience of culture was denied for whatever reason and the person involved grew up oblivious to their Aboriginal heritage. One person explained that her Nan is well respected in the community and so she, as a grand-daughter, is readily accepted as a member of the community. But she also explained that one of her aunts was a member of the stolen generation, did not grow up in culture (through no fault of her own) and has struggled for community acceptance as a consequence. Another person told us that he did not grow up in culture and that he only found out later in life about his Aboriginal ancestry which had been hidden from him. He now wants to be able to embrace his Aboriginality. Another person explained that their father was ashamed of his Aboriginality and so never spoke of it. This person only recently discovered their ancestry through their grandmother. One person suggested that it would be important to make space for truth-telling about the generation of people who were raised in denial of their Aboriginality because of racism.

One well-respected Elder within the community told us that they used to be strongly of the view that unless you are descended from Fanny Cochrane Smith, Dalrymple (Dolly) Briggs or one of the island families you are not Aboriginal. This Elder told us that their views on this issue were challenged while studying at University and being taught to suspect and scrutinise sweeping generalised or absolute claims. The Elder told us they had lived in Circular Head for some time and knew people who 'were not Aboriginal back then' but now claim Aboriginality and belong to CHAC. This Elder conceded that some families may have hidden their ancestry in order to survive the impact of colonisation and that history and identity may have been lost and only recently rediscovered. Another person told us that generations of Aboriginal people have been silenced and that some are now searching for connections within families. Just because a parent has made a decision for their child(ren) does not mean that child/those children will not find their own voice or want to explore their culture or discover their heritage later in life.

Several people, who identify as Aboriginal and claim their lineage to ancestors who were not from the three uncontested lines of descent, explained how demoralising it is to spend several years learning about and becoming proud of their Aboriginality to now have their heritage denied to them and to be told that their Aboriginality is concocted. A contrary view was that there is recurrent emphasis on the harm done to Aboriginal people when their claim to Aboriginality is not believed but rarely any mention of the harm caused by 'pretenders' to the Aboriginal community.

Establishing Aboriginal ancestry

Documentary evidence of Aboriginal ancestry can be difficult to produce. The State Archivist and key staff from the Tasmanian Archives division of Libraries Tasmania provided an overview of the nature of the archival records and the process for acquiring documentary evidence of Aboriginal ancestry.

To document Aboriginal descent in Tasmania you need to have a sequence of records going back from you to an identified or accepted Aboriginal person. Records held by the Tasmanian Archives that identify people as Aboriginal are from the first few decades of European colonisation – later records do not indicate race. The only exception is in records about the Bass Strait islands.

They explained to us that their role 'is not to determine identity'. Rather, they provide guidance with family history research via access to the official records held by the Tasmanian Archives and relevant publications from State Library collections. Official records held by the Tasmanian Archives that are of use include church records, births, deaths and marriages records,[56] some welfare files dating back to the 1890s,[57] as well as records relating to Cape Barren Island.

Archives Office staff can only confirm what the official records say about a person's ancestral lineage. For example, if the official records list non-Aboriginal parents of a child, Archives cannot certify a family's oral history that the child was actually born from an extra-marital relationship involving one Aboriginal parent. The Archives staff told us that one of their most formidable challenges is tempering unrealistic expectations about what they will be able to do or provide to a person making a request. The staff are often asked to certify a family tree that a member of the public has prepared and wants officially endorsed.

56 Official births, deaths and marriage records did not commence in Van Diemen's Land until 1838.

57 Adoption was not legislated in Tasmania until 1920 – *Adoption of Children Act 1920* – so there are no official adoption papers prior to that. However, there are welfare notes about children, their families and the movement of children dating back to the late Nineteenth Century.

Archives staff claimed that it was only a miniscule proportion of approaches that would result in the State Archivist issuing a letter confirming Aboriginal ancestry based on the information available (as low as 3% of requests). The staff told us that they still receive requests for assistance to help find documentary evidence of Aboriginality from families of the 130 co-applicants whom the Administrative Appeals Tribunal (AAT) decided were eligible to vote in ATSIC elections for the Tasmanian Regional Council. Archives staff could not find documentary evidence in 2001 and no further records of interest have been identified since then. Archives staff believe that the AAT's emphasis on the sufficiency of family oral history of Aboriginality has raised unrealistic expectations about the existence of documentary records to confirm the oral history. We heard from at least three of the successful co-applicants about the importance to them of the AAT upholding their claim to Aboriginality.

We heard a range of different experiences about whether or not documentary evidence can be produced to confirm Aboriginal ancestry and the implications for communal recognition. The birth certificate of one respected Elder in the community, for example, lists her European 'parents' as her biological mother and father. Not only was the respected Elder informed by their birth mother of their Aboriginal father but: their mother ensured that the Elder experienced extended time in culture as a child; the Aboriginal community is well aware of the extra-marital affair, knows the identity of the biological father (who was a member of a well-known island family) and knows that the Elder and their one full-sibling were products of the extra-marital relationship. We have regularly reflected on the fact that if documentary evidence of Aboriginality was the sole test for, or otherwise a compulsory prerequisite for, proof of Aboriginality, this respected Elder's Aboriginality would not be accepted. This case provided a glaring case-study of the power of communal recognition of identity and also the limitations of documentary evidence of Aboriginal ancestry where the official records hide or obfuscate the Aboriginality of an ancestor. At the other end of the spectrum are the cases of oral family history of an Aboriginal ancestor who may have been adopted into a white family and whose birth certificate lists the adoptive parents as the biological mother and father. There is no documentary evidence of the Aboriginality of the ancestor, those who now identify on the basis of this ancestry are three or four generations removed and no-one in the contemporary Aboriginal community knows of the ancestor. If one of the registered Aboriginal corporations recognises this identifier's claim of Aboriginality, other Aboriginal people scratch their heads and ask how can this be?

Federal and Tasmanian Government eligibility criteria

In 2010 the Australian Law Reform Commission published a report entitled *Essentially Yours: The Protection of Human Genetic Information in Australia.*[58] That Report included a chapter on 'Legal Definitions of Aboriginality' which commences with the staggering statement by the legal historian John McCorquodale that 'since the time of white settlement, governments have used no less than 67 classifications, descriptions or definitions to determine who is an Aboriginal person'.[59] It is little wonder that ALCT expressed angst about the protracted history of 'the undermining of Aboriginal identity' by white/non-Aboriginal people in a written submission to us.

Many people expressed the view that it must be for Aboriginal people to decide who is and who is not Aboriginal. One person, while critical of Justice Merkel's Federal Court decision in *Shaw v Wolf* (as yet another example of a white person in a white institution imposing their values on Aboriginal people. Details of this case are discussed below.) nevertheless endorsed Justice Merkel's concluding comments that in the future Aboriginal people should be determining this issue for themselves. Another person told us that the Aboriginal community needs a safe space to talk about identity and for those whose identity is not known, it should be up to the community to make a determination. Another person asserted that identity is something for the Aboriginal community to decide and not for white people.

In the late 1970s the Commonwealth started using the now familiar three-part test to determine Aboriginality: descent; self-identification; and community recognition. The *Report of the Aboriginal Affairs Study Group of Tasmania* presented to the Parliament in 1978 approved the Commonwealth three-part test for use in Tasmania. The Report states that:

> For the purposes of this report, the words *Aborigine* or *Aboriginal* is (*sic*) used to describe a living person of Aboriginal descent according to the usage of the Commonwealth Department of Aboriginal Affairs, that is 'an Aboriginal is a person of Aboriginal descent who identifies himself as such and who is recognised by the Aboriginal community as being an Aboriginal'. … The words Aborigine or Aboriginal will therefore be used to describe the existing Aboriginal population of Tasmania *who identify as such*, and who have been previously referred to by a number of terms including *Bass Strait Islander*, *Cape Barren Islander, Islander, Straitsman, Hybrid, Part-Aboriginal, Half-Caste* or *Aboriginal Descendent*.[60]

and also that:

58 ALRC, above n 49.
59 John McCorquodale in ALRC, above n 49.
60 Parliament of Tasmania, *Report of the Aboriginal Affairs Study Group of Tasmania* (1978), 8.

> It had already been noted at the beginning of this report that the Commonwealth definition of an Aboriginal is satisfactory for the purposes of this and allied reports except for the fact that the Commonwealth term Aboriginal or Torres Strait Islanders should be changed to read Aboriginal or Torres or Bass Strait Islanders.[61]

In 1981 the Commonwealth Department of Aboriginal Affairs *Report on a Review of the Administration of the Working Definition of Aboriginal and Torres Strait Islanders* formally proposed the three-part test to determine Aboriginal or Torres Strait Islander identity: 'An Aboriginal or Torres Strait Islander is a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander and is accepted as such by the community in which he [or she] lives'.[62] The High Court endorsed the three part test in its 1983 decision in *Commonwealth v Tasmania*. Justice Deane's judgment is regularly cited as the leading judicial authority on the definition, particularly the statement that:

> By "Australian Aboriginal" I mean, in accordance with what I understand to be the conventional meaning of that term, a person of Aboriginal descent, albeit mixed, who identifies himself as such and who is recognized by the Aboriginal community as an Aboriginal.[63]

Since the early 1980s, the three-part test has been utilised widely by Commonwealth, State and Territory Agencies. It was, for example, the approach taken in s 4(1) of the *Aboriginal and Torres Strait Islander Commission Act 1989* which defined 'Aboriginal person' in s 4(1) as 'a person of the Aboriginal race of Australia'.

Despite the apparent simplicity of the three-part test, it became apparent that the definition was open to diverse and variant interpretation. Gardiner-Garden, for example, made the following observations in his Report for the Parliamentary Library:

> When it came to the test, which of the three criteria was the most important? Which criteria, if satisfied, could carry an identification in the event that meeting the others proved problematic? In the course of the 1990s there were cases when people identifying strongly as Aboriginal would claim that the sources were simply not available to prove their Aboriginal descent but that this should not mean their Aboriginality could not be recognised. On the other hand, there were people who argued that Aboriginality should only be recognised with evidence of descent. The debate became particularly divisive in Tasmania. In that state many people without 'known' Aboriginal family names, found themselves relying on self or community identification at a time when the Tasmanian Aboriginal Centre (TAC), the main operator of Aboriginal services in Tasmania, was putting more emphasis on evidence of descent and reassessing eligibility for services based on more stringent requirements than those that had been imposed for the issue of earlier certificates of Aboriginality.[64]

The first case to interpret and apply the ATSIC legislation definition was *Gibbs v Capewell*, a 1995 Federal Court judgment of Justice Drummond. The petitioner Desmond Gibbs asked the Court to declare void the election of Lyle Capewell to the Roma Ward of the Roma Regional Council in the 1993 ATSIC elections, on the basis that Capewell was not an Aboriginal person within the meaning of s 4(1) of the legislation. Counsel for Capewell had claimed that a person without Aboriginal descent could nevertheless be Aboriginal if they self-identified and had communal recognition – basically if an Aboriginal community took a non-Aboriginal person in and raised them as an Aboriginal. Justice Drummond rejected that proposition and determined that:

> Since the Act itself makes it clear that proof of descent from the pre-European settlement inhabitants of Australia is essential before a person can come within the expression "Aboriginal person" in the Act, I reject the suggestion advanced on behalf of the first respondent [Capewell] that a person without any Aboriginal genes but who has identified with an Aboriginal community and who is recognised by that community as one of them can be an "Aboriginal person" for the purposes of this particular Act. It follows that adoption by Aboriginals of a person without any Aboriginal descent and the raising of that person as an Aboriginal (a possibility mentioned by the first respondent) will not, because of the statutory requirement for descent, bring that person within the description "Aboriginal person".
>
> …
>
> Aboriginal communal recognition will always be important, when it exists, as indicating the appropriateness of describing the person in question as an "Aboriginal person". Proof of communal recognition as an Aboriginal may, given the difficulties of proof of Aboriginal descent flowing from, among other things, the lack of written family records, be the best evidence available of proof of Aboriginal descent. While it may not be necessary to enable a person to claim the status of an "Aboriginal person" for the purposes of the Act in a particular case, such recognition may, if it exists, also

61 Ibid 34.
62 Gardiner-Garden, above n 50.
63 *Commonwealth v Tasmania* (1983) 158 CLR 1, 274.
64 Gardiner-Garden, above n 50, 6.

provide evidence confirmatory of the genuineness of that person's identification as an Aboriginal.[65]

It would be hard to disagree with Justice Drummond here. Surely some degree of descent is an essential prerequisite for Aboriginality. But several critical questions arise from Justice Drummond's judgment and they were then, and remain now, particularly relevant in Tasmania: what proof of descent is required and who decides? In the absence of archival documentary proof of descent, is communal recognition adequate? Who constitutes the community entitled to extend recognition of Aboriginality?

The first three ATSIC elections (1990, 1993 and 1996) were all conducted on the basis of declaration and verification of a claim of Aboriginal or Torres Strait Islander identity. For those voting in person the verification of an identity claim was overseen by Aboriginal liaison officers employed by the Australian Electoral Commission to either confirm a would-be voter's declaration of eligibility or investigate a challenge to that declaration through their contacts in Aboriginal communities. For postal voters, verification of a declaration of eligibility to vote involved the signature of an office holder in a registered Aboriginal corporation.[66]

In Tasmania, the number of votes cast grew steadily from 340 in 1990 to 805 in 1993 and to 1,094 in 1996. A distinctive feature of the Tasmanian elections was the huge percentage of postal votes: in 1996 60% of the votes (647 of 1,094 total votes) were postal compared to 2% of total votes case in the rest of the country. Some TAC-aligned people expressed concern that some of those voting as well as some of those running for office were not Aboriginal and, therefore, not eligible to participate in the elections. The court challenge to some of those running for election in *Shaw v Wolf* (details below) was initiated in the aftermath of the 1996 ATSIC Regional Council elections in Tasmania. The ATSIC Commissioners responded to the concerns by requiring a statutory declaration and a letter of confirmation signed under the common seal of an Aboriginal organisation. These stricter declaration and verification measures had an immediate impact in Tasmania and there was a drop in votes cast in the 1999 ATSIC elections (from 1,094 in 1996 down to 824 in 1999 – basically equivalent to the votes cast in 1993).[67]

The first elections to ALCT followed on the heels of the third triennial ATSIC election in 1996. ALCT was established pursuant to the *Aboriginal Lands Act 1995* and an electoral roll of eligible voters was created to facilitate the election of eight members of the Council in five regional electorates (two from the South, two from the North, two from the North West and one each from Flinders Island and from Cape Barren Island). Similar to the electoral roll for ATSIC elections: (1) eligibility for those registering followed the three-part Commonwealth test; (2) those registering could be the subject of objection to their Aboriginality; and (3) in considering an objection the Electoral Commissioner can take 'advice from such persons as the Electoral Commissioner considers necessary'.[68]

The issue of eligibility – to either enrol to vote or to run for election – on the basis of Aboriginality has been litigated on three separate occasions in Tasmania[69] and it is important to understand the context in which these three cases were decided, what was decided and what tests were applied in each of the three cases. Two cases involved judicial determinations in relation to disputes arising pursuant to the ATSIC legislation and the third case involved a judicial determination as to eligibility to enrol to vote in elections pursuant to the Tasmanian *Aboriginal Lands Act 1995*.

We provide the following summaries of the key points arising from each of the cases and provide more detailed analysis in Appendix A.

1998 Federal Court of Australia case of *Shaw v Wolf*

It is unfortunate that the determination of a person's Aboriginal identity, a highly personal matter, has been left by a Parliament that is not representative of Aboriginal people to be determined by a Court which is also not representative of Aboriginal people. Whilst many would say that this is an inevitable incident of political and legal life in Australia, I do not accept that that must always be necessarily so. It is to be hoped that one day if questions such as those that have arisen in the present case are again required to be determined that that determination might be made by independently constituted bodies or tribunals which are representative of Aboriginal people.[70]

65 *Gibbs v Capewell* (1995) 128 ALR 577, paras 10 and 20.

66 Will Sanders, *The Tasmanian Electoral Roll Trial in the 2002 ATSIC Elections*, ANU Centre for Aboriginal Economic Policy Research (Discussion Paper No. 245, 2003) 1-2. <https://apo.org.au/sites/default/files/resource-files/2003-07/apo-nid7707.pdf>.

67 Ibid 2.

68 See s 10(4)(a) of the *Aboriginal Lands Act 1995*.

69 There was in fact a fourth case, *Bleathman v Taylor* [2007] TASSC 82, decided by Justice Blow in the Supreme Court of Tasmania. That case involved an appeal against a rejection by the Electoral Commissioner of an objection to a person registering to vote in ALCT elections. The case is not summarised here because it was decided on the basis of a procedural technicality and did not involve a substantive analysis of Aboriginality as defined in the *Aboriginal Lands Act 1995*.

70 *Edwina Shaw & Anor v Charles Wolf & Ors* (1998) 163 ALR 206, 268.

In *Shaw v Wolf* two petitioners appealed to the Federal Court of Australia arguing that 11 respondents who were candidates in the 1996 Aboriginal and Torres Strait Islander Commission (ATSIC) Hobart Regional Council elections were ineligible for election on the basis that they were not Aboriginal – a precondition to vote for candidates and also to nominate for election to ATSIC.

To determine Aboriginality under the ATSIC legislation, Justice Merkel applied the well-established three-part Commonwealth test. He also decided that the petitioners carried the onus of proving on the balance of probabilities that the respondents were not Aboriginal. In Justice Merkel's view, the petitioners in a civil action must carry the onus of proof to the requisite standard. However, because the implications of an adverse finding against the respondents – that they were not Aboriginal for the purposes of the ATSIC legislation and so ineligible to run for election to ATSIC – were so serious, Justice Merkel applied the so-called *Briginshaw* Principle to the effect that he would not lightly apply the balance of probabilities test. That made it more difficult for the petitioners to prove that the respondents were not Aboriginal for the purposes of the ATSIC legislation.

Justice Merkel decided that the petitioners had not discharged their onus of proof in respect of nine of the respondents but that they had in respect of the other two – Debbie Oakford and Lance Lesage. Mr Lesage had not been successful in the ATSIC election but Ms Oakford had. Consequently, Justice Merkel declared Ms Oakford ineligible for election and ordered a recount of votes to decide who would replace her.

On the issue of descent, it is significant that in respect of the nine respondents whom Justice Merkel decided were eligible to stand for ATSIC elections, seven of them traced their genealogies to ancestors other than Dalrymple (Dolly) Briggs, Fanny Cochrane Smith or one of the Furneaux Island families. Justice Merkel quoted from the evidence of Dr Cassandra Pybus that there were some women of child-bearing age and of Aboriginal descent (other than Dalrymple (Dolly) Briggs and Fanny Cochrane Smith) on mainland Tasmania after 1830 and that 'we can't be sure about what happened to them'. Justice Merkel decided that the gaps in the historical records as to descent necessitated caution in discounting oral history – particularly where that oral history 'has some contemporaneous corroboration'.[71]

On the issue of communal recognition, Justice Merkel decided that the TAC was not the only body to extend recognition. He stated that:

> A difficulty with the petitioners' "community" submissions is that they assume that there is only one Aboriginal community in Tasmania and on the evidence before me this assumption cannot be accepted. I accept that as a result of its central role in Tasmania in relation to Aboriginal affairs, if an individual is recognised by the TAC as being an Aboriginal person, then, subject to descent, they are likely to be an Aboriginal person. I am not satisfied, however, that if the TAC does not recognise an individual as Aboriginal the converse is true and that they are not an Aboriginal person. … As a result of the complexity inherent in defining an Aboriginal community in Tasmania, throughout these reasons I have referred generally to community recognition, or to recognition by a section of a community, rather than to a defined community.[72]

The agitations in Tasmania arising from the 1996 ATSIC elections did not abate during, or in the aftermath of, the 1999 elections. Discontent focussed, predictably, on the question of eligibility – of some of the 824 voters as well as of some of those elected. Others questioned the merits of the enrolment and voting procedures given the relatively meagre voting turnout at a time when 14,000 Tasmanians identified as Aboriginal. Pursuant to s 141 of the ATSIC legislation a five-person independent Review Panel was constituted but rather than being tasked to consider the usual subject matter of, for example, electoral boundaries, the Panel undertook a review of all aspects of the poll procedure.[73] The Review Panel recommended the trial of an Indigenous Electoral Roll in Tasmania for the 2002 ATSIC Regional Council elections and both ATSIC and the Commonwealth Government agreed. The Commonwealth Minister for Aboriginal Affairs, then Philip Ruddock, announced the adoption of administrative rules to give effect to the recommendation and the trial was implemented.[74]

According to Gardiner-Garden, a total of 1298 Tasmanians registered on the Electoral Roll and 2572 objections against almost 1100 of those registrants were received by ATSIC. Pursuant to the Rules, an Independent Indigenous Advisory Committee (IIAC) was appointed and that Committee reviewed the registrations and objections. The IIAC approved 621 registrations and rejected 587. Gardiner-Garden stated that:

71 Ibid 222.

72 Ibid 218-19.

73 John Gardiner-Garden, above n 50, 8.

74 Ibid.

Debate continued. Some suggested the IIAC was biased towards the TAC position and that the IIAC was being used to disenfranchise voters intent on reforming the TAC. Others argued that the TAC was being disadvantaged having all the onus of disproof being put on them and that more help was available to those who wanted to claim Aboriginality than who wanted to challenge someone's claim.[75]

In September 2002, just weeks before the scheduled 2002 ATSIC Regional Council elections in Tasmania, many of those rejected by the IIAC jointly appealed the IIAC's adverse finding to the Administrative Appeals Tribunal. The following provides an overview of the case:

2002 Administrative Appeals Tribunal (AAT) decision of Patmore (and Others) and the IIAC

> It is to be hoped that any system worked out for the future requires something more from objectors than simply asserting that the objector does not know the applicant and questions aboriginality on that basis alone.[76]

In the AAT Decision of *Patmore and Others v Independent Indigenous Advisory Committee*, 131 applicants appealed against a decision of the IIAC to uphold the objections that had been made to the Council against each of the 131 applicants for enrolment to vote in the 2002 Tasmanian Regional Council to elect representative members to ATSIC. The ATSIC Rules for the 2002 Tasmanian Regional Council election authorised the IIAC to review objections and determine eligibility to vote and provided for appeal against an adverse decision of the IIAC to the AAT.

There were a large number of objections to people on the Provisional Roll and the Committee worked its way through those objections. Primarily on the basis of known descent and/or endorsement of claims of Aboriginal ancestry from the records of the Archive Office of Tasmania, the Committee approved approximately 700 people on the Electoral Roll and rejected approximately 600. Fifty-five of those who the Committee did not approve for inclusion on the Roll appealed against the Committee's decision to the AAT. Before the AAT had concluded its hearing, the number of applicants had increased to 131.

The key issue for determination in this case was the same as in *Shaw v Wolf*: did the relevant individuals satisfy the requirements to be 'Aboriginal persons' within the meaning of s 4(1) of the ATSIC legislation or not? One key difference between the two cases involved the party carrying the onus of proof. In *Shaw v Wolf* the petitioners were appealing to the Federal Court to uphold their objections to the respondents nominated for election to the ATSIC Regional Council, but in the AAT Decision the applicants were appealing to the AAT to overturn the decision to exclude them from the ATSIC electoral roll for the Tasmanian Regional Council. In the Federal Court the objectors were the petitioners and they carried the onus of proving that the respondents were not eligible to run for ATSIC Regional Council elections. In the AAT decision, those objected to (the 'objectees' one could say) were the petitioners and they (and not the IIAC) had the onus of establishing their entitlement to enrol to vote in the ATSIC Regional Council elections. It would be easy but wrong to assume that this single difference would have made it harder for the objectors in *Shaw v Wolf* than for the objectors in the AAT case to successfully preclude participation in ATSIC elections.

The AAT overturned the decision of the IIAC in the cases of 130 of 131 applicants and the only reason for the outlier was that that one particular applicant, Peter James Clements, did not appear in person for the hearing. Rather than decide that Clements chose not to appear and, therefore, to dismiss his application, the AAT decided his case on the basis of the documents before them. Those documents were insufficient to substantiate Clements' claim of Aboriginality and so the AAT upheld the decision of the IIAC. Clements subsequently successfully appealed the decision of the AAT to the Full Court of the Federal Court and the AAT decision was overturned.[77]

The AAT results should be contrasted with the results in the Federal Court where the objecting petitioners carried the onus of proof to disprove the eligibility of the respondents who all nominated for election to the ATSIC Regional Council. The petitioners were able to satisfy the *Briginshaw* test and discharge their burden of proof against two of the 11 petitioners. It is true that one of those two unsuccessful respondents, Lance Lesage, did not appear before the Federal Court. That non-appearance made the petitioners' task easier. However, the case of the other unsuccessful respondent, Debbie Oakford, is instructive.

75 Ibid 9.

76 2002 Administrative Appeals Tribunal (AAT) decision of Patmore (and Others) and the IIAC ("AAT Decision"), [51].

77 Clements v Independent Indigenous Advisory Committee [2003] FCAFC 143.

The specific case of Debbie Oakford's Aboriginality

In 1998 Justice Merkel found that the petitioners established to the requisite standard that Ms Oakford was ineligible to stand for election to the ATSIC Regional Council and yet, just four years later, the AAT found that this same Ms Oakford was eligible to vote in the 2002 elections for the ATSIC Regional Council. How was it possible that those two apparently irreconcilable outcomes could both have been achieved? The judicial decision-makers in both courts accepted Ms Oakford's evidence of self-identification and community recognition. The key difference lay in the approach of the respective judges to the question of Ms Oakford's Aboriginal descent.[78]

Justice Merkel discussed Ms Oakford's claim in some detail and explained that neither the historical records nor the material Ms Oakford produced in Court supported her descent claim. The AAT also discussed the same claimed lines of descent for Ms Oakford and yet decided that she was eligible to vote. That decision was reached exclusively on the basis of family oral history at the expense of archival records which, on the admission of the decision-makers themselves, suggested that the oral history was at best weak. Justice Merkel was not prepared to accord a similar weight to the same oral history: instead placing greater emphasis on the archival record and the testimony of those whose professional expertise lies in the interpretation and application of that record. One critical question here then is at what point does family oral tradition trump archival records? In circumstances where there is a neutral absence of archival confirmation of descent or in circumstances where the archival records suggest a positive refutation of descent?

78 A more detailed case study of Debbie Oakford's claim to Aboriginality and the approach of the respective judicial decision-makers to it is discussed below in Appendix A.

2001 Supreme Court of Tasmania case of *Aboriginal Lands Act 1995 and Marianne Watson*

Marianne Watson appealed to the Supreme Court of Tasmania against a decision by the Chief Electoral Officer (now known as the Electoral Commissioner) to uphold an objection to her registration to vote in elections for ALCT. Chief Justice Cox confirmed that Ms Watson, as the appellant, carried the onus of proof in this case and so he was required to determine whether or not Ms Watson had established her Aboriginality within the meaning of the legislation.

Chief Justice Cox applied the three-part test for Aboriginality. On the question of descent, Ms Watson traced her ancestry back to her great-grandmother Ellen Janet Bessell. Ms Watson believed that Ellen Bessel was Aboriginal and, while conceding that the historical record did not substantiate that view (Ellen's birth certificate listed her parents as John Bessell and Edith Bessell (nee Harris) and Ms Watson conceded that neither of them was Aboriginal), she argued that Ellen's actual mother was in fact Ada Amelia Baker (nee Harris). Ellen's marriage certificate listed her parents as Ada Amelia Baker and John Baker (not Bessell). Ms Watson argued that Ada Harris was the daughter of a Scottish convict named Janet Jamieson who, Ms Watson speculated, had had her daughter to an unidentified and unnamed Aboriginal man on one of the Furneaux Islands. Chief Justice Cox claimed that:

> With respect, it has to be said that this theory is speculative in the extreme and without any supporting evidence, documentary or otherwise. Whether Ellen was the daughter of Edith Harris or Ada Amelia Harris and the granddaughter of Janet Jamieson, there is no evidence of any connection with an Aboriginal person, let alone one who has been identified.[79]

Chief Justice Cox accepted that sometimes historical records are incomplete and/or inconsistent and so cannot be relied upon as the only possible evidence of descent but that, in Ms Watson's case, there was 'no evidence of any family oral history of descent from a known Aboriginal person and but little evidence of such a history connecting any ancestor of the appellant with an Aboriginal community.'[80] Ms Watson produced photographs of her great-grandmother Ellen and of some of Ellen's children and grandchildren. The Chief Justice accepted that the people in the photographs observed by those swearing affidavits were indeed Ellen and some of her children and grandchildren. The key question though was whether or not these claims were sufficient evidence of Ms Watson's Aboriginality.

79 [2001] TASSC 105 [7].
80 Ibid [8].

The Chief Electoral Officer had established an advisory committee of eight Aboriginal people to consider objections to inclusion on the Electoral Roll. That committee had met to consider the objection to Ms Watson's enrolment. The members of the committee met with the Chief Electoral Officer and with staff from the Tasmanian Archives and agreed 'firmly and unanimously' that the material provided by Ms Watson was insufficient to establish her Aboriginality. One member of the advisory committee, Greg Lehman, swore his own affidavit and indicated that, in his view, he did not consider the photographs of Ellen and her offspring offered any objective evidence of Ms Watson's claim to be of Aboriginal descent. Chief Justice Cox decided on the basis of all the evidence before him that Ms Watson had not established that she was entitled to be registered to vote in the ALCT elections.

2008 Ray Groom's assessment of claims pursuant to the *Stolen Generations of Aboriginal Children Act 2006*

The Tasmanian Government's response to the *Bringing Them Home Report* from the Commonwealth Human Rights and Equal Opportunity Commission 1997 National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families was to enact the *Stolen Generations of Aboriginal Children Act 2006*. The legislation established a $5 million fund for monetary compensation to the Tasmanian victims of the stolen generations and provided for the appointment of an Independent Assessor to assess claims for compensation. Ray Groom was appointed to the role and he assessed a total of 151 claims for compensation.

Ray Groom's 2008 *Report of the Stolen Generations Assessor*[81] provides a moving account of the historical context in which successive Tasmanian Governments implemented a policy of forcible removal of Aboriginal children from their families and of some of the devastating impact on the victims of those policies. No doubt his assessment of individual claims for compensation involved some harrowing evidentiary material on the pain and trauma inflicted on the victims and on their families.[82]

The *Stolen Generations of Aboriginal Children Act 2006* specified that only Aboriginal people as defined in the *Aboriginal Lands Act 1995* were eligible to apply for compensation under the scheme. As explained above in the 2001 case of Marianne Watson before the Supreme Court of Tasmania, the definitional approach in the *Aboriginal Lands Act 1995* was a replication of the Commonwealth's three-part test. Ray Groom determined that 106 of the 151 applicants were eligible for payment and 45 were not.[83] Of the 45 unsuccessful applicants, 17 of them were ruled ineligible on the basis that their Aboriginality was not confirmed to the requisite standard.[84]

One of the final sections of Ray Groom's Report involves a summary of issues of interpretation that he encountered and was required to navigate during the process. The last of these issues was 'Aboriginality' which Ray Groom described as 'obviously a very difficult and sensitive issue in the assessment process'.[85] The Report explains that:

> The Assessor had to be positively satisfied on the balance of probabilities after taking into account all of the evidence before him that an applicant was an Aboriginal person. The Assessor was not looking for possibilities. He had to reach a state of mind where he was satisfied to the abovementioned standard that a particular applicant was an Aboriginal person.[86]

Ray Groom needed some positive evidence of Aboriginality. A finding that an applicant did not produce sufficient evidence of Aboriginality to meet the requirements of the compensation scheme did not constitute a finding that they were not Aboriginal. Ray Groom was adamant that that was not the case and he would not engage in any such judgment. His job as Independent Assessor was to determine whether an applicant met the criteria established by the legislation and that is the approach he took. In the cases of the 17 applicants deemed ineligible because Aboriginality was not confirmed to the requisite standard:

> The principal issue was usually the applicant's ancestry. A great deal of family research was undertaken by the Archives Office of Tasmania and family trees prepared. Applicants often provided a substantial amount of information. All of the available information was carefully considered before the Assessor made his final decision.[87]

81 Department of Premier and Cabinet, *Report of the Stolen Generations Assessor: Stolen Generations of Aboriginal Children Act 2006* (February 2008) <https://www.dpac.tas.gov.au/__data/assets/pdf_file/0020/306191/Stolen_Generations_Assessor_final_report.pdf>.

82 Ibid, see in particular s 8 entitled 'Assessor's Reflections', 17-18. One example of the harrowing personal experiences of a victim of the Tasmanian Stolen Generations is described in: Andrys Onsman, 'Tasmania's Stolen Generation' (23 September 2019) <https://andrysonsman.com/tasmanias-stolen-generation/>.

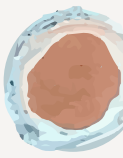
83 DPAC, above n 81, 12 [Table 6.1].

84 Ibid 13 [Table 6.3].

85 Ibid 15.

86 Ibid.

87 Ibid 16.



2016 Premier Hodgman's 'Resetting the Relationship'

In his Australia Day address for 2016, the then Premier and Minister for Aboriginal Affairs, Will Hodgman, announced his intention to 're-set the Government's relationship with the Tasmanian Aboriginal people'.[88] The Premier had travelled extensively around the State to consult with Aboriginal people and discovered that the single overwhelming issue of concern to most of those he spoke to was the question of Aboriginal identity. From 2006 the Tasmanian Government's *Policy on Eligibility for Aboriginal and Torres Strait Islander Specific Programs and Services* applied the Commonwealth three-part test for eligibility and, to satisfy the criterion of descent, required applicants to provide documentary evidence of ancestry 'verified by historical or archival records'. The Premier claimed that this approach to eligibility for services effectively limited access to services to about 6,000 Tasmanian Aboriginal people despite the fact that more than 25,000 Tasmanians then identified as Aboriginal. He explained that in 2012 the administration of the 2006 policy across Government was suspended because of difficulties in administering it, and complaints by individuals and organisations about its application. Instead, Tasmanian Government agencies were left to develop and deliver their own policies under an 'interim arrangement'.[89] The Premier expressed grave concern about the disparity for many of those who identify as Tasmanian Aboriginal people from eligibility for Commonwealth services but exclusion from Tasmanian Government services and/or rights to practice culture. He was adamant that 'something is very wrong here' and that 'it has to change'.[90]

Following the Premier's speech, the Government called for community feedback on eligibility criteria for access to community services and also in relation to individual benefits and permits for cultural activities.[91] The key change to eligibility policy took effect from 1 July 2016 and now requires the completion of an Eligibility Form for Tasmanian Government Aboriginal and Torres Strait Islander Specific Programs and Services.[92] The form requires a statutory declaration of self-identification and a statement of confirmation from an Aboriginal organisation. This approach removes the requirement of documentary evidence of Aboriginal descent.

In our meetings we heard polarised views about the effects of the 2016 'Resetting the Relationship' and no-one spoke in neutral terms about the policy shift. One recurrent view was that the Premier 'destroyed the Aboriginal community in Tasmania' with the 2016 change of eligibility policy because now any non-Aboriginal person can get one of the 'so-called Aboriginal' organisations to confirm their Aboriginality. We were told that the change of policy has 'driven a huge wedge between members of the Tasmanian Aboriginal community'. A number of people expressed the view that government policy is to blame for division in intra-communal relations in Tasmania and that the 2016 Hodgman policy was 'the final nail in the coffin' of any possible unity and shared purpose amongst Tasmanian Aboriginal people. One person was of the view that the Premier Hodgman's consultations in 2015 and his announcement of the 2016 policy shift encouraged the emergence of Tasmanian Regional Aboriginal Communities Alliance (TRACA) which created political tension in the Aboriginal community. That person claimed that some people are now using organisations to pursue personal vendettas. We also heard from another person that the Government's acceptance of these other newly emergent organisations undermines the representation of Tasmania's single Aboriginal community and devalues the standing of the leaders of that community.

88 Premier Will Hodgman, 'The Premier's 2016 Australia Day Address' (Speech, 21 January 2016).

89 Department of Premier and Cabinet, 'Background on the Approach to Determining Eligibility for Tasmanian Government Aboriginal Programs and Services' (Information Sheet, May 2016) <https://www.dpac.tas.gov.au/__data/assets/pdf_file/0009/287262/Eligibility_May2016.pdf>.

90 Hodgman, above n 88.

91 DPAC, above n 89.

92 Department of Communities Tasmania, 'Eligibility Form for Tasmanian Government Aboriginal and Torres Strait Islander programs and services' <https://www.communities.tas.gov.au/__data/assets/pdf_file/0022/16186/Aboriginal-Eligibility-Form-revisedAugust-2021.pdf>.

In stark contrast, the other recurrent view was that the 2016 shift in policy was 'revolutionary'. We heard that 'Resetting the Relationship' did not divide the Aboriginal community – it was already divided (and that was certainly the then Premier's view following his consultations) from at least the early days of ATSIC when Commonwealth funding for Aboriginal programs became more plentiful and easier to access. This same person claimed that lateral violence marginalised dissenting voices amongst Aboriginal people and the 2016 policy shift gave other Tasmanian Aboriginal organisations a voice previously denied to them. Another person told us that the 2016 policy shift constituted a positive commitment from the Government for a more inclusive approach to Aboriginal identity.

Since 2016, it has been easier for those identifying as Aboriginal to secure designated employment positions, services and permits to engage in cultural activities. Ironically, despite the easing of requirements, there have been some unintended negative consequences of the implementation of the policy. We heard from one person that, post-2016, some Aboriginal people previously widely-accepted as Aboriginal could not access the organisation confirmation they now need to secure a designated employment position. This person told us that they could not acquire organisational approval from Flinders Island Aboriginal Association Incorporated (FIAAI) even though they were born on Flinders Island because they now live and work in Launceston. We heard of another example of someone who could not receive organisational approval from South East Tasmanian Aboriginal Corporation (SETAC) because although they are descended from Fanny Cochrane Smith, they now live and work in Hobart and do not live in the Huon Valley.

Several people explained that one consequence of the 2016 policy shift has been a substantial increase in requests for organisational confirmation of Aboriginality. We were told that confirmation of the previous three-part test, including the requirements of documentary evidence of descent and communal recognition, was previously managed under the auspices of the Tasmanian Government's Office of Aboriginal Affairs (OAA) but that, post-2016, OAA no longer undertakes this task. Now organisations are approached directly to confirm Aboriginality. We learned of a relatively recent Commonwealth Government initiative that has compounded the increasing demands on organisations for confirmation of Aboriginality. 'Supply Nation'[93] is a federal database of verified Aboriginal businesses designed to provide confidence to potential customers of the indigenous *bona fides* of listed companies. Verification for inclusion on the database requires written confirmation of Aboriginality by a registered organisation. That requirement for inclusion in the Supply Nation database, in combination with the emphasis on organisational confirmation since the 2016 change of Tasmanian Government policy, has resulted in such a spike in requests that a number of organisations have decided that the task is too onerous and they will now discontinue it in the absence of allocated funding for that specific purpose.

Previous proposed solutions

2000 Legislative Council Select Committee on Aboriginal lands

The Legislative Council established a Select Committee to review proposed amendments to the *Aboriginal Lands Act 1995* including the proposed return of a number of additional parcels of land. The Legislative Council established the Select Committee because of multiple concerns that the original 1995 legislation had not necessarily achieved all that the government of the day had hoped. In the course of the Select Committee's hearings and consultations, the question of Aboriginal identity, and particularly frustrations with the limitations of the procedure to determine eligibility to vote in ALCT elections, resurfaced repeatedly. The Select Committee stated that:

> The issue of Aboriginality … has raised evidence of concerns from many within and outside the Aboriginal community. Aboriginal Elders believe that they have a role in determining Aboriginality. Members of the Tasmanian community who, whilst seeing themselves as Aboriginal and in most instances being accepted under the Commonwealth ATSIC rules but not accepted by the ALCT election rules, also wish to have a feeling of participation in the ownership of any transferred land as well as input into management of these lands. The Committee accepts that the Aboriginal community should determine Aboriginality. It was concerned however that the only avenue of appeal outside this process was to the Supreme Court and thus has recommended an alternative to this costly and, to many, fearful experience.[94]

93 See Supply Nation (2021) <https://supplynation.org.au/>.

94 Legislative Council Select Committee, Parliament of Tasmania, *Aboriginal Lands* (Report, June 2000).

The Select Committee's recommendation of an alternative to appeal to the Supreme Court was the establishment of a Tribunal to make determinations on eligibility for those deemed ineligible to vote in ALCT elections by the Electoral Commissioner on the advice of the Aboriginal Advisory Council. The proposed Tribunal would consist of three members appointed by the Minister for Aboriginal Affairs: 'an Elder from the community where the applicant normally resides, an eminent Aboriginal person of State-wide standing and a current or retired legal practitioner'.[95] The Select Committee proposed that the legal practitioner act as chair of the Tribunal and that there be a designated Deputy Chair, also a legal practitioner, who could step in if and when the Chair was unable to sit. The Select Committee considered it important that the Tribunal operate less formally than the Supreme Court but also specified that the onus of establishing eligibility should sit with the applicant.[96]

2003 ANU Centre for Aboriginal Economic Policy Research

As noted above, there was significant national interest in the ATSIC Trial Electoral Roll in Tasmania for the 2002 Regional Council Elections. Will Sanders, a Research Fellow at the ANU Centre for Aboriginal Economic Policy Research, published a Discussion Paper providing an overview of the history of ATSIC Regional Council elections in Tasmania and a detailed analysis of the 2002 ATSIC Trial and the AAT decision on the 131 co-applicants challenging the adverse findings of the IIAC. After extensive discussions of the various attempts to resolve the identity question, Sanders makes the intriguing observations and suggestion that:

> All the lessons and options for the future discussed above are built on the premise that the recent disputes over lines of descent and identity within the Tasmanian Aboriginal community can, in some way, be resolved and finalised. But the longer the disputes go on, unresolved by various attempted mechanisms, perhaps the more Aboriginal Tasmanians should be envisaging the possibility that these disputes simply cannot be resolved and finalised and that it may not be in the best interests of the Tasmanian Aboriginal community to prolong them. It may be better to walk away from the disputes and adopt a different approach to that of the last ten years.[97]

Sanders made this observation nearly 20 years ago and, in our experience, nothing has changed in the time since. Sanders freely acknowledged that he was not a Tasmanian Aborigine and so was loathe to 'offer advice to a people clearly recovering from a very difficult history and trying, in the process, to come to grips with their own personal and group identity'.[98] Nevertheless, as a professional academic social-scientist immersed in the study of Aboriginal affairs he considered it incumbent upon himself to make the following observation:

> [Jim] Everett, [Michael] Mansell and the TAC were, I would argue, more on the right track in the 1980s, when they thought of Aboriginal Tasmanians as a nation and when they were more welcoming in their acceptance of new members of the TAC than they have been since. Nations can and do grow, through people wanting to join them. And while few nations adopt a completely 'open-door' policy, healthy tolerant nations do generally accommodate significant growth without losing their sense of distinctive historical origins or contemporary common purpose. So, another option for the future for core members of the Tasmanian Aboriginal community, it seems to me, would be to embrace people with more tenuous Aboriginal ancestral connections who want to become part of the contemporary Tasmanian Aboriginal community and to project that attitude, to the larger Australian and world communities, as the sign of a healthy, vibrant, active and adaptive contemporary Tasmanian Aboriginal nation. This option, both theoretically and strategically, clearly points in a very different direction from those which seek to continue the disputes of the last ten years which have tried to restrict membership of the Tasmanian Aboriginal community to just the descendants of the three recognised ancestral groups.[99]

Identity or Eligibility?

While some would prefer us not to have raised the identity question at all, principally because it is characterised as a distraction to treaty negotiation and the establishment and undertaking of a truth-telling process, we were repeatedly confronted by the issue and have reached the conclusion that it cannot be avoided.

95 Ibid 32.
96 Ibid 32-33.
97 Sanders, above n 66, 16.
98 Ibid.
99 Ibid 18.

The question of identity is at the heart of fractured intra-communal relations and has been for at least 25 years. One strongly held view is that successive governments are responsible for the division that questions of identity have caused within and between those who identify as Aboriginal in Tasmania. We understand that view, although we do not agree with it entirely. It seems to us that access to government funding and services has necessitated the articulation of eligibility criteria and the implementation of those eligibility criteria has exacerbated disagreement in Tasmania about who satisfies those criteria. But to suggest that difference of opinion about who is and who is not Aboriginal has been solely caused by the Government misrepresents the complexities of the issue.

The Legislative Council Government Administration Committee's 2013 Report on the Aboriginal Lands Amendment Bill (No 27) included an insightful observation about the importance of distinguishing between identity and eligibility when it comes to the question of Aboriginality. Although the Report focussed primarily upon the proposed return of two parcels of land – at Iarapuna / Eddystone Point on the east coast and Rebecca Creek on the west coast, consistently with all similar reports, the Committee felt compelled to reflect what it had heard in submissions about the question of Aboriginality. The Committee quoted Professor Greg Lehman on this important point:

> It is an issue that is at the same time extremely difficult and extremely easy. I am contacted by a lot of people who want to talk to me about Aboriginality and the first thing I do is work out whether they are talking about Aboriginality or eligibility and there is a key difference in that. Eligibility is about whether or not you are eligible to participate in a particular service that is provided exclusively for Aboriginal people or whether you are eligible to benefit from an initiative, whether it be to participate in an electoral process or whatever. This might sound like splitting hairs but, it is a very important distinction because administrative appeals, tribunals and federal courts, senior public servants … are there to administer processes, policy based bureaucratic processes, around eligibility and they do not determine a person's Aboriginality. That to me is what makes the process quite simple, unfortunately people get very easily upset and quite emotional about the idea that their cultural identity is being denied them and people have an idea of their cultural identity for a range of reasons.
>
> Some, like many people who you would have met, whose families come from Cape Barren Island or a couple of the other major family groups, Dolly Briggs's family or Fanny Cochrane Smith's family, have a cultural identity because of the strong family history and continuing cultural practices. Other people have a view about a cultural identity because of things that they have discovered or have been told and it is that latter group that often get in to trouble because oral histories are informative but not determinative. They can provide clues and hints and suggestions that should lead to quality processes of research to determine what is at the basis of those oral histories. [100]

This distinction between eligibility and identity is fundamentally important to the process we have engaged in. So much of what we have analysed and discussed above relates to the question of eligibility. Chief Justice Cox, Justice Merkel, the AAT decision-makers and Ray Groom were all required to make determinations on eligibility. All of them said that they were not (and could not pretend to be) making determinations on individuals' personal identity. Neither do we. The reason why we consider the issue of Aboriginality an inescapable one is inextricably related to eligibility: who will represent the Aboriginal people in treaty negotiations with the Government.

In a written submission we received from ALCT we were told that 'the question of identity should not be an issue. A treaty can be made between the State and the Aboriginal people, and be left at that. Who the beneficiaries of the treaty are is an internal matter for Aborigines'. We agree that the State can announce its commitment to treaty negotiations with the Aboriginal people and we believe it should do so (see Recommendation 5). However, as we envisage it, that will be a preliminary step. At some subsequent stage the State will need to sit down with representatives of Tasmania's Aboriginal people to negotiate the terms of a treaty or treaties. An essential element prior to the negotiation phase will be the process of selection of representatives of the Aboriginal people to negotiate on behalf of their constituents. The question of who is eligible to participate in the appointment of representatives of the Aboriginal people to negotiate with the State must be dealt with and cannot be avoided.

100 Legislative Council Sessional Committee Government Administration B, Parliament of Tasmania, *Aboriginal Lands Amendment Bill (No 27)* (Report, 2013) 61-62 <https://www.parliament.tas.gov.au/ctee/Council/Reports/Final%20Report%20Part%201.pdf>.

Recommendations

We accept that all too regularly in the past, non-Aboriginal people have determined eligibility criteria for Aboriginal people to access services or to be appointed to designated employment positions or to be enrolled to participate in elections. That recurrent practice has been routinely criticised and we understand and accept the reasons for sustained criticism. Accordingly, we make the following recommendations.

Recommendation 8: Truth-Telling Commission to decide test for eligibility

We recommend that the government-appointed Truth-Telling Commission with its majority Aboriginal members (see Recommendation 1), be empowered to also deal with the question of Aboriginality in so far as it relates to eligibility to determine representatives of the Aboriginal people to negotiate treaty with the State.

It should be for the Panel members to determine the test they will apply for the determination of ancestry and communal recognition:

- If the members of the Panel determine that growing up in culture is an essential requirement for eligibility to determine who the representatives of the Aboriginal people for treaty negotiations will be, many of those who currently identify as Aboriginal will be excluded from the process. That will undoubtedly be hurtful for many of those people but, in our view, any such determination will not affect those people's individual identity, their right to identify as Aboriginal and even their satisfaction of Commonwealth criteria for eligibility receive federally-funded services;
- If, however, the Panel members decide that growing up in culture is not a prerequisite for eligibility, they will need to determine what will suffice for proof of descent. For those descended from one of the three established family lines – Dalrymple (Dolly) Briggs, Fanny Cochrane Smith and the island families – presumably it will be relatively straightforward to establish ancestry through documentary evidence and/or strong and established communal recognition. For those not descended from one of the three established family lines, documentary evidence presumably will be harder to produce. The Panel will need to decide what weight it will be prepared to give to communal recognition and oral tradition in the absence of documentary evidence. It will be beneficial for people – individually or in family groups – to come before the Panel and to be heard; to be afforded the opportunity to present evidence of descent, of family oral tradition and of communal recognition. The Panel may be able to provide assistance, including from the Tasmanian Archives, on the question of whether any documentary evidence exists or whether the documentary evidence supports the preferred interpretation of the applicants. Ultimately it should be for the Panel to determine whether or not those applicants satisfy the requirements for eligibility to determine who the representatives of the Aboriginal people in treaty negotiations will be.

Recommendation 9: The same test for eligibility to determine representatives to treaty negotiations be applied to ALCT elections

We discuss in the next section of the Report ('Land') that there are problems with the ALCT elections – particularly the very low numbers of Aboriginal people registered to vote and the even lower numbers that participate in the voting. The Electoral Commissioner has suggested possible reform to the registration process and we recommend the adoption of his approach below (see Recommendation 10). We see it as inefficient to develop two concurrent tests for eligibility to vote and so we recommend here that the test developed by the Truth-Telling Commissioners to determine eligibility to elect representatives of the Tasmanian Aboriginal people to negotiate a Treaty with the Tasmanian Government should also be used for registration to vote for ALCT elections.

LAND

We don't own the land, the land owns us.[101]

It's not about pieces of land here and there, it's all land, all Country and waterways.

Tasmanian Aboriginal Elder

I do not think it is enough for governments to simply sign over title to a parcel of land and then that it is an end to it. It is important to provide resources so that opportunities can be realised, and different opportunities are presented on different parcels of land.[102]

Background

In order to provide background to the issues raised in the meetings in relation to land hand-back and management, this section will outline the legal mechanisms for land hand-back in Tasmania; the role of the Indigenous Land and Sea Corporation in supporting land acquisition; and State and Commonwealth provisions and procedures in relation to land and sea reservation for conserving and managing natural and cultural values.

The *Aboriginal Lands Act* and land return

The *Aboriginal Lands Act 1995* is the key legislation providing for the return of land and its management. It establishes the ALCT as a statutory body with responsibility for the use and sustainable management of 'Aboriginal land' which it holds in perpetuity for all Tasmanian Aboriginal people. The Act outlines the functions and powers of ALCT and establishes a mechanism for electing members to the Council. ALCT comprises eight members elected for a term of three years and representing five regional electorates (for details of eligibility to enrol to vote, see the 'Vexed Question of Aboriginality' above).

For land to be returned as 'Aboriginal land', the *Aboriginal Lands Act* 1995 must be amended by Parliament (by adding the land to the list in the Schedule of Lands Vested in the Council (Sch 3) under s 27(1)). Alternatively, ALCT can apply to the Minister for a declaration that any land acquired by it be declared 'Aboriginal land' under s 35A.

With the enactment of the *Aboriginal Lands Act 1995*, 15 parcels of land were returned to ALCT. In addition, land at Wybalenna was returned in 1999,[103] truwana / Cape Barren Island and Clarke Island were returned in 2005,[104] land on Bruny Island in 2006 (via s 35A) and Nimena Nala Cave (upper Derwent Valley) was returned in 2015. ALCT has also acquired 'Aboriginal land' through the Indigenous Land and Sea Corporation (see below) and by gift from private individuals. An example of the latter is 'Windsong' on the East Coast, part of which became 'Aboriginal land' when it was given to ALCT and then declared to be such by the Minister under s 35A.

Once land is 'Aboriginal land' it cannot be sold – it is held in trust for all Tasmanian Aboriginal people in perpetuity[105] and the Council is precluded from mortgaging the land or using it as any form of security.[106] In its use and management of the land the Council is to have regard to the interests of local Aboriginal communities and may in respect of any area of Aboriginal land, nominate a local Aboriginal group for that area.[107] The Council is required to involve local Aboriginal groups in the management of Aboriginal land where appropriate.[108]

In 1999 the Bacon Government announced an 'Aboriginal Reconciliation Package' which included the transfer of eight areas of Crown Land totalling 52,800 ha. The ensuing concern in the Tasmanian community led to the establishment of a Legislative Select Committee on Aboriginal Lands.[109] After hearing submissions, the Committee recommended against the transfer of the proposed Crown land parcels on the grounds that 'it does not assist reconciliation' but was divisive not only between Aboriginal and non-Aboriginal people but also within the Aboriginal community itself. Reform of the land transfer process was recommended. In 2012 and 2013, attempts to return Crown land at larapuna / Eddystone Point and Rebecca Creek in Tasmania's North West failed to pass the Legislative Council.[110] A 40-year lease of Crown land at larapuna / Eddystone Point had been granted to ALCT in 2006 (lease granted by the Department of Arts, Education and the Environment) while the land at Rebecca Creek remains under the control of Parks.

101 S. Knight (1996) *Our Land Our Life*, card, Aboriginal and Torres Strait Islander Commission, Canberra.
102 Greg Lehman, *Report on the Aboriginal Lands Amendment Bill* (2013) 56.

103 *Aboriginal Lands Amendment (Wybalenna) Act 1999*.
104 *Aboriginal Lands Amendment Act 2005*.
105 *Aboriginal Lands Act 1995*, s 27(1).
106 Ibid s 30.
107 Ibid s 18(3) and (5).
108 Ibid s 31.
109 Legislative Council Select Committee, above n 94.
110 See Legislative Council Sessional Committee Government Administration B, above n 100.

In November 2017, the Hodgman Government announced a project to review the Tasmanian model for returning land to Aboriginal communities. Submissions and face-to-face consultations were invited in August and September 2018 and a discussion paper was developed to support the consultation. The responses and comments were summarised in a published report which was to inform a draft report containing recommendations for consideration in another round of consultations.[111] A draft report has not been published and may not be. However, proposed amendments to the Act will be announced shortly.

Indigenous Land and Sea Corporation (formerly Indigenous Land Corporation)

The Commonwealth Indigenous Land and Sea Corporation (ILSC) was originally established in 1995 as the Indigenous Land Corporation (ILC) to provide for the contemporary and future needs of Indigenous Australians, particularly those unlikely to benefit from native title or land rights. It was renamed in 2019 after its operations were extended to include water and sea rights. Indigenous Australians are assisted to acquire land and water-related rights and to manage Indigenous-held land and Indigenous waters. Focus areas for ILSC include supporting the development of land, salt and freshwater Country based eco-tourism operations and supporting enterprises in key sectors including aquaculture, horticulture and livestock industries. ILSC has enabled or assisted in the acquisition of a number of Tasmanian properties including: Thule, a farm on Flinders Island (by FIAAI); Modder River Station on truwana / Cape Barren Island (by ALCT), titima / Trefoil Island (by ALCT); trawmanna, 6 hectares at Smithton (by CHAC); land and building for a health and family services organisation in Goodwood (by Karadi AC); trawtha makuminya, formerly Gowan Brae in the Central Highlands (by ALCT); and Murrayfield, a farm on Bruny Island (by weetapoona AC); panatana, a reserve at Port Sorell, (by a lease to Six Rivers AC); and Kings Run, a former farm on the West Coast near Arthur River (by ALCT). trawtha makaminya, panatana, Murrayfield and Kings Run are described in more detail below. The standard process is that the ILSC acquires the land and holds the title on behalf of a local Aboriginal organisation, which must demonstrate the capacity to sustainably manage the land. When this is demonstrated, the land is granted to the organisation, with a caveat preventing its sale. As is evident from the list of properties above, some of the properties have program related activities or an economic activity such as farming, others have cultural and heritage significance, or the property may have both economic and cultural significance.

trawtha makuminya

The properties Gowan Brae and Circular Marsh in the Central Highlands totalling 6,750 hectares, were acquired in 2012 after a partnership was formed between the ILSC, the Tasmanian Land Conservancy (TLC), ALCT and the Australian Government. The Australian Government provided two thirds ($2 million) of the purchase price through the National Reserve System component of Caring for our Country and ILSC provided the balance and the immediate management costs. The land was transferred to ALCT, which oversees its management in association with the TAC under a formal management plan and the vision that 'trawtha makuminya is a place to create story, to develop understanding of its history, heritage values, use and environment, for traditional and new practices'.[112] The TLC provides ongoing support and assistance to manage the property for its conservation values and to establish a philanthropic capital fund to support future management of trawtha makuminya.[113]

panatana

panatana occupies almost 235 hectares and is located near Port Sorell on the eastern shore of the Rubicon Estuary, close to the waters of Bass Strait and neighbouring Narawntapu National Park. It was acquired through a collaboration between the ILSC and the TLC, with TLC funding one title and ILSC funding the other two titles which were then leased to Six Rivers AC in 2015. David Gough, a Director of Six Rivers, had been running cultural tours on panatana prior to its purchase by ILSC. The property is now managed by Six Rivers and the TLC in partnership and is used for camps where participants learn about Aboriginal culture and visit living sites.

111 Department of Communities Tasmania, *Improving the model for returning land to Aboriginal communities* (Consultation and Stakeholder Feedback Report, June 2019) <https://www.communities.tas.gov.au/__data/assets/pdf_file/0019/78022/Review-of-the-Model-of-Returning-Land-to-the-Aboriginal-Community-Consultation-and-Stakeholder-Feedback-Report-June-2019.pdf>.

112 Tasmanian Aboriginal Centre Inc., *trawtha makuminya: Healthy Country Plan 2015,* 5 <http://tacinc.com.au/wp-content/uploads/2015/07/20150529_trawtha-makuminya-hcp_Final.pdf>.

113 Jane Hutchinson, 'Gowan Brae, cultural heart of the central highlands: a historic partnership with the Tasmanian Aboriginal community' (Winter 2013) 37 *Tasmanian Land Conservancy,* 1.

Murrayfield

Murrayfield is a 4000-hectare property on Bruny Island that runs some nine thousand superfine wool merino sheep and has some 300 sites of significance to Aboriginal culture. It is the site of George Augustus Robinson's 1829 mission and is thought to be the country of Truganini who was known to be born on Bruny Island. After its purchase in 2015 by the ILC, title was given to the weetapoona Aboriginal Corporation and the property was leased back to the ILC to run the farm. weetapoona is in the process of negotiating to run the farm after the purchase of the sheep and machinery. The farm is used for young Aboriginal people to learn about sheep farming and handling and the shearing quarters are available for Aboriginal people and their families for short breaks. Aboriginal people also assist in regeneration of the land, and practise and learn about cultural burning. Festivals celebrating Aboriginal traditional burning practices are held regularly.

Kings Run

This is a 338-hectare coastal property on the takayna coast which was formerly run as part of a cattle property until the owner, Geoff King, developed a conservation agreement over it with the help of the TLC. After Geoff King's death, the return of land to the Aboriginal community was facilitated by the fundraising efforts of the TLC and the Bob Brown Foundation and with the contribution of funds from the ILSC. The titles to the property were then passed to the ALCT in 2017 and designated 'Aboriginal Land' at the request of ALCT. The TAC now manages the property to protect both the biodiversity conservation values and the Aboriginal cultural values.

Property name / location	Aboriginal name	Year	Status	Title holding body
Oyster Cove	putalina	1995	Returned	ALCT
Mt Cameron West	preminghana	1995	Returned	ALCT
Mt Chappell Island	Hummocky	1995	Returned	ALCT
Steep (Head) Island		1995	Returned	ALCT
Kuti Kina Cave	kutikina	1995	Returned	ALCT
Ballawinne Cave	ballawinne	1995	Returned	ALCT
Wargata Mina Cave	wargata mina	1995	Returned	ALCT
Badger Island		1995	Returned	ALCT
Babel Island		1995	Returned	ALCT
(Great) Big Dog Island		1995	Returned	ALCT
Risdon Cove	piyura kitina	1995	Returned	ALCT
Cape Barren Island (Wombat Point)	truwana	1995	Returned	ALCT
Wybalenna	Wybalenna	1999	Returned	ALCT
Cape Barren Island	truwana	2005	Returned	ALCT
Clarke Island	lungtalanana	2005	Returned	ALCT
Bruny Island (part)	pungkatina	2006	Returned	ALCT
Eddystone Point	larapuna	2006	40-year lease	ALCT
Nirmena Nala Cave (upper Derwent Valley)	nirmena nala	2015	Returned	ALCT
Thule (Flinders Island)		2005	ILC granted	FIAAI
Modder River Station (Cape Barren Island)		2010	ILC granted	ALCT
Trefoil Island	titima	2010	ILC granted	ALCT

17 Mella Road, Smithton	trawmanna	2012	ILC granted	Circular Head AC
Rothesay Circle, Goodwood	Karadi	2015	ILC granted	Karadi AC
(formerly Gowan Brae)	trawtha makuminya	2012	ILC granted	ALCT
Murrayfield & Kirkby Lodge, Bruny Island	Murrayfield	2016	ILC granted	weetapoona AC
panatana	panatana	2015	ILC held	ILC (lease to Six Rivers AC)
Kings Run (between Bluff Hill Point and Arthur River)		2017	ALCT held	ILC grant

Table 1: Land vested, or acquired through the Aboriginal Lands Act 1995, or involving the Indigenous Land Corporation (ILC)[114]

Other land

In addition to land acquired through the *Aboriginal Lands Act 1995* or involving ILSC, Aboriginal organisations have acquired land. FIAAI, for example, owns considerable property at Lady Baron on Flinders Island including 78 houses which are leased to Aboriginal families. The Indigenous Tasmanians Aboriginal Corporation is primarily a housing provider and owns more than 70 houses and land for housing development around the State. CHAC also has land holdings as does SETAC, Six Rivers, Karadi and the Tasmanian Investment Corporation.

Land held by organisations other than ALCT is not 'Aboriginal land' and so it does not have the same rights or fetters as land declared to be 'Aboriginal land' under the *Aboriginal Lands Act 1995.*

Reserved land in Tasmania

Reserves are declared under the *Nature Conservation Act 2002,* which sets out the values and purposes of each reserve class, and are managed under the *National Parks and Reserves Management Act 2002* according to the management objectives for each class. There are ten classes of reserved land: national park; State reserve; nature reserve; game reserve; conservation area; nature recreation area; regional reserve; historic site; private sanctuary; and private nature reserve. The only class of reserved land to expressly mention values or purposes of special significance to Aboriginal people is the 'State reserve' category with listed values that include 'sites, objects or places of significance to Aboriginal people', with the purpose of the reservation being to protect and maintain such 'sites, objects or places of significance to Aboriginal people contained in that area of land', and or 'use of the land by Aboriginal people'.[115]

In total, the PWS manages 823 terrestrial reserves covering about 2.9 million hectares, or over 42% of the land area of the State. In addition, there are 21 marine reserves that have been declared in State waters. Marine reserves or marine protected areas include both marine nature reserves, which are like the terrestrial national parks in that fishing is generally off-limits, and marine conservation areas, which allow for commercial and recreational fishing.[116]

Land becomes reserved land by virtue of a proclamation by the Governor.[117] There are special requirements for parliamentary approval of draft proclamations before Crown land (including future potential production forest land) can become reserved land. These require the draft to be laid on the table of each House. If no notice of a motion of disallowance is given within five sitting days after tabling, the draft is taken to have been approved.[118]

While there are provisions in the *Crown Lands Act 1976* for transferring freehold title in Crown land by sale or grant, this cannot be done in respect of land that is reserved land under the *Nature Conservation Act,* nor to permanent timber production zone land (PTPZ).[119] There are also provisions in the *Crown Lands Act 1976* relevant to local management of reserves[120] and in the *National Parks and Reserves Management Act 2002* for the appointment of a body corporate whose primary purpose is conservation as the managing authority of reserves other than a national park or nature reserve.[121]

114 Department of Communities Tasmania, *Improving the model for returning land to the Aboriginal community* (Discussion Paper, 2018) 2 <https://www.communities.tas.gov.au/__data/assets/pdf_file/0026/18575/Discussion_Paper_Improving_the_model_for_returning_land_to_the_Aboriginal_community.pdf>.

115 *Nature Conservation Act 2002*, s 16(2) and Schedule 1, item 2.

116 See *Living Marine Resources Management Act 1995*, Part V for the mechanism for creating MPAs.

117 *Nature Conservation Act 2002*, s 11 (Crown land); s 12 (private land) or s 13 (land vested in a public authority); s 13 (land acquired for a conservation purpose).

118 Ibid s 18. These provisions differ from the general provisions in relation to disallowance of subordinate legislation: *Acts Interpretation Act 1931*, s 47(4).

119 *Crown Lands Act 1976*, ss 2A; 12, 13 and 64.

120 Ibid ss 31, 32, 33.

121 *National Parks Reserves Management Act 2002*, s 29 and see s 31 (Conservation Trusts).

The Tasmanian Wilderness World Heritage Area (TWWHA)

The TWWHA was first placed on the World Heritage List in 1982, and was extended in 1989 and again in June 2010, June 2012 and June 2013. It comprises an area of 15,800 square km in the South-West of the island which includes ten national parks and reserves. Because Australia has ratified the World Heritage Convention the Federal Government has a role in management of Australia's World Heritage Areas including the TWWHA. It means that there is both a federal and an international overlay to the management of the TWWHA. Management is shared by the Federal Government and the State through the PWS which receives federal funding for this, with oversight arrangements through various bodies such as the TWWHA Consultative Committee. At an international level, the Australian Government is required to submit periodic State Party Reports to the World Heritage Committee (a committee of UNESCO) and management of the TWWHA is monitored by UNESCO.

The TWWHA was listed because of its natural and cultural heritage of 'Outstanding Universal Value' based on it meeting four natural criteria and three cultural criteria – one of only two World Heritage Properties globally to meet this many listing criteria. The listed cultural values of the TWWHA are Aboriginal cultural values and are the only cultural values recognised in the World Heritage listing of the TWWHA. In response to the 2015 UNESCO Reactive Monitoring Mission Report, the 2016 Management Plan recognised the management of the TWWHA had focused too much on the natural values at the expense of attending to cultural values, and that these values have been further threatened by the limited participation by Aboriginal people in its management and by a lack of recognition and opportunity for cultural practice. The TWWHA's Management Plan has attempted to address these issues by providing for a range of measures including creating a cultural management group for the TWWHA to oversee Aboriginal cultural values management, oversee 'a stand-alone Community Engagement Agreement' and play a key role in providing cultural awareness training for TWWHA management staff and develop a potential pathway for effective joint management.[122]

In response to the request of the World Heritage Committee in 2018 to provide a report on the state of conservation in the TWWHA, the Australian Government has provided a State Party Report[123] and an update.[124] These outline progress on a number of projects designed to support and improve the management, understanding and protection of Aboriginal cultural values in the TWWHA, including the preparation of a detailed multi-year plan for a comprehensive cultural assessment prepared in consultation with Tasmanian Aboriginal community organisations and individuals and supported by the Tasmanian Heritage Council. Projects mentioned include Rock Art in the Landscape and Seascape of the TWWHA; a guide to the Interpretation and Presentation of Aboriginal Cultural Values in the TWWHA; Aboriginal Community Access Visits to the TWWHA and Aboriginal Cultural and Heritage Awareness Training for staff. It also reports on the creation of a Cultural Management Group within Aboriginal Heritage Tasmania comprised of a manager, two archaeologists, a Project Officer and an Aboriginal Heritage Advisor.

Indigenous Protected Areas and Indigenous Ranger Groups

This is a Commonwealth funded program that has been helping Indigenous communities voluntarily dedicate their land or sea country as Indigenous Protected Areas (IPAs) since 1997. IPAs are part of the National Reserve System. There are currently eight declared IPAs in Tasmania: Babel Island, Badger Island, Great Dog Island, lungtalanana / Clarke Island, Hummocky / Mount Chappel Island, preminghana / Mt Cameron West, putalina / Oyster Cover, and piyura kitina / Risdon Cove. An IPA does not affect title, it is an agreement between the land-owner and the Commonwealth which allows for biodiversity conservation. It helps Indigenous communities to protect the cultural values of their Country and it can create jobs for Aboriginal men and women, working and looking after their land and providing interpretive activities for visitors. Before an area is declared an IPA, there is a consultation stage which can lead to an IPA and funding to implement the management plan prepared during the consultation phase. It must be demonstrated that the land has the necessary conservation values to be accepted into the national reserve system.

122 Department of Primary Industries, Parks, Water and Environment, ***Tasmanian Wilderness World Heritage Area (TWWHA) Management Plan*** (Hobart, 2016), 9-10.

123 Department of the Environment and Energy, *State Party Report on the state of conservation of the Tasmanian Wilderness World Heritage Area (Australia),* Commonwealth of Australia 2019.

124 Department of Agriculture, Water and the Environment, *Additional information on the state of conservation of the Tasmanian Wilderness World Heritage Area (Australia): Key updates and achievements since December 2019* (Canberra, February 2020).

There are three federally funded Indigenous Ranger Groups (formerly Working on Country Programs, first funded in 2007) in Tasmania: milaythina pakana rangers (TAC); Tasmanian Aboriginal Trainee Rangers (PWS) and truwana Rangers (Cape Barren Island ALCT). Each of these three ranger groups have just had their funding approved for 2021-2028. The Aboriginal Trainee Rangers in the PWS undertake a four-year program in land conservation and management and fire-fighting operations and graduate with a Diploma of Conservation and Land Management and the skills and knowledge to develop and implement plans for sustainable and use of natural and cultural resources. Graduates transition into full-time permanent positions in Parks.

Some States, such as Queensland, have their own state-funded Indigenous land and sea ranger programs.[125]

Aboriginal National Parks

There are currently no Aboriginal National Parks in Tasmania although there have been Aboriginal National Parks for several decades in other places on mainland Australia with various legal and procedural models for their ownership, partnerships, land management and resourcing. The more sophisticated arrangements tend to require the transfer of title to Aboriginal people,[126] as is the case of parks created under Commonwealth legislation. For example, in Kakadu, Uluṟu-Kata Tjuṯa and Booderee National Parks, land is owned by Aboriginal people – held as inalienable freehold title by a Land Trust on behalf of Traditional Owners – and leased to the Director of National Parks. Rent is paid to Traditional Owners on an annual basis for the leasing of the three parks, as is a percentage of revenue derived from activities in the park. In accordance with the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), the three parks are cooperatively managed and overseen by a Board of Management with an Aboriginal majority and a joint management plan guides daily operations, decisions and relationships.

The creation of Aboriginal National Parks remains dynamic and similar arrangements exist in the States and Territories. In Queensland, for example, 160,000 hectares of land was recently returned to Aboriginal people under the *Cape York Peninsula Tenure Resolution Program*, bringing the total number of Aboriginal-owned and managed national parks on the Cape York Peninsula to 32. This was made possible under the *Aboriginal Land Act 1991* (Qld) and the *Nature Conservation Act 1992* (Qld), which allow land claims by the Traditional Owners over certain national parks, provided there is a joint management arrangement and lease-back to the State Government. In the Northern Territory, national parks like the Garig Gunak Barlu and Nitmiluk (formerly Katherine Gorge) have also been granted as Aboriginal freehold land – vested in a Land Trust on behalf of the Traditional Owners – and, in the case of Nitmiluk, leased back to the NT Government. Traditional Owners also receive an annual fee from the Government. Similar arrangements also exist in NSW and for conservation parks in South Australia.

These joint management arrangements allow community to access, occupy and use the land to carry out traditional practices, such as hunting and fishing within the park. These rights are protected and affirmed in the relevant legislation. However, often, Aboriginal people are unable to pursue economic and development opportunities on this land due to its national park status. It has been suggested that these issues can be resolved through the park management process, for example in providing rental payments, resources to protect and maintain significant sites and cultural heritage, employment, training and capacity building opportunities, and ownership over business ventures including tourism activities.

What we heard

Land was a common theme addressed in meetings and the importance and deep significance that Country has for Aboriginal people was often reiterated. This was particularly apparent to us when we walked on Country with Aboriginal people and listened to them explain the spiritual significance of a particular place. We understand that this connection to Country exists even if one's ancestors did not come from that particular Country. Because of the nature of Aboriginal history in Tasmania, all of the sites belong to all Tasmanian Aboriginal people and attachment to land can be historic rather than traditional (e.g. the association of the Fanny Cochrane Smith descendants with the Huon Valley and Bruny Island because Fanny, although a granddaughter of Mannalargenna of the North East Nation, lived for most of her long life in the Huon Valley and she, according to family members, was welcomed onto Bruny Island by Truganini).

We heard resentment about private non-Aboriginal companies profiting from Aboriginal history, sites and land and that Aboriginal people want revenue from tourism too. There was also opposition to foreign acquisition of land and support for prioritising Aboriginal land ownership and management over international investment.

125 See Queensland Government, 'Indigenous Land and Sea Ranger program' (2021) <https://www.qld.gov.au/environment/plants-animals/conservation/community/land-sea-rangers/about-rangers>.

126 Dermoth Smyth, 'Joint Management of National Parks in Australia' in Richard Baker, Jocelyn Davies and Elspeth Young (eds) *Working on Country – Contemporary Indigenous Management of Australia's Lands and Coastal Regions* (Oxford University Press, Oxford 2001).

The significance of returning land

People spoke to us about the importance of having land to practise their culture, caring for land, and having fire and healing circles when loved ones die. We understood that being 'on Country' is healing for Aboriginal people, restorative of identity and vital to well-being – 'rediscovering who we are on Country'. Connection to Country is a sense of being a part of that Country and indivisible from it – the trees can be considered Elders. This is summed up in the words, 'We don't own the land, the land owns us'. Some stated that title to land was not the most important thing, but that land return offers a significant opportunity for Tasmanian Aboriginal people to re-establish active ties to culturally significant land.

It was explained to us that land return was not about asset-building as it often seems to be for non-Aboriginal Tasmanians acquiring land and yet land was seen as a means of self-determination and autonomy for Aboriginal people. The importance of returned land being of value with potential for capacity building and tourism was also mentioned. A respected Aunty talked of the importance of doing something with the land once it is returned as well as using land to address the need for housing homeless Aboriginal people. In summary, we heard that land was of spiritual, social, cultural and economic importance to Aboriginal people.

Lack of access to returned land was raised and given as a reason for no further land returns to ALCT (see discussion of access to returned land in the next section). For this reason, there was considerable support for local groups having the control and management of the land in their area. The current legislative requirement for 'Aboriginal land' to be held by ALCT was opposed and it was suggested that land should be returned to regional or local Aboriginal community groups to both own and manage. So, for example, it was claimed that land in the North East, tebrakunna Country, wukalina / Mt William National Park and the Blue Tier should be returned to melythina tiakana warrana Aboriginal Corporation (mtwAC) as the local community rather than to ALCT.

There was just one Aboriginal person who opposed land hand-back on the ground that it would be divisive in the non-Aboriginal community.

The need for land hand-backs to be genuine and permanent was stressed in one meeting. For this reason, leases were considered inadequate and inappropriate and even when title was transferred to ALCT this was viewed with suspicion because of the possibility of the repeal of the *Aboriginal Lands Act* 1995 and the abolition of ALCT.

The need for adequate resources and ongoing assistance to manage returned land was frequently stressed, whether the land is returned to ALCT or to individual organisations and the need to ensure that there is compliance with PWS regulations in conducting cultural burning while also ensuring that Aboriginal people can exercise authority over the land.

Murrayfield

Murrayfield (see above for a description) is a good example of the importance and value that land has to Aboriginal people. In meetings organised by SETAC in Cygnet, weetapoona at Murrayfield and Ballawinne in Huonville, we heard how much Aboriginal families enjoyed being on Country at Murrayfield, to be there connecting with culture, helping caring for Country and learning about cultural burning. We also heard from Aboriginal people outside these organisations how much they valued Murrayfield. The following is a selection of comments made to us about Murrayfield in meetings:

- *'One of the trainees told me that Murrayfield is the first place they've ever felt grounded in their life';*
- *'Murrayfield is a wonderful place to be, fishing and on Country. We need more places like that';*
- *'Murrayfield is really about custodianship and caretaking, so it's open to all Aboriginal people to visit – no exclusion';*
- *'The most connected I feel on Country is at Murrayfield, it's healing';*
- *'We all come here for different reasons but with the same long-term goal in mind – caring for Country';*
- *'Murrayfield gives us an opportunity to have a connection to Country and people through the work we're doing to regenerate the land';*
- *'It is one of the first places I came to as a young boy to connect with culture. Now I can bring young people and school groups here to teach them what I have been taught'.*

The Aboriginal Land Council of Tasmania

We heard mixed opinions from Aboriginal people about ALCT, its composition and its role in managing land for the Aboriginal people of Tasmania. For many, ALCT was the best placed body to take on land returns and returning land to local organisations was seen to run the risk of deepening the fractures between organisations. However, the need for ALCT to work with all Aboriginal people and organisations and not just the TAC was emphasised and the assertion that it only reflects the views of certain families was seen as problematic. It was suggested that when land is returned to ALCT, access licences could be provided to local organisations in lieu of title to the land being granted to them.

While some thought it problematic to have just one body responsible for returned land and desirable to have local involvement and management of such land, concerns were raised with land being wholly managed by local groups, some of whom lack respect for and understanding of the cultural value of Aboriginal sites. A perceived risk of giving land to organisations other than ALCT was that they may not be able to manage the land on an ongoing basis. We were told that this has happened – an example is land near Saltwater River that was acquired by an organisation that has since been deregistered.

Others were supportive of land return to ALCT but suggested changes to its composition. For example, appointing representatives from each of the nine nations or one from each of the Aboriginal organisations. Some considered this review of ALCT's composition as a pre-condition of any further land hand-back. Others felt ALCT ought to be disbanded and a new independent body appointed.

Insufficient budget and a lack of necessary resources to manage land was a concern often raised in relation to ALCT. We also heard that, for funding reasons, ALCT had to give up its rented office space and is now sharing space with the TAC in Launceston. These funding restraints also increase the need for ALCT to rely on TAC for land management, which can compromise the body's independence. ALCT has an annual budget of $365,000, which only funds three part-time positions. It is also expected to fund considerable auditing and compliance costs. Lack of resources also has an impact on initiatives such as the cultural burning program, which is run with a small staff base and limited funding with milaythina pakana (TAC) and truwana Rangers.

Funding restraints also limit access to much Aboriginal land which is in remote locations. Instead, people are taken to remote sites in the TWWHA without approval from ALCT. Some significant Aboriginal sites on Crown land, such as Riveux Cave and Joe's Lair at Mole Creek, continue to be managed by PWS without input from ALCT.

We heard from several people that ALCT has plans to increase land acquisitions and resources with a campaign to invite people to bequeath properties to Aboriginal people as a means of 'paying the rent', an initiative that has been successful in Victoria.

Supporters of ALCT claim it is too often sidelined rather than being viewed as the only democratically elected and statutory Aboriginal Land Council. However, critics of ALCT spoke of its control by one organisation, which has led to too few Aboriginal people taking an active part in voting or standing for election. For example, we heard in one meeting that there were few people registered as voters from Flinders Island and even fewer who voted in the last election.

Distrust of ALCT also extended to its status as a statutory body, which some believe make it susceptible to abolition by the Government. The same people are under the impression that this makes land return and current tenure insecure. Lack of transparency in relation to funds was also mentioned as a problem with ALCT.

In other consultations, we heard that ALCT was supportive of local community involvement with Aboriginal land and that if there was an increase in land hand-backs, day-to-day management would be given to local Aboriginal people. However, we also heard stories of access being denied. preminghana was frequently mentioned in this context. Members of CHAC said they did not feel welcome since one of their Elders, Norman Richardson, was convicted of trespass when he and his wife set out on a walk to climb Mt Cameron West. We heard reports that formal requests to go to preminghana have been refused – a local Aboriginal Education Officer has only recently been allowed to visit with Smithton High Students after repeated requests. On the other hand, one Aboriginal person living in Circular Head whom we spoke to said he could understand why preminghana had been locked up, stating that it had been a big task to rehabilitate the land and do weed control.

Other claims of exclusion by ALCT include exclusion of FIAAI from their mutton bird rookery on Big Dog Island after it was handed back and the failure of ALCT to come to an acceptable arrangement with FIAAI over management of Wybalenna. Parradarrama Pungenna Aboriginal Corporation (PPAC) expressed frustrations over the lack of access to land near Saltwater River, which they were denied access to once it had been acquired by ALCT and transferred to the Tasmanian Aboriginal Land and Sea Council Aboriginal Corporation (TALSCAC). This land had been owned by one of the ten founding families of PPAC, and so their exclusion from it was strongly resented.

The exclusive control of land in the North East by ALCT, such as larapuna, was a concern of some members of mtwAC, as well as the possibility of ALCT gaining more Aboriginal land in the North East such as Poonerluttener / Mt Cameron and wukalina / Mt William. This did not necessarily mean there was opposition to land returns to ALCT in other areas, but that money and support for land should be given to other organisations too. ALCT was also criticised for its failure to reap an economic benefit from some of the land returned, for instance not engaging in farming on lungtalanana / Clarke Island, which used to run 4000 sheep.

Concerns were expressed about further hand-backs to ALCT in the APCA because 'the TAC would just lock everybody out'. On the other hand, ALCT supporters criticised the Arthur Pieman Conservation Area Management Committee appointed to advise the Minister for the Environment and Parks, a committee which sidelines ALCT and the Aboriginal people from involvement in APCA.

Wybalenna[127]

We heard about ongoing conflict about the management of Wybalenna, an issue which has divided Aboriginal people for decades. This reveals some of the tension between ALCT and regional Aboriginal organisations about control and management of Aboriginal land in their geographical area.

Located on the west coast of Flinders Island, just north of Whitemark, is one of the most historically significant sites in Tasmania. Wybalenna (meaning 'black man's houses') is a mournful place that carries with it a deeply tragic history and painful memories for Tasmanian Aboriginal people.

Wybalenna was established under the guise of a temporary establishment and on the basis of a promise, or treaty, made between Chief Mannalargenna and George Augustus Robinson on 6 August 1831. Following a violent period of conflict in Tasmania – the Black War from 1824 to 1831 and the so-called Black Line of 1830 – an agreement was struck between the two men, which ultimately led to the removal of 250 Aboriginal people from mainland Tasmania to Wybalenna in an attempt to 'civilise and Christianise' them. However, Robinson's promise to allow the Aboriginal occupants of Wybalenna to return to their lands was never fulfilled. After significant and devastating loss over the years, including the death of the great Mannalargenna, only 47 people survived Robinson's failed mission. Wybalenna was ordered closed by the Governor in 1847 and those surviving were taken to putalina / Oyster Cove.

A rise in Aboriginal activism in Tasmania revived interest in Wybalenna in the 1970s and 1980s. A number of attempts were made to protect the historic site, including protecting the unmarked graves of ancestors desecrated by farmers' cattle, vandals and thieves. In 1991, a small group of Aboriginal activists occupied the site. The commanding 1992 film, Black Man's Houses, documents this deeply moving story of Aboriginal strength, resilience and recognition.

127 Ryan above n 27; Maxine Roughley-Shaw, 'Wybalenna and the Treaty of Whitemark: A Major Step in Reconciliation' (1999) 4(22) *Indigenous Law* Bulletin, 10; and Glenn Shaw, 'Wybalenna', *The Companion to Tasmanian History* (2006) <https://www.utas.edu.au/library/companion_to_tasmanian_history/W/Wybalenna.htm>.

On 15 November 1996, FIAAI and Flinders Municipal Council entered into an agreement known as the Treaty of Whitemark. The agreement outlines a local, consultative management approach to the everyday management of Wybalenna and records the Council's support for the land at Wybalenna to be returned to the Aboriginal community. Several years later and four years after the significant land hand-backs in 1995, the Tasmanian Government returned Wybalenna to Tasmanian Aboriginal people. The Aboriginal Lands Amendment (Wybalenna) Bill 1999 was passed, vesting the titles in the ALCT and local day-to-day management in FIAAI.

We heard from a number of people that issues have arisen between ALCT and FIAAI concerning the management of Wybalenna. While ALCT was open to appointing FIAAI as the local manager of Wybalenna, in accordance with the Act, it was not ready to divest total control and management powers to the group, which FIAAI believed was the more appropriate arrangement given they are the local community group. We understand that these challenges remain unresolved.

Aboriginal Rangers (formerly Working on Country Rangers)

There was wide support for the employment of Aboriginal rangers from participants in our meetings. As explained above, there is Commonwealth funding for the training and employment of Indigenous Rangers (formerly called the Working on Country (WoC) Program) and there are three such groups in Tasmania: a group with the State Government (PWS), the milaythina pakana rangers employed by the TAC, and truwana Rangers on truwana / Cape Barren Island.

The need for more rangers was raised including access and equity for training and employment of rangers by Aboriginal organisations other than TAC and Cape Barren Island Aboriginal Association Incorporated (CBIAAI). The importance of locally sourcing Aboriginal rangers was mentioned and the difficulty of recruiting in some areas such as Arthur River.

Concerns were raised in relation to the Parks' Aboriginal Rangers in terms of pressure to conform and perform in accordance with departmental policies, creating friction between what is culturally appropriate and what the PWS expects. At the completion of their training, they are given a permanent position as a base-level park ranger, but they are not employed in culturally relevant work after their traineeship such as on Aboriginal sites or engaged in cultural burning. Instead, they spend too much time in the office, pinning up notices or are employed on compliance. As a result, there is a risk of disillusionment and burn out. This is seen as a missed opportunity. The need for greater liaison between WoC Rangers, Aboriginal Heritage and PWS was raised. There were contrary views claiming that Parks has done a good job building up opportunities for Aboriginal people through jobs and training. On truwana / Cape Barren Island the funding for truwunna Rangers has been welcomed and there are plans to have sea rangers as well. We also heard that the relationship between the milaythana pakana rangers and Parks staff in the Arthur River centre was a good one.

Joint management

Joint or co-management was a recurring theme in discussions about land and it was widely supported including joint management within the TWWHA and National Parks.

What is joint management?

The head of PWS explained joint management as an agreement between the Government and an Aboriginal entity and described how this was done in Queensland via Indigenous Land Use Agreements (ILUA), which spell out the roles and responsibilities of each party together with the provision of resources to continue to manage the land. One Aboriginal person experienced in land management stressed the importance of having a shared understanding of what co-management is. They viewed it as the Government working with a community-led structure in partnership and collaboration, within an agreement that defines all the parties. It was further described as a 'thorny issue' because individual Aboriginal organisations would each want their own structures in place.

The difference between staff of community-led structures working with Government and government-employed Aboriginal rangers working in PWS was discussed. It was emphasised that the latter is not genuine co-management – Aboriginal rangers are pressured to perform in accordance with departmental policies and conform and operate within a closed loop in the public service (see above). Another view was that joint management should be approached through the lens of self-determination. Aboriginal people should own the land title first and then, if they choose, reach out to Government and third parties to establish their own partnership. This would strengthen respect for Aboriginal knowledges and culture. At the very least, a partnership indicates a 50/50 split.

Joint management and the TWWHA

Joint management was discussed in connection with the TWWHA. It was said that the original intention was for a partnership between the Tasmanian Government and the Aboriginal community with respect to the TWWHA when Matthew Groom was Minister for Aboriginal Affairs and Parks, but this did not eventuate.

Frustrations about joint management in the TWWHA also included comments about a team in Aboriginal Heritage that had tried to develop a framework for joint land management but which had been unsuccessful due to identity-related issues, as well as criticisms of PWS, which was unable to establish joint management due to a lack of resources and is said to have an inability to let go of power and a focus on natural values rather than cultural values. There were other concerns expressed about whether management of the TWWHA that does not involve the TAC could amount to genuine joint management. We also heard calls for a joint management plan for the TWHHA.

Sites for joint management and Aboriginal National Parks

It was suggested that there was potential for joint management in Freycinet National Park, particularly with respect to employing Aboriginal people to manage the park and run cultural programs. The current land management plan for Freycinet National Park was criticised for 'tacking on' Aboriginal heritage and history without embedding it in policy in a more meaningful way.

The concept of an 'Aboriginal National Park', as a new category of reserve, was suggested in a number of meetings. One possibility that was put forward for hand-back and rezoning was wukalina / Mt William National Park, which we heard ALCT has considered but not progressed. Another suggestion was to establish the 'kooparoona niara Aboriginal National Park'. Specifically, we heard calls for the rezoning of Future Potential Production Forest Land (FPPFL) on the Great Western Tiers' boundary of the TWWHA. It was explained that this would open up a number of opportunities for the local Aboriginal community, including employment and career pathways, upskilling through a Registered Training Organisation that brought in Elders and WoC rangers, and cultural tourism. Some groups have already considered possible partners for assistance in drawing up management plans, which included Bush Heritage as a promising option. One local mob told us they were interested in creating and registering a new Aboriginal organisation in order to assist with day-to-day management of the land.

Our attention was drawn to a submission that ALCT had made to the Government and Premier in response to a State Government proposal to grade areas of FPPFL in the TWWHA as Conservation Area or Regional Reserve. ALCT submitted that this presents a unique opportunity to create a new tenure, namely an Aboriginal National Park, a tenure which exists under State and Federal legislation in other jurisdictions (as described above). It would be underpinned by two things:

- land rights and self-determination; and
- management in line with the protection of cultural and natural heritage values expected as world heritage-listed land.

It was submitted that as well as the FPPFL, neighbouring Conservation Areas and Regional Reserves should be incorporated into a broader Aboriginal-owned kooparoona niara National Park.[128]

kunanyi / Mt Wellington

The Lord Mayor, Cr Anna Reynolds suggested adding an Aboriginal overlay to kunanyi, or joint management with Aboriginal people of Wellington Park. Our discussions did not extend to land hand-back of the Park. Currently, Wellington Park is managed by the Wellington Park Management Trust under its own legislation (the *Wellington Park Act 1993*).[129]

In one community meeting we did hear interest in kunanyi being returned to the Aboriginal people.

Informal arrangements for joint management or use

We were informed about a 'voluntary partnership' between PWS and PPAC, which allowed this Aboriginal organisation to access 200m of foreshore on the Tasman Peninsula for cultural activities and caring for Country. It was suggested that, in some cases, other small parcels of Crown land could be handed back without the need for additional resources to manage them.

Similarly, informal agreements have facilitated the use of Crown land in George Town and St Helens by the local Aboriginal community and Aboriginal Education Workers. This land is primarily used for cultural programs and activities, such as building bark shelters.

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128 Aboriginal Land Council of Tasmania, Submission to the Department of Primary Industries, Parks, Water and Environment, *Reservation of Future Potential Production Forest Land in the Tasmanian Wilderness World Heritage Area* (31 March 2021) <https://dpipwe.tas.gov.au/Documents/71%20FPPF%20Land%20Submission%20-%20Aboriginal%20Land%20Council%20Tasmania.pdf>.

129 The possibility of an IPA over kunanyi was suggested, but we understand this would not be possible unless the land was first returned to Traditional Owners.

Additional suggested land hand-back opportunities

Views on land hand-backs varied greatly. We heard calls for the return of all Crown land, including National Parks and the revenue for and from them and all of the islands in the Furneaux group (currently six have been returned) to no land hand-backs at all. In addition to the parcels of land mentioned above, the following places were mentioned:

- Land around Recherche Bay and Cockle Creek and north of Catamaran River;
- South Bruny National Park, cultural walk to Cape Bruny Lighthouse (National Park and Forestry Land;
- Land at Cape Queen Elizabeth on Bruny Island;
- takayna / Tarkine;
- Bedlam Walls Bushland Reserve on Hobart's Eastern Shore;
- Ben Lomond National Park;
- Lagoon of Islands (Central Plateau near Woods Lake);
- Little Musselroe Bay at tebrakunna: lease from Hydro and of Crown land from the Government with the possibility of an offshore marine reserve;
- Land at Luemerrernanner / Cape Portland including a significant farm with employment and capacity building potential;
- Land on the Huon River, currently owned by Huon Valley Council;
- 5ha parcel of land adjacent to South George Town Primary School; and George Town foreshore area of land;
- Crown land on Mersey Bluff, Devonport and Marshalls Hill adjacent to panatana.

Recommendations

Clearly there is an impasse with respect to return of public land to Aboriginal people, with no significant land returns since 2005. This is despite repeated commitments by the Government to return land. There are two major obstacles to returning public land: first, the way the Act works in practice with respect to management and input from local Aboriginal groups and secondly the vexed issue of identity. We have heard that any efforts to include Aboriginal people in management in the TWWHA have been tokenistic at best, and genuine joint management with the Aboriginal community does not exist in Tasmania with respect to our State reserved lands. The position is different with respect to lands returned with the support of the Commonwealth's ILSC which has been more successful in facilitating partnerships with non-governmental organisations.

The obstacles to land hand-backs have led to a 2018 review of the current model for returning land to the Aboriginal community. As discussed above, this process stalled in 2019 after the publication of the Consultation and Stakeholder Feedback Report. These recommendations are not intended to pre-empt or disrupt those reforms or to suggest that further reform is unnecessary (such as increasing the scope of the rather limited objectives in the *Aboriginal Lands Act 1995,* expanding the concept of Country to include freshwater and sea country and providing a process to apply for land hand-backs), but they are intended as a suggestion for first steps to a way out of the impasse on further land returns.

The Aboriginal Land Council

There are many advantages to having a single Aboriginal land council holding 'Aboriginal land' on behalf of Tasmanian Aboriginal people, including capacity building and resources. Managing land, rehabilitating it and caring for it requires considerable human resources, funding, equipment and expertise that is not necessarily readily available in the local Aboriginal community living in the area of the returned land. Having a single land council also avoids duplication of administrative effort. The federally funded WoC ranger programs have assisted in capacity building but access to them is currently limited to the three ranger groups established in Tasmania. While the PWS have, we understand, a good relationship with the two WoC Ranger Groups there is nothing in Tasmania which could be called joint management between PWS and Aboriginal groups. We heard from a number of sources, including from Government sources, that ALCT is under-resourced. There are non-Government organisations, such as the TAC, which partner with Aboriginal organisations to assist them with land management. However, this does not solve the capacity problem.

If the model were changed so that land is returned to local Aboriginal organisations living in the area of land hand-back, there is potential for the registered organisation to be deregistered, which was the case with TALSCAC. Following the deregistration of this organisation, the land it held at Saltwater River fell under de facto management with ALCT, which remains the case until a new community-based land management group is appointed.

Despite support for ALCT, there are significant problems with the way the current model is working. This was evidenced in our meetings and is reinforced by submissions made to the 2018 review into the *Aboriginal Lands Act 1995*.

First, while the Act requires the Council to have regard to the interests of local Aboriginal communities and to involve local Aboriginal groups in the management of Aboriginal land where appropriate, this has not always been the case. While this is justified on the grounds that the local groups are not in the Council's view 'Aboriginal', we heard criticisms from a broad section of the Aboriginal community, including respected Elders, that the Council was not sufficiently inclusive.

Secondly, there have been situations where access to Aboriginal land has been denied. preminghana, in particular Mout Cameron West, were cited most often as key examples. This has created the impression that preminghana is 'out of bounds'. There are similar sentiments about piyura kitina / Risdon Cove and an Aboriginal site near Saltwater River. There may well be good reasons for limiting access, such as protection of the site, but it has created the impression that ALCT – and TAC as managers of the land – do not welcome all Aboriginal people on 'Aboriginal land'. Nor is the public right of pedestrian access at preminghana always respected as is evidenced by ALCT's refusal of a request made to visit the site by the Legislative Council committee considering the Aboriginal Lands Amendment Bill in 2013.[130]

Thirdly, the ALCT Roll only has 627 Aboriginal persons registered and therefore eligible to vote or to nominate for election as members of the Council (further details about this can be found in the graph below). It is believed this is considerably fewer than would otherwise be entitled to be on the Roll in accordance with the definition of 'Aboriginal person' in the Act. Before the last election, 59 people had lodged an enrolment application by the close of the enrolment period on Thursday 1 October 2020. The Preliminary Roll, containing the names of those 59 persons, was available for inspection from Monday 12 October 2020 until Monday 9 November. At the conclusion of this period, no objections were received so all individuals were subsequently transferred to the Roll in accordance with section 10A of the Act.

It is also the case that few of those on the ALCT Electoral Roll actually vote (details can be found in the graph below). In the last election, ballots were not required for the Cape Barren Island or Flinders Island regions, as candidates for both Island groups ran unopposed. Our understanding is that many choose not to register or participate because they have given up on the Council being a representative body for all Tasmanian Aboriginal people, or out of fear or misunderstanding about how the Council operates.

To progress land hand-back we recommend a number of changes.

130 Legislative Council Select Committee, above n 94, 6[9].

Recommendation 10: The process for registering to vote for ALCT elections be changed

As indicated above, it is clear that there is a problem with the ALCT roll in that too few Aboriginal people register to vote and even fewer vote. Moreover, the objection process can be triggered by any person, regardless of their relationship to the Aboriginal community; it creates substantial additional obligations for the individual applicant to provide evidence of their Aboriginality and it can be highly stressful for those objected to, with a large proportion withdrawing their application upon being informed of the objection. In discussions with the Electoral Commissioner, it was suggested that the process could be improved by having a more substantial initial process which may:

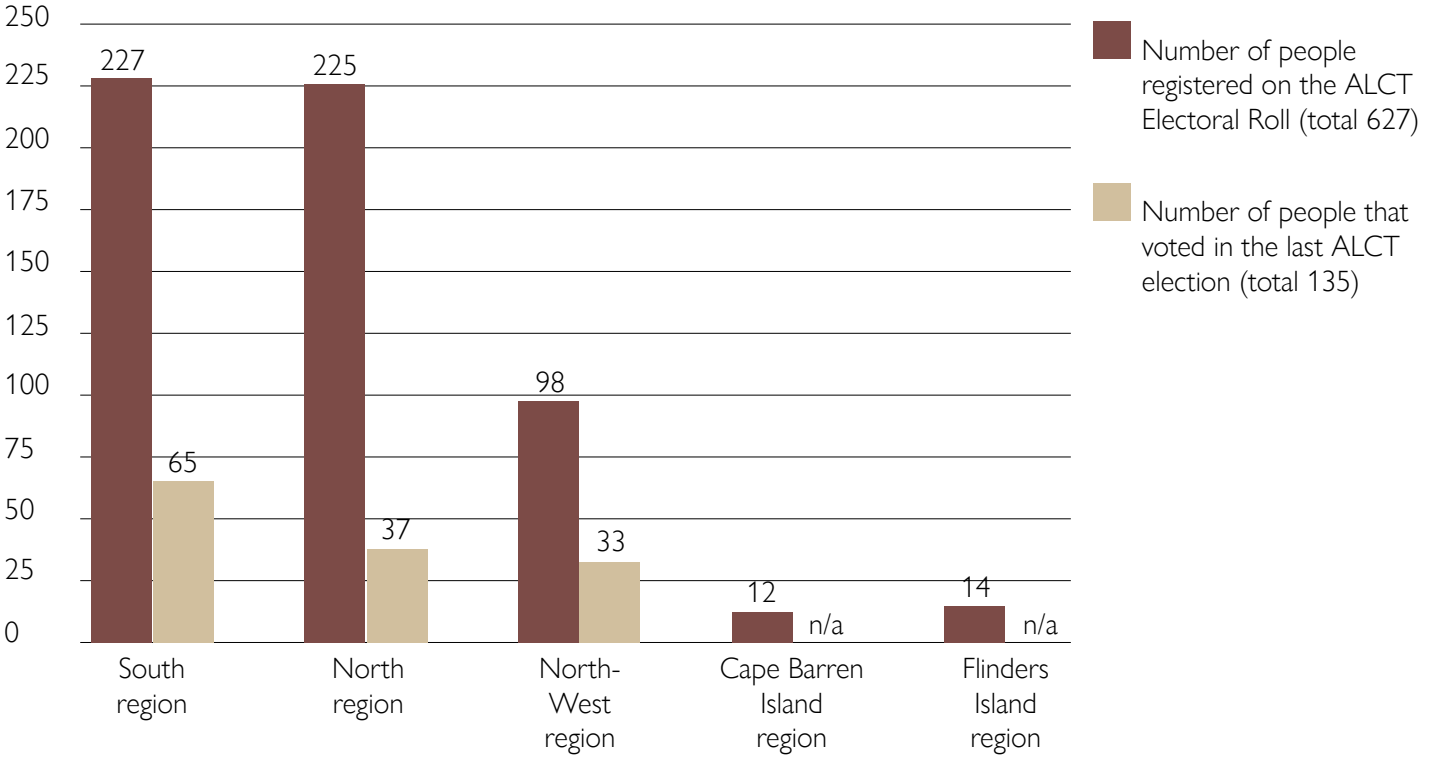
- remove the need for an objection process;
- provide a more consistent and fair process;
- enable enrolments to take place throughout the three-year cycle rather than only prior to a main election (midterm byelections can occur).

We recommend this change in procedure and that as recommended in Recommendation 9, the Truth-Telling Commission's test of eligibility to register on the role be the same as eligibility to vote for representatives for treaty negotiations.

Recommendation 11: A statutory framework for Aboriginal Protected Areas

We recommend that a new category of reserve land tenure be created under the *Nature Conservation Act 2002*, namely 'Aboriginal Protected Area' with appropriate values and reservation purposes.[131] The details of how this new class of reserved land would fit in with the existing legislative framework under the *Nature Conservation Act 2002* and the *National Parks and Reserves Management Act 2002* would need to be resolved along with the necessary consequential amendments to other legislation. Alternatively, each of the classes or some of the classes of reserved land could have an Aboriginal overlay which picks up appropriate values and purposes (e.g. Aboriginal National Park, Aboriginal state reserve). In the alternative again, a separate statutory framework for Aboriginal Protected Areas could be created. There are models from other Australian jurisdictions which could be explored to create the most appropriate model for Tasmania. In each case, title in the Aboriginal Protected Area could be vested in ALCT or another Aboriginal organisation with flexibility for permanent or interim leasehold or lease-back arrangements and funded healthy Country plans/ management plans a requirement.

ALCT Electoral Roll numbers



131 See Schedule 1 for the current ten categories.

Recommendation 12: Creation of the kooparoona niara Aboriginal Protected Area

Together with the enabling legislation, the first Aboriginal Protected Area, the kooparoona niara Aboriginal Protected Area in the Western Tiers including the FPPFL on the boundary of the TWWHA should be declared. If the land (boundaries to be determined) was vested in ALCT, there could be conditions relating to joint management with the local Aboriginal community in the management plans for the park. This first Aboriginal Protected Area could serve as a model and would serve as a test of local management and access.

We believe that the proposal for the kooparoona niara Aboriginal Protected Area would have considerable support from the wider community. For example, we were contacted by the Friends of the Great Western Tiers / kooparoona niara, who wrote to us to support such a proposal:

> We are writing in support of the Aboriginal community's claim for an Aboriginal owned and managed national park in kooparoona niara / Great Western Tiers, as a significant contribution to much needed Land Justice and as a source of empowerment for the Aboriginal community. It will also be of benefit to the non-Aboriginal community through the increased tourist visitation that such a national park would attract.[132]

Recommendation 13: Consider creation of kunanyi / Mt Wellington an Aboriginal Protected Area

We understand that for many Tasmanian Aboriginal people, kunanyi is a special place that features in creation stories passed down through generations and that it is a sacred place where ancestors' spirits are laid to rest. Sharnie Read, a palawa woman who lives in Hobart, has said: 'It's a pathway to our ancestors and to the spirit world, a doorway if you like to the next stage of who we are.'[133]

For many years the possibility of declaring kunanyi / Mt Wellington a national park has been considered for reasons which include properly resourcing it so that there are funds for conserving and managing the land and tracks. We recommend that the Government seriously explore the possibility of doing this using the recommended statutory framework for Aboriginal Protected Areas but there is a need to first consult with Tasmanian Aboriginal people.

Recommendation 14: Increased resources for ALCT and land management

It is clear to us that ALCT is grossly under-resourced. Its lands are in remote locations and difficult to access. With its limited budget it has no choice but to rely on the TAC, leading to questions about its independence. We understand that the Government has many competing claims on its budget and that there need to be imaginative ways of supporting the land management functions of ALCT. With more land hand-backs, additional resources will be needed.

To ensure their success, Aboriginal Protected Areas would need to be adequately resourced by the Government. Options for partnerships with non-government organisations experienced in land management, such as the TLC and Bush Heritage, may assist but more is needed. The creation of a philanthropic endowment fund is currently being explored by ALCT. However, there is also the possibility of using park fees from kunanyi to fund the management of lands returned to the Aboriginal people.

To assist in building the capacity of the Aboriginal community to manage its land, the Government should establish an Aboriginal land and sea ranger funding program, and could consider looking to the Queensland model to do this.

Recommendation 15: Increasing the joint management of Crown land, parks and reserves

Joint management in Tasmania remains an aspiration rather than a reality. We understand that while some Aboriginal people have resisted the concept of joint management because they considered that this conflicted with their claim not to have relinquished sovereignty, there is now a greater willingness to engage in the interests of capacity building and as a step towards return of title to land. We recommend that the Government look at ways to engage in joint management including by using the existing provisions in the *Crown Lands Act 1976* and the *National Parks Reserves Management Act 2002* to facilitate this (with amendments if necessary).

132 Letter dated 20 October 2021 from Friends of the Great Western Tiers / kooparoona niara. This is a group of conservation activists who work with the local Aboriginal community. They also joined with the Wilderness Society, the Tasmanian National Parks Association and Mole Creek Caving Club in calling for the creation of a kooparoona niara (Great Western Tiers) National Park in response to the Government's process in relation to the FPPF in the TWWHA, see media release 28 March 2021. See: Tasmania National Parks Association, 'Kooparoona Niara (Great Western Tiers) National Park proposal, *Media Release* (2021) <https://tnpa.org.au/kooparoona-niara-great-western-tiers-national-park-proposal/>.

133 Quoted in Phoebe Hoesler, 'What does Hobart's kunanyi / Mt Wellington mean to Tasmania's First Nations people?' *ABC* (online, 26 April 2020) <https://www.abc.net.au/news/2020-04-26/what-hobarts-mt-wellington-mean-to-tasmanias-indigenous-people/12141266>.

SEA AND WATER RIGHTS

In Tasmania, women are of the sea, men are of the land and all are of the night sky.[134]

Our identity as Indigenous people comes from our country – our land and our seas. We have maintained our connection to sea country and we continue to look after our oceans. This is part of our cultural responsibility for country, and for each other.[135]

Australia wasn't uninhabited when white settlers came; there were people here who used the land and the sea, and who traded their harvest.[136]

For any new fishery that is developed, if it was historically used as a food source for Indigenous people, there is some potential to help Indigenous people get into those fisheries and help develop those fisheries.[137]

Background

The traditional understanding of Aboriginal Country includes freshwater and sea country. For this reason, one of the suggested reforms to the *Aboriginal Lands Act 1995* is to include water rights and the return of sea and freshwater Country in the legislative and policy framework. It also explains the extension of the operation of the ILC to allow it to support the acquisition of water rights and Indigenous businesses operating on sea country. As a result, the now-named ILSC has supported Aboriginal communities in South Australia to acquire licensing and quota for a commercial pipi fishing operation and a commercial tuna fishing joint venture.

The Commonwealth Fisheries Research Development Corporation (FRDC) has an Indigenous Reference Group (IRG), which includes a Tasmanian Aboriginal fisher. The IRG aims to get the best outcomes in research projects to help Indigenous communities enter different fishing enterprises. The FRDC has funded a number of Indigenous fishing projects, including the project, '"wave to plate", establishing a market for Tasmanian cultural fisheries', a University of Tasmania project with Aboriginal post-doctoral research fellow, Dr Emma Lee. This project highlights the barriers to participation and engagement in cultural fisheries and the economic contributions that they can make to the State.

One of the key areas identified as essential for establishing a market for cultural fisheries in Tasmania is access to marine resources for Aboriginal Tasmanians.[138]

The Minister for Primary Industries and Water has recently announced the appointment of an Aboriginal Fisheries Officer to help engage aboriginal fishers in the design of a range of marine resource management strategies and to identify options for further cultural fisheries development in Tasmania.[139] Dr Emma Lee has been appointed to this position.

Currently there are some statutory fishing rights for Aboriginal people but they are limited to non-commercial fishing and the collection of shellfish for making shell necklaces for sale.[140] The fishing provisions exempt an Aboriginal person from the requirements to hold a licence for lobster pots, recreational scallop and abalone licences, but bag and possession limits, size restrictions and seasons, and gear marking requirements still apply. While some shellfish, such as limpets and elephant snails, are completely protected, there is an exemption for Aboriginal people. In relation to shell collecting, there are bag limits on collecting shellfish targeted for shell collection such as maireeners, black crows, oat shells and toothies, but these do not apply to Aboriginal persons.

What we heard

Sea and water rights were not raised as consistently as land rights but the need to expand the concept of Country to include rights in relation to sea and rivers was raised in some meetings. This was seen as necessary for environmental protection, to facilitate cultural practices and to provide economic benefits.

The commodification of fresh-water rights was raised as well as the need for Aboriginal people to have a senior role and voice in the allocation of water rights, a process that corporations and farmers currently dominate.

There was a strong message of concern in a number of meetings about commercial and recreational over-fishing, which is depleting coastal marine resources. In response to environmental degradation causing the decline in the giant freshwater crayfish, it was suggested that Aboriginal people should be granted inland fishing licences in compensation.

134 tebrakunna Country and Emma Lee, '"Reset the relationship": decolonising government to increase Indigenous benefit' (2019) 26 *Cultural Geographies* 415, 424.

135 Rodney Dillon in National Oceans Office, 'Sea Country: An Indigenous perspective, The South-East Regional Marine Plan', (Assessment Report, 2002) 9 <https://parksaustralia.gov.au/marine/pub/scientific-publications/archive/indigenous.pdf>.

136 Brian Denny quoted in Catherine Norwood, 'Sustainability-lesson-from-our-ancient-past' <https://www.frdc.com.au/media-publications/fish/FISH-Vol-27-2/Sustainability-lesson-from-our-ancient-past>.

137 Ibid.

138 Emma Lee, *'Wave to Plate': establishing a market for cultural fisheries in Tasmania*, (Report to Fisheries Research and Development Corporation, May 2019) <https://www.frdc.com.au/sites/default/files/products/2016-204-DLD.pdf>.

139 Guy Barnett, 'Aboriginal Fisheries Officer to lead consultation on sea Country' (Media release, 2 August 2021) <https://www.premier.tas.gov.au/site_resources_2015/additional_releases/aboriginal_fisheries_officer_to_lead_consultation_on_sea_country>.

140 *Living Marine Resources Management Act 1995*; *Fisheries (General and Fees) Regulations 2016*, r 15, r 21; *Fisheries (Shellfish) Rules 2017* r 14.

Commercial Aboriginal fishing licences, transfer of abalone and rock lobster units were suggested as a means of providing apprenticeships and employment opportunities for young people as well as a way of encouraging healthy and sustainable lifestyles and maintaining and reviving cultural links.

On-shore abalone farming was also raised as a potential Aboriginal-run industry, modelled on Moana New Zealand, the Māori owned, successful abalone farm, which was seen as a more environmentally friendly form of aquaculture than salmon farming.

At the truwana / Cape Barren Island meetings there were calls for fishing rights within a truwana / Cape Barren Island exclusion zone, including one in Armstrong Passage between truwana / Cape Barren Island and lungtalanana / Clarke Island. Similarly, at the community meeting at Murrayfield on Bruny Island, Aboriginal people wanted an exclusive fishing zone in Trumpeter Bay adjacent to Murrayfield as the area was over-fished. Members of mtwAC also aspired to have exclusive fishing rights on the waters adjacent to the land they are caring for at Tebrakunna / Little Musselroe Bay.

We also heard from a commercial fisher about how he acquired knowledge of sustainable Aboriginal fishing practices for periwinkles by studying the size of periwinkle shells in middens. As a result, he increased the size of periwinkles he harvested beyond the minimum size authorised by the regulations. This is an example of the failure of fishing regulators to respect Indigenous knowledge of sustainable fishing practices. Based on his observation of the impact of strip harvesting most legal-size animals from a site, he also changed his practice to take no more than two thirds of them, leaving a small satellite population to reproduce.

We also heard of progress that is being made to facilitate the lease of abalone quota to the Land and Sea Aboriginal Corporation of Tasmania (LSACT). Arising out of the return to the Government of the Furneaux Islands' abalone units some years ago, a quantity of abalone units has become available for tender. There is a plan is to lease these 40 units to LSCAT, a newly created ORIC-registered organisation whose functions include to acquire, manage, hold and own land and sea interests. This will be supported with ILSC funding. The plan is that profits will be invested in the acquisition of more quota units in the future.

Recommendations

The following recommendations will be relevant to the current review of the *Living Marine Resources Management Act 1995*.[141]

Recommendation 16: Amend the *Aboriginal Lands Act 1995* to include water

The Tasmanian *Constitution Act 1934* acknowledges Tasmanian Aboriginal people as the traditional and original owners of *Tasmanian lands and waters* and recognises the enduring spiritual, social, cultural and economic importance of *Tasmanian lands and waters* to the Aboriginal people (emphasis added). The inclusion of Aboriginal water rights and the return of sea and freshwater Country into a legislative/treaty framework is strongly supported by Tasmanian Aboriginal people and it is our recommendation that this be progressed to give substance to the words in the preamble.

Recommendation 17: Support and investment for commercial cultural fisheries

The development of a commercial cultural fishery in Tasmania presents a wonderful opportunity which can benefit the whole of the State through food tourism and hospitality when the catch is sold to local restaurants. The vision is that profits will fund new Aboriginal youth justice diversion programs and train young Aboriginal abalone divers, giving them jobs. As Dr Emma Lee has said, '[It] is a global opportunity for Indigenous people to rewrite what it means to have stewardship over these resources that belong to all of us.'.[142]

The planned lease of 40 abalone quota units to LSACT is an important first step towards creating a commercial cultural fishery. However, while significant as a first step, it is a modest share of what is the world's largest commercial abalone fishery, with just 40 of the 3,500 quota units. Nevertheless, the initiative needs to be well supported so that it can serve as a foundation for a more permanent arrangement in relation to the 40 abalone units, the acquisition of other traditionally harvested shellfish species and kelp harvesting. As we heard in meetings, Tasmanian Aboriginal people aspire to the commercial opportunities of owning lobster quota.

141 DPIPWE, 'Review of the Living Marine Resources Management Act 1995', *Sea Fishing & Aquaculture* (2021) <https://dpipwe.tas.gov.au/sea-fishing-aquaculture/sustainable-fisheries-management/review-of-the-living-marine-resources-management-act-1995>.

142 Matthew Denholm, 'Diving deep to close the gap: indigenous abalone fishery offers 'revolutionary' new model', *The Australian* (online, 2 November 2021) <https://www.theaustralian.com.au/nation/diving-deep-to-close-the-gap-indigenous-abalone-fishery-offers-revolutionary-new-model/news-story/7f8604e23882c5e7f7e8cbf03620d715>.

Recommendation 18: Granting titles to low water mark and exclusive fishing zones

We received a strong message about the importance of using the coast, beaches and seas for food and cultural practices such as shell-gathering for necklaces and collecting kelp for basket-making - activities which are means of maintaining and reviving links to culture. To facilitate this, we recommend that the Government explore the options for extending title to coastal Aboriginal land and land owned by Aboriginal organisations to the low water mark.

It should be noted that starting with a focus on cultural fisheries does not mean that Aboriginal fishing rights should be limited to cultural fisheries. Traditional ways of fishing evolve and may include modern methods and materials as well as expanding the species harvested. As Rodney Dillon has observed,

> Our culture and our view of oceans aren't fixed in time ... Oceans are part of us, and we are part of them. It's an ancient relationship that Aboriginal people ... share with our oceans. It's dynamic; its expression changes with the environment around us.[143]

Recognising that Aboriginal people have engaged in fishing since time immemorial, we recommend granting marine leases of the sea-bed and coastal waters adjacent to such land with exclusive fishing rights in these areas. The Government should start with exploring the options for the three areas mentioned above, namely Trumpeter Bay on Bruny Island, the Armstrong Passage between Cape Barren Island and Clarke Island and Little Musselroe Bay.

143 Dillon in National Oceans Office, above n 135.

HERITAGE

It is my dream that we have our own Pakana community governed and operated space; a space that empowers a real Pakana museology – a place where there will be no question as to 'who tells whose story, and to what audience.[144]

Background

In order to give context to the issues raised in meetings and consultations pertaining to cultural heritage, this section provides background on State and Commonwealth legislative frameworks for the protection of cultural heritage in Tasmania. Included is a brief discussion about the *Aboriginal Heritage Act 1975* (Tas), the Aboriginal Heritage Council of Tasmania and Aboriginal Heritage Tasmania, as well as two key pieces of legislation in the Commonwealth legislative framework:[145] the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* and the *Environment Protection and Biodiversity Conservation Act 1999.*

Aboriginal Heritage Act 1975 (Tas)

The *Aboriginal Heritage Act 1975* (Tas) is the primary piece of legislation governing Aboriginal cultural heritage in Tasmania. Prior to its amendment in 2017, the Act was referred to as the *Aboriginal Relics Act 1975*. The *Aboriginal Heritage Act* continues to use this outdated and offensive word to describe what is protected under the law.

For the purposes of the Act, a 'relic' is defined as:

> (a) *any artefact, painting, carving, engraving, arrangement of stones, midden, or other object, made or created by any of the original inhabitants of Australia or the descendants of any such inhabitants, which is of significance to the Aboriginal people of Tasmania; or*
>
> (b) *any object, site, or place that bears signs of the activities of any such original inhabitants or their descendants, which is of significance to the Aboriginal people of Tasmania; or*
>
> (c) *the remains of the body of such an original inhabitant or of a descendant of such an inhabitant that are not interred in–*
>
> (i) *any land that is or has been held, set aside, reserved, or used for the purposes of a burial-ground or cemetery pursuant to any Act, deed, or other instrument; or*
>
> (ii) *a marked grave in any other land.*

The Act establishes a series of criminal offences for activities that harm Aboriginal heritage. This includes, for example, destroying, damaging, defacing, concealing or interfering with a relic; making copies or replicas of a relic; removing, selling or taking a relic; or excavating Crown land in search of relics.

A review of the Act is currently underway. The initial public phase of the review commenced in May 2019 with the release of a Discussion Paper and a call for public submissions. This was undertaken by DPIPWE on behalf of the Minister for Aboriginal Affairs, who presented the findings of the review to the Minister in March 2021. The review team received 39 submissions, containing a number of suggestions for improvement, including:

> Increased education and awareness; the need for cooperative and proactive management of Aboriginal heritage based on early consideration in planning and development approval processes; and widespread support for cooperative and consultative approaches that closely involve Tasmania's Aboriginal people.[146]

The Minister subsequently tabled a report outlining the Government's commitment in response to the review findings on 1 July 2021.[147] The report identifies and accepts a number of the key issues, including the need for a new Act and better definitions of Aboriginal heritage, including the omission of the word 'relic'. The Government has made some immediate commitments, including improving the early consideration of Aboriginal heritage under existing planning and development approval law, and commencing or extending important projects such as the replacement of the current non-statutory Aboriginal Heritage Register. The Minister also outlined an intention to develop new legislation as soon as practically possible, subject to the need for further consultation. Further negotiation and consultation will be conducted before many of the key issues are addressed, including the question about who makes decisions on Aboriginal heritage.

144 Zoe Rimmer quoted in Amanda Mackinnon, '#91 A shining light', *The Tasmanian Tuxedo* (online, 15 October 2021) <https://www.thetasmaniantuxedo.com/all-stories/91-a-shining-light/>.

145 The Joint Standing Committee on Northern Australia recently released a report into the destruction of Indigenous heritage sites at Juukan Gorge. This provides a useful and succinct summary of the cultural heritage protection framework under Commonwealth law. This section has been adapted for this report. Joint Standing Committee on Northern Australia, Parliament of the Commonwealth of Australia, *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge* (Final Report, October 2021), 149-174.

146 DPIPWE, *Review of the Aboriginal Heritage Act 1975* (Review Report, March 2021).

147 Roger Jaensch, *Aboriginal Heritage Act 1975: Review under s.23 – Government Commitment in Response to the Review Findings* (Tabling Report, 1 July 2021).

The Aboriginal Heritage Council of Tasmania

The AHCT is an independent statutory body that was established by the *Aboriginal Heritage Act 1975* in 2017. It replaced a non-statutory body of the same name. Members of the all-Aboriginal Council are appointed by the Governor on the recommendation of the Minister for Aboriginal Affairs and have extensive knowledge and experience in Aboriginal heritage management.

The role of the AHCT is to advise the Tasmanian Government, land managers and owners on the protection and management of Aboriginal cultural heritage in Tasmania. It examines Aboriginal heritage permit applications and makes recommendations to the Minister for Aboriginal Affairs on whether these should be supported.

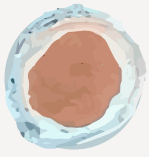
Aboriginal Heritage Tasmania

Aboriginal Heritage Tasmania, located within DPIPWE, is responsible for the administration of the *Aboriginal Heritage Act*. Aboriginal Heritage Tasmania supports the Minister for Heritage, the AHC and DPIPWE by providing professional and technical expertise.

Part of the role of Aboriginal Heritage Tasmania is to record, protect and manage Aboriginal cultural heritage in the Aboriginal Heritage Register, a database of Aboriginal heritage places and objects which are significant to Tasmanian Aboriginal people. There are currently over 13,000 listings in the database.[148] Aboriginal Heritage Tasmania also administers the Aboriginal Heritage Property Search and conducts Aboriginal heritage awareness training.

The Guidelines

The guidelines are issued by the Minister under s 21A of the *Aboriginal Heritage Act 1975*. They specify steps towards compliance for individuals and businesses seeking to minimise the risk of causing harm to Aboriginal heritage when undertaking activities that may impact on relics. This includes activities such as mining and exploration, forestry, large-scale construction projects, commercial and residential development, civil engineering projects and other infrastructure works.



Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act) was designed to preserve and protect areas and objects in Australia and in Australian waters that are of particular significance to Aboriginal and Torres Strait Islander people from injury or desecration.

The ATSIHP Act allows the Federal Minister for the Environment, upon application by an Aboriginal group or individual, to declare an area a place of significance for the purpose of protecting that area or an object or class of objects. Once a declaration has been made, the desecration of a declared area or object can result in criminal sanctions.

However, as legislation of last resort, the ATSIHP Act is limited in its ability to protect cultural heritage. A declaration by the Environment Minister may only be made where all other State and Territory pathways have been exhausted. It also relies on interested parties making an application, rather than creating a protective framework from the outset. As recently noted by the Joint Standing Committee on Northern Australia,[149] the ineffectiveness of the ATSIHP Act is evidenced by a 2017 report on the state of the environment in Australia (the most recent available data on applications). It states:

> The ATSIHP Act has done little to fulfil its intended purpose of protecting significant Aboriginal areas or objects. Between 2011 and 2016, 32 applications were received for emergency protection under s. 9 of the Act, 22 applications were received for long-term protection under s. 10 of the Act, and 7 applications were received for protection for objects under s. 12 of the Act. During the past 6 years, no declarations under ss. 9, 10 or 12 of the Act were made.[150]

Since the events at Juukan Gorge, which resulted in the destruction of two rock shelters of great cultural, ethnographic and archaeological significance, there has been an increase in the number of cases brought under the ATSIHP Act.[151] However, that has not deterred criticism about the effectiveness of the Act or the Aboriginal and Torres Strait Islander community's negative experiences with it.

148 Aboriginal Heritage Tasmania, 'Aboriginal Heritage Register' <https://www.aboriginalheritage.tas.gov.au/about-us/aboriginal-heritage-register>.

149 Joint Standing Committee on Northern Australia, above n 145, 152.

150 Richard Mackay, *Australia State of the Environment 2016: Heritage* (Independent report to the Australian Government Minister for the Environment and Energy, 2017) 84.

151 Joint Standing Committee on Northern Australia, above n 145, 157.

Environment Protection and Biodiversity Conservation Act 1999 (Cth)

The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) is the Australian Government's central piece of environmental legislation. It provides a legal framework to protect and manage matters of national environmental significance, including cultural heritage. Its objects include:

- to provide for the protection and conservation of heritage; and
- to promote a cooperative approach to the protection and management of the environment involving governments, the community, landholders and indigenous peoples; and
- to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; and
- to promote the use of indigenous peoples' knowledge of biodiversity with the involvement of, and in cooperation with, the owners of the knowledge.[152]

The EPBC Act establishes the National Heritage List, which includes natural, historic and Indigenous places of outstanding significance to the nation. Currently, in Tasmania, there are two places that have been listed for their indigenous significance – the Jordan River Levee site and the Western Tasmanian Aboriginal Cultural Landscape. The Act also establishes the Commonwealth Heritage List, which includes places on Commonwealth lands and waters or under Australian Government control that have Indigenous, historic and natural value. No Tasmanian sites have been placed on the Commonwealth Heritage List for reasons of Indigenous significance.

In general, very few sites of Aboriginal and Torres Strait Islander heritage are listed. In some cases, Aboriginal cultural heritage benefits only from the protection given to non-specific Indigenous heritage, for example where environmental value has been identified, rather than as a result of specifically being listed for its Indigenous significance.

A number of reviews have been conducted, and recommendations made, to amend the EPBC Act, including to improve the protection of cultural heritage by increasing engagement with Aboriginal and Torres Strait Islander peoples. A recent independent review of the Act (the 'Samuel Review'), conducted in 2020, found a culture of 'tokenism and symbolism' in the EPBC framework, which prioritises the views of western science and fails to genuinely include Aboriginal and Torres Strait Islander peoples. The Samuel Review concluded that 'reform is needed to ensure that Indigenous Australians are listened to and decision-makers respectfully harness the enormous value of Indigenous knowledge of managing Country'.[153]

The Samuel Review has made a number of recommendations for reform, including:

- immediately adopting and implementing a National Environmental Standard for Indigenous engagement and participation in decision-making, developed by the Samuel Review through an Indigenous-led process;
- recasting the role of the Indigenous Advisory Committee as the Indigenous Engagement and Participation Committee, whose role it would be to 'provide leadership in the co-design of reforms and advise the Environment Minister on the development and application of the National Environmental Standard for Indigenous engagement and participation in decision-making';
- giving equal weight to Indigenous knowledge and western science when considering advice provided to the Minister for the Environment; and
- transitioning responsibility for decision-making in jointly managed parks to Traditional Owners and to build capacity and capability in this respect to ensure long-term success.[154]

Righting the wrongs of the past – the return of ancestral remains and sacred objects

Aboriginal human ancestral remains and cultural heritage have been taken from Tasmania and placed in overseas and local museums, universities and private collections for two centuries. Often in the name of science, the remains and artefacts of First Peoples were being taken from their original lands and custodians well into the late 1900s. Today, communities around the world continue their fight to have their Ancestors repatriated and sacred objects returned.

152 *Environment Protection and Biodiversity Conservation Act 1999*, s 3(ca), (e)-(g).

153 Graeme Samuel, 'Independent Review of the EPBC Act – Final Report' (Final Report, Department of Agriculture, Water and the Environment, 2020) ix.

154 Ibid 57.

The Australian Government has funded repatriation activities in Australia for forty years. However, lobbying for the return of cultural heritage was first spearheaded by Aboriginal and Torres Strait Islander peoples in the 1970s. Today, more than 3,500 ancestral remains and over 2,200 sacred objects have been returned to Aboriginal and Torres Strait Islander custodianship.[155] It is believed there are over 100,000 cultural heritage objects that remain in the collections of overseas institutions.[156]

The TAC's research and activism in the mid-1970s are widely recognised as ground-breaking efforts, which sparked the cultural heritage repatriation movement globally. In 1975, the Secretary of the Aboriginal Information Centre (now the TAC) Roy Nichols, lobbied the Tasmanian Government to have Truganini's remains removed from the Tasmanian Museum and Art Gallery and cremated on the centenary of her death. Prior to this, Truganini's body had been exhumed by the Royal Society of Tasmania and perversely placed on public display in the museum. She was finally put to rest on 1 May 1976, when Roy Nichols scattered her ashes over the D'Entrecasteaux Channel in accordance with her wishes.

The TAC, and others, continued these efforts throughout the 1980s, 1990s and 2000s. In 1982, the TAC wrote to the Tasmanian Government requesting the return of Aboriginal remains in the Crowther Collection in TMAG. That year, they also wrote to the University of Edinburgh requesting the return of all Tasmanian Aboriginal remains, upon learning that the skull of William Lanney had been on public display at the School of Anatomy.[157] In 1997, a small delegation travelled to Europe to lobby governments and museums for the repatriation of ancestral remains and objects, many of which flatly refused to consider any requests for return. In 2001, UK Prime Minister Tony Blair established a Working Group on Indigenous Remains to identify collections of Aboriginal ancestral remains and cultural heritage in UK museums. The TAC made a submission to the Working Group and ATSIC Commissioner Rodney Dillon travelled to London to address members of the Working Group in person.

In 2004, legislation was passed in the UK helping to facilitate the return of Aboriginal remains from British museums to their place of origin – something the TAC had called for in its 2001 submission to the Working Group. In the years since, a number of trips have been made and campaigns continued to further these efforts towards repatriation of ancestral remains and sacred objects – some successfully and some not. Today, the shocking practice of cultural theft continues.

In January this year, TMAG and the Royal Society of Tasmania jointly made a formal and public apology to Tasmanian Aboriginal people for the 'pain, suffering and ongoing trauma' these institutions caused – acknowledging, recording and apologising for the devastating impacts their institutions' actions have had, and continue to have, on Tasmanian Aboriginal people. The apology was coupled with a commitment to create a more positive, truthful and respectful future.

What we heard

Discussions about the importance of protecting Tasmanian Aboriginal culture and heritage emerged in a significant number of community consultations.

Protections for Aboriginal heritage

On the topic of amending the *Aboriginal Heritage Act 1975*, one community member posited that 'changes must be made to meaningfully and actually protect our heritage, as well as [hold] those accountable for damage and destruction caused at sites'.

A number of people spoke about inconsistencies between protections for Aboriginal heritage and 'white heritage', not only with respect to the protection of these places and objects but also in terms of accountability and enforcement. One person raised the issue of a disconnect between Aboriginal heritage and current planning policy, explaining that there is no current expectation that vendors disclose known cultural value on the land. Another person expressed concern about the Minister's conflicting portfolios, stating that 'planning will always be in conflict with heritage' and that the AHCT should not sit within DPIPWE.

155 Iain G. Johnston et al, 'The AIATSIS Return of Cultural Heritage Project: Understanding Aboriginal and Torres Strait Islander Cultural Heritage Material Held Overseas and the Initial Challenges to Repatriating Material to Custodians' (2021) 64(4) *Curator: The Museum Journal*, 1, 4.

156 Ibid 9.

157 Ryan, above n 27, 319.

Decision-making power

We heard widespread frustration about the lack of power and resources afforded to Tasmanian Aboriginal people, including through the Aboriginal Heritage Council, to protect and enforce the protection of Aboriginal heritage. One person described 'a feeling of sadness' around the ongoing lack of protection of cultural sites and expressed frustrations about Aboriginal heritage 'always being put last'. Another group submitted that 'Aboriginal heritage is more at risk today than it ever has been'.

The issue of final decision-making power regarding Aboriginal heritage permits was also raised. Some spoke about the discrepancy between the number of recommendations made by the AHCT to refuse a permit and the number of Council recommendations accepted by the Minister. A list of permits opposed by the Aboriginal Heritage Council, and the resulting action from the Minister, shows that between July 2017 and June 2021 the Council opposed a total of seven permits. Of this number, the Minister accepted the Council's recommendation in two cases, and granted permits in the other five cases – four permits were granted on the basis of social and/or economic benefit and one was granted on the basis of public health concerns. In one large community consultation, people discussed the importance of restoring ownership of Aboriginal cultural heritage to the Tasmanian Aboriginal people. This followed similar reasoning to a statement Michael Mansell made in the 2021 Japanangka errol West Lecture: 'every people is entitled to own and look after the manifestations of their history and heritage'.[158]

There were some objections to the way cultural sites were recorded by Aboriginal Heritage Tasmania. We heard that Aboriginal Heritage Tasmania are unable to protect cultural sites unless the coordinates are shared with the department and included on the Heritage Register, but we were also told that this is a 'lose-lose situation' – if the coordinates of significant sites are made public, you risk people stealing or destroying them, but if you don't make the locations public this may happen anyway out of ignorance.

Capacity and expertise

Many people raised the issue of capacity and expertise in the area of consultancy on Aboriginal heritage. Several community members expressed disappointment about the lack of opportunities for professional development, skills development or training for Aboriginal Heritage Officers. Another praised the skills and expertise of some of the members of the Aboriginal Heritage Council, but regretted the lack of experience on the Council to tackle more challenging strategic priorities like the TWWHA and intangible landscapes. Similarly, we heard there was a need for capacity building within the community in the areas of law and policy making and that the Government ought to provide these opportunities. Fears were also raised about regional-based autonomy in cases where local community members are uninformed or untrained in the protection of cultural heritage. We were told, 'when we don't see core Aboriginal values respected, it brings into question the genuineness of motives'. Optimistic responses were also shared with us though, with one person speaking about the enormous potential of the AHCT and the opportunity to reinvigorate the Council to be more empowered and strategic.

We also heard calls for the creation of Aboriginal identified positions and opportunities for training and professional development in the Tasmanian Archives and Heritage Office. The Archives Office informed us that in the last financial year, enquiries from Aboriginal people have gone up by at least 31% (and a high number of referrals come from the TAC). Despite the critical importance of this responsibility, there are currently no Aboriginal staff or trainees working in the Tasmanian Archives or the State Library of Tasmania, whereas Australia's other State and Territory archives and libraries specifically employ Aboriginal staff to build greater awareness of and engagement with their archival collections and make their services more culturally safe. As one person expressed, 'If we can't easily, or comfortably, access a place where we are represented on staff … and manage and produce our histories, then are we just ghosts? We need truth to, at and in the places of power and that includes the holding places of our history'. The same person also told us,

> It is an imperative responsibility and duty that this place [Tasmanian Archives] becomes Aboriginalised as soon as possible in order to assist and progress Aboriginal voices, perspectives, publications and programs (residencies, fellowships, publishing aid) resources from and in the collections in the State Library and Archives, so that alternatives to the colonists' texts about our people and history can emerge.

158 Mansell, above n 25.

Return of ancestral remains and cultural heritage

All across the State, people spoke about the return of ancestral remains and cultural heritage, including the return of the petroglyphs to preminghana. The majority of comments indicated strong support for burying the petroglyphs as the most effective means of preservation. However, significant concerns about this prospect were also raised by one group, who would prefer to see them displayed in public. In several cases, among those who supported burying the petroglyphs, it was agreed that it would be beneficial to find a way to replicate the petroglyphs in a non-destructive way, as a means of educating the general public about Aboriginal heritage and ensuring the 'knowledge wouldn't be lost'. In all cases, people expressed a desire to see the petroglyphs returned to Country. The discrepancy in the repatriation of artefacts held by private entities and those found on Crown land was also highlighted.

The failure of the *Aboriginal Heritage Act* to include a process for the repatriation of human remains and cultural objects was raised with us, as well as the fact that, according to Crown Law advice, once repatriated they were caught by the Act and required the Minister's approval before they could be dealt with. In another meeting, participants called for the respectful repatriation of Aboriginal remains to be dealt with in a treaty.

Tasmanian arts and cultural centre

The creation of an Aboriginal-owned, run and managed Aboriginal arts and cultural centre was suggested by the First Peoples Art and Culture Team at TMAG. This is a conversation that Aboriginal people have been having for a number of years. It is envisaged that this could be a culturally appropriate space to bring Aboriginal people together to look at and talk about the collection of Aboriginal heritage and cultural objects, as well as a place for ceremonies and story-telling. It could also be a place to share Tasmanian Aboriginal culture with the rest of the world. One person said to us, 'every person who steps through that door is an act of reconciliation'.

Such a centre could also assist in the repatriation of remains and objects from overseas institutions, which want to repatriate directly to community but need to do that within a recognised framework. This facility would need to be able to care for artefacts in a culturally appropriate manner. On this point it was suggested that an ongoing relationship with TMAG would be important, as cultural objects could continue to be stored at TMAG if necessary, provided control and ownership vested in Tasmanian Aboriginal people. Similar models were identified, including the North Stradbroke Island Minjurribah cultural centre and the Larrakia Development Corporation's plans for a cultural centre near Stokes Hill, a sacred site in the Northern Territory.

While the TMAG First Peoples Art and Culture Team did not necessarily have Macquarie Point in mind as the site for the centre, they considered this would be appropriate. The Lord Mayor of Hobart drew our attention to Adelaide's Lot Fourteen with its $200 million Aboriginal Arts and Cultures Centre and First Nations Entrepreneur Hub as an example of what could be done on the Macquarie Point site. Professor Greg Lehman shared his vision for a vibrant cultural centre to avoid a passive Truth and Reconciliation Art Park but instead facilitate an internationally renowned living and active precinct as a place for exhibitions, cultural retail and tourism, as well as festivals and other social events. The park could also serve as a public venue for protests and rallies. The Koorie Heritage Trust in Federation Square is an example of such a place which, in addition to being a keeping place to preserve and protect collections of artworks and artefacts, also includes retail outlets for local makers, exhibitions spaces, a conference facility, document archive and research facility with relationships with universities and the National Gallery of Victoria. In Greg Lehman's words, 'activation and ambition are key'.

We believe the concept could be driven by the First Peoples Arts and Culture Team from TMAG. The Museum of Old and New Art (MONA), who co-developed the idea for a Truth and Reconciliation Art Park with Tasmanian Aboriginal representatives, could also be encouraged as a development partner.

When discussing the idea of an arts and cultural centre, Dr Gaye Sculthorpe, Tasmanian Aboriginal woman and Head of the Oceania Section at the British Museum, emphasised that the cost of running cultural centres is substantial and unlikely ever to be self-sustaining. There have been many established in Australia over decades which have failed for lack of adequate funding. However, like State museums, the benefits of supporting them are immense and should not be considered in financial terms alone. Like others, Dr Sculthorpe pointed to Lot Fourteen's Aboriginal Arts and Cultures Centre in South Australia as a possible model which plans to provide an important place for telling Aboriginal stories and histories, without duplicating all the technical infrastructure such as conservation laboratories and storage facilities existing or planned for State institutions. Dr Sculthorpe acknowledged that she wasn't familiar with Tasmanian Aboriginal people's current aspirations in relation to a cultural centre, but she warned that more than anything this shouldn't be seen as the 'solution' to the underlying issues of justice needing to be addressed.

Former Premier Ray Groom also imagined an Aboriginal cultural centre for Mac Point, a place which was much more than a museum for collections and which could also serve as the location for a truth-telling commission. He said that the land on which a cultural centre is built should obviously be Aboriginal land. Ray Groom also emphasised that this idea was subject to full and proper consultation with the Aboriginal community of Tasmania. Similarly, Matthew Groom spoke of a reconciliation park as the most exciting idea in the Mac Point development concept. He believed this was something the Government should commit to, in close consultation with Tasmanian Aboriginal people, in order to give reconciliation a physical presence. He envisaged it as including a dedicated structure or building that would be both symbolic and functional, a gathering place for truth-telling and a place where decisions are made.

There was some discussion about the need for an alternative, temporary site to be established as an art and cultural centre, while the permanent facility was being designed and built. One suggestion put forward, including by Madeleine Ogilvie, was the Treasury Building. Similarly, the Goods Shed could also be a temporary location for it until the centre is built.

An art and cultural centre was also suggested as a possible repository for laser scans of cultural heritage sites, which would avoid putting original sites at risk by publicising their location. A similar idea was mentioned in a meeting with a respected Elder, who would like to see the creation of a repository of collected works by Elders, including artwork and scholarship, as a means of preserving these things for their community.

Recommendations

Recommendation 19: Reform of the *Aboriginal Heritage Act 1975* (Tas) as a matter of urgency

A comprehensive consultation process undertaken for the purposes of the 2019-2020 review of the *Aboriginal Heritage Act 1975* canvassed the views of Tasmanian Aboriginal people and wider stakeholder groups. The views we heard tended to reiterate those reported in the Review Report,[159] including: the need for a new Act with stronger protections of Aboriginal heritage; a decision-making role for the AHCT rather than a merely advisory one; a statutory Aboriginal Heritage Register; ownership of heritage and a procedural framework for dealing with return and repatriation of removed heritage and cultural objects; greater support for professional development and training of Aboriginal Heritage Officers; and capacity building in relation to legislation and policy development for prospective members of the Aboriginal Heritage Council.

Clearly, there is a need for reform of the Act to be progressed as a matter of urgency. Reform should not wait for a truth-telling or treaty process. There is also merit in proceeding immediately with the measures mentioned in the Tabling Report as interim steps independently of the introduction of the new legislation.

Recommendation 20: Establishment of a Tasmanian Aboriginal Art and Cultural Centre

We strongly recommend the creation of an Aboriginal-owned, run and managed art and cultural centre at Mac Point. This is an ambitious project but with enormous potential and benefits, not only for Aboriginal people but for other Tasmanians and Australians. While not a 'solution' to reconciliation or an end in itself, a cultural centre such as this could have numerous dimensions. It could create space for coming together, healing, truth-telling, ceremony, celebration, research, learning and the keeping of sacred objects and repatriated cultural heritage.

A facility like this could also have global significance. International visitors wonder at our failure to celebrate and advertise the fact that Aboriginal culture in Tasmania dates back more than 40,000 years. A world class Aboriginal art and cultural centre would help fill that gap. Similar cultural centres already exist in Canberra (the Australian Institute of Aboriginal and Torres Strait Islander Studies) and at Uluru (the Uluṟu-Kata Tjuṯa Cultural Centre). In Victoria, a draft proposal has been developed for a $400 million First Nations Cultural Centre in Victoria, that could 'house the nation's first 'Black Parliament' [and] become a 'keeping place' for repatriated artefacts and serve as a symbol of reconciliation'.[160] Developments for other institutes and centres are also being proposed in other States and Territories of Australia. Such a centre would provide Tasmania with the opportunity to position itself as the gateway to the oldest living cultures in the world. Our history of war, the near genocide of a whole race, appalling treatment and attempted assimilation, but also survival, makes Tasmania the most appropriate place to tell this story of decimation, resilience and resurgence.

A facility that is owned, run and staffed by Tasmanian Aboriginal people would further ideals of self-determination and autonomy and be an appropriate signal to the way forward. Central to the concept, the centre would need to be on 'Aboriginal land' and housed in a strikingly impressive and culturally appropriate building.

Who would manage the centre, what entity needs to be created to do this?

There is no doubt the knowledges and expertise needed to care for cultural objects, heritage and artworks already exists within TMAG's First Peoples' Art and Culture Team and Aboriginal Advisory Committee, as well as in the Tasmanian Aboriginal community more broadly. Moreover, we found the composition of the existing Advisory Committee bridges divisions in the community because of their common focus on the need to protect Aboriginal heritage and culture.

A board or management committee would be necessary for the effective operation of the centre, and members of this governance structure could be drawn from these groups for the reasons above.

The potential for a role for MONA in supporting this initiative should also be explored.

What would the purpose of the centre be?

There are a range of possibilities for the purpose and function of such an arts and cultural centre. This would need to be decided by the Tasmanian Aboriginal people leading the project, in accordance with the aspirations of the Aboriginal community.

159 DPIPWE, above n 146.

160 Jack Latimore, 'Proposal for First Nations precinct in the heart of Melbourne', *The Age* (online, 1 November 2021) <https://www.theage.com.au/national/victoria/proposal-for-first-nations-precinct-in-the-heart-of-melbourne-20211028-p593xb.html?btis>.

Zoe Rimmer's vision is for a cultural centre 'where the story belongs to us and is not told, or misrepresented, by others'. She explained:

> It is my dream that we have our own Pakana community governed and operated space; a space that empowers a real Pakana museology – a place where there will be no question as to who tells whose story, and to what audience.

She has seen how Aboriginal collections can revive and inspire cultural practice as was the case with the luna tunapri project workshops funded by Arts Tasmania and the Australia Council which inspired a new generation of shell stringers. She explained,

> Shell stringing is an ancient Pakana tradition, the end product of which is beautiful necklaces. But it so much more than that. It's about conversations and connections that occur during the collecting, cleaning and stringing of the shells. Those stories string together endless generations.[161]

The arts and cultural centre could also house repatriated objects such as Mathinna's doll and pin cushion, which Zoe and her colleagues are attempting to have returned from the local council archive in England. These objects were taken by Sir John and Lady Franklin to England and were handed down through their family.

As Greg Lehman, who developed the idea of a Truth and Reconciliation Art Park with MONA, imagines it, this centre would not be merely a static museum and a place for collections of artefacts and artworks, but a living active space of immersive experiences – story-telling and ceremonies, a research space and cultural archive, and a place to nurture new generations of Aboriginal art practitioners and thinkers in a way that represents palawa culture, but also confidently takes its place on an international stage through creative engagement with Indigenous culture globally. Like the First Americans Museum in Oklahoma, mentioned in the above section on 'Truth-Telling', story-telling would be a way of fostering truth-telling and educating the public.

Greg Lehman also suggested that the centre should have the capacity to promote economic participation and entrepreneurship by Aboriginal people, an idea that echoes the plans for the First Nations Entrepreneur Hub in Adelaide's Lot Fourteen, which will provide support for Aboriginal businesses and foster Aboriginal innovation, entrepreneurship and employment.

Given that we have heard from Aboriginal people about their need for a family history service, this could also be provided at the centre.

Partnerships

Both Greg Lehman and the First Peoples Art and Culture Team envisaged an arts and cultural centre would enter into partnerships with:

- TMAG and QVMAG for sharing of expertise and objects and materials owned by the Centre, and for the conservation, storage and cataloguing of them if necessary;
- the University of Tasmania and other academic institutions; and
- MONA to facilitate international perspectives and collaborations.

Funding and endowment

We understand that all museums, arts and cultural centres are expensive to run and maintain. They are frequently underfunded and under-resourced. Clearly, for an arts and cultural centre to be successful at Mac Point, the design, development and completion of the building and site will require significant funding. Following this, the daily management and operation of the centre will require ongoing funding from an endowment that will ensure it can continue to operate successfully and sustainably.

There is the possibility that the British Government may be interested in the concept of an Aboriginal arts and cultural centre in Tasmania – one that tells the story of the effects of colonisation on the island, particularly given the lessons of errors learnt and advice conveyed to the Colonial Office by Lt. Governor George Arthur, advice which was heeded when New Zealand was colonised. This is another reason why the British colonisation of the island, then known as Van Diemen's Land, was so significant and deserving of truth-telling in a visible and enduring way by a place that immortalises that part of our history. This idea should be explored further to determine whether there is a role for the British Government to play in facilitating the development of an arts and cultural centre in Tasmania.

There is also considerable, albeit as yet unexplored, philanthropic potential for support from local, national and international donors.

161 Rimmer in Mackinnon, above n 144.

LANGUAGE

palawa kani ('Tasmanian Aborigines speak') – the reconstruction of Aboriginal language in Tasmania

It is thought that there were about twelve Aboriginal languages spoken in Tasmania, however, none of the languages survived the devastating impact of colonisation as a complete spoken language. Fortunately, remnants of many of the original languages were written down in word-lists by more than twenty different European recorders from Cook's visit in 1777 and through the colonial period. In addition to speakers of different English dialects, recorders were French, one was a Scot and another Danish. They attempted to reproduce the unfamiliar sounds they heard using the spelling system of their own language. This has compounded the difficulties of recovering the languages together with the fact that complete sentences were not recorded.

The palawa kani program began in 1992 as part of a Commonwealth funded language retrieval program and was part of international interest in revitalising Indigenous languages. Initially the program was to be jointly run by the Aboriginal community and Riawunna at the University of Tasmania, but it came to be run through the TAC with funding from the Commonwealth Indigenous Language and Arts Program and its predecessors. With the assistance of linguists and using a methodical process, which is accepted world-wide for recovering Indigenous languages, the task began to retrieve and reconstruct an Aboriginal language using the historical records, word-lists and language remembered in families from both the Bass Strait and D'Entrecasteaux Channel areas. palawa kani combines words retrieved from as many of the original languages as possible. By painstaking examination of the original words, evidence was found of patterns of use and grammatical functions which were used to make plurals, word order, suffixes etc. Participants in Aboriginal community workshops in 1993 and 1994 agreed that the remnants of the original languages were not enough to revive any one language but that one language could be retrieved from the remnants of them all. Principles were agreed upon for the reproduction of a language which was accurate and authentic, simple and had a consistent spelling system.

Place names in palawa kani are derived from the language which was originally spoken in that place if the name in that language survives.

The TAC has a policy and protocol for the use of palawa kani based on the fundamental principle of Aboriginal control. All gazetted palawa kani place names are freely available for the public to use. While there is no need for any Tasmanian Aboriginal person to seek permission to use palawa kani for their own use, any other Aboriginal organisation and non-Aboriginal person, group or organisation wishing to use palawa kani for any purpose must submit a request to the TAC's palawa kani Language Program.[162]

The importance of preserving and revitalising Indigenous languages is explained by linguist Terry Crowley who pointed out that where, as a result of colonisation and policies of assimilation, physical appearance is not necessarily a reliable guide to Aboriginal identity, having a language of your own that is clearly different from that of the English-speaking mainstream would be a powerful symbol of distinctiveness.[163] Anthropologist, Christopher Berk, writing of the value of palawa kani argues, 'palawa kani is a cultural artefact, that like an emblem, works to distinguish the Tasmanian Aboriginal community, one that lacks many of the stereotypical components of Australian Aboriginality, within Tasmanian society.' As such it is 'a vehicle through which Tasmanian Aboriginal extinction and non-existence can be challenged and effectively erased'.[164]

Aboriginal and Dual Naming

In 2013 the Aboriginal and Dual Naming Policy was unveiled by the State Government after decades of lobbying from the Aboriginal community. Tasmania was the last Australian State or Territory to implement such a policy.[165] Premier Lara Giddings stated that 'recognising Aboriginal names for Tasmanian features will help preserve and promote Aboriginal language, which has endured thanks to the committed work of the Aboriginal community'.[166]

162 TAC, 'Policy and Protocol for Use of palawa kani Aboriginal Language' (2019) <https://tacinc.com.au/the-policy-and-protocol-for-use-of-palawa-kani-aboriginal-language/>.

163 Terry Crowley, *Field Linguistics: A Beginners' Guide* (Oxford University Press, 2007) 4.

164 Christopher Berk, 'Palawa Kani and the Value of Language in Aboriginal Tasmania' (2017) 87(1) *Oceania* 2-20, 2, 17.

165 Office of Aboriginal Affairs, Department of Premier and Cabinet, *Aboriginal and Dual Naming Policy: A policy for the naming of Tasmanian geographical features* <https://www.dpac.tas.gov.au/__data/assets/pdf_file/0008/189314/Aboriginal_and_Dual_Naming_Policy.pdf>.

166 Carol Raabus, 'Tasmanian dual naming policy announced atop kunanyi', ABC Hobart (online, 13 March 2013) <https://www.abc.net.au/local/audio/2013/03/13/3714934.htm>.

Six Aboriginal and dual names were assigned on 19 December 2013 including larapuna (in the vicinity of Bay of Fires), kunanyi / Mount Wellington and kanamaluka / River Tamar. An additional seven Aboriginal names were assigned on 19 January 2016. These included wukalina / Mt William and pinmatik / Rocky Cape. After a review and consultation process, the Government's policy was revised in 2019 and this included the creation of an Aboriginal and Dual Naming Reference Group to provide advice to the Place Names Advisory Panel (formerly the Nomenclature Board) to allow more Aboriginal groups to have a say in assigning Aboriginal names. The Reference Group replaced the earlier process under the 2013 procedure which provided that the TAC would identify features for Aboriginal naming, consult with the Aboriginal community and provide names to the Government via the Nomenclature Board.[167] The revised process led to threats of legal action and to the TAC withdrawing from the Aboriginal and dual naming process. In March 2021, 15 Aboriginal and dual names were assigned to places in the North West (e.g. Kennaook / Cape Grim), North East (e.g. Polelewawta / Little Forester River) and in the South East (Teralina / Eaglehawk Neck).

What we heard

palawa kani

There was widespread support and praise for palawa kani in our meetings and interestingly this was across organisations and individuals across the State, from Circular Head and the North West Coast to the Huon and the Tasman Peninsula in the south. In George Town, palawa kani was widely embraced in at least one of the Primary Schools, but the Aboriginal Education Worker regretted that it was not cemented into the curriculum like European and Asian languages. However, even within TAC membership and Elders there were reservations and objections. These included that palawa kani was a 'made-up language', a 'contemporary creation'; that it used Māori words; and similarly that it is not being researched by Aboriginal people; that the palawa kani language workers with the TAC should be more open to accepting multiple words for places and things into the palawa kani dictionary as a mark of respect to ancestors and as a way of preserving as much of the original Aboriginal languages as possible.

Others resented the fact that there has been no financial support for reviving other languages such as melukerdee and the languages of the North West and North East Nations. That palawa kani is not allowed to be used by some registered Aboriginal organisations was a complaint and sometimes Aboriginal Education Workers have not been allowed to teach it. In fact, palawa kani and language emerged as both a uniting instrument and a divisive one with some referring to what has become the 'language wars' and to palawa kani being used as a weapon of power and control over other groups.

Strong supporters of palawa kani expressed the view that its opponents did not adequately understand linguistics and the methods used to develop it whereas its opponents saw it as wrongly avoiding the complexity and nuances of the many languages. Its opponents challenge the use of the word palawa vs pakana to describe Aboriginal people and lutruwita vs trouwunna to describe Tasmania. Some stated they compromise by using both names for Tasmania – lutruwita/trouwunna.

As well as Elders who opposed palawa kani or who were more ambivalent about it, others spoke of its unifying potential and the possibility of allowing some diversity in vocabulary with different words for the same thing.

We heard that while palawa kani is widely taught in schools around Tasmania and has been taught to three generations, in the Huon Valley the melukerdee word list is used in at least some schools and in Circular Head schools they teach the use of local Aboriginal words.

Aboriginal and dual naming

The contention around language has spilled over into Aboriginal and dual naming. We heard of objections to 'kunanyi' as the Aboriginal name for Mount Wellington on the grounds that it had different names given by the various local mobs who could see the mountain. On the other hand, there were objections to deriving Aboriginal names from other sources that lack the rigorous process adopted by the palawa kani program. For example, the name 'Paranaple' for the Devonport Arts Centre based on the local Aboriginal name for the Mersey River is contested by TAC's palawa kani program team.

167 *Aboriginal and Dual Naming Policy*, n 4, p 4 (4.6-4.9). See also *Tasmanian Place Naming Guidelines*, May 2021, 3.9 and 3.10.

Recommendations

The TAC has done a commendable job in their years of painstaking work on reviving an Aboriginal language for Tasmania and it is unfortunate that it is not more widely embraced by all Tasmanian Aboriginal people. Having one's own language is a powerful symbol of distinctiveness and survival. Resistance to sharing palawa kani more widely and requiring approval for its use was understandable in the early days of its development but a more open approach is now desirable. Clearly there is much misunderstanding in the community about how this language has been reconstructed; suggestions for example that it is 'made-up' and it is Maori, or not evidence-based, illustrate this. There is also much resentment about the exclusion of words and place names which local mobs would like to use leading to attempts to try and reconstruct alternative languages. The unifying potential of palawa kani and the possibility of allowing some diversity of vocabulary with different words for the same thing could be explored in the truth-telling process. Currently it has become divisive rather than unifying. This has impeded its revival and acceptance as a spoken language.

Recommendation 21: Reconstitute the Aboriginal and Dual Naming Reference Group

Conflict about palawa kani is reflected in disputes about place names with the consequence that the TAC and the palawa kani team have withdrawn from the Aboriginal and Dual Naming Reference Group. This is unfortunate and undermines the potential of palawa kani. Moreover, it impedes the use of Aboriginal names in signage and interpretation panels and creates conflict when there is disagreement about a particular name. It is recommended that the Aboriginal and Dual Naming Reference Group be reconstituted with the inclusion of an external expert in linguistics and a respected Tasmanian Aboriginal person so that input into Aboriginal place names can proceed in an inclusive way.

There is also the possibility that while there can be an official Aboriginal or dual name that local communities be supported to continue to use their own name for a local feature.

Recommendation 22: Funding to Aboriginal organisations for word lists

The proprietorial approach of the TAC language team to palawa kani has led other Aboriginal organisations to work on compiling words lists for the language of their region and even to attempt to reconstruct the local language. We recommend that support be given to Aboriginal organisations to assist with projects to compile word lists. Rather than reconstructing the local language, we suggest that these word lists be used in combination with palawa kani as the base language and that the TAC be encouraged to allow this to happen. In our view, this approach with concessions from both the TAC and other Aboriginal organisations would offer the best hope of the revival and broad acceptance of an Aboriginal spoken and written language. By allowing the use of local alternative words this gives Aboriginal people the opportunity to honour their ancestors by contributing to the preservation of remnants of the original languages.

EDUCATION AND CAPACITY BUILDING

[I]t is clear that we are all missing chapters from Tasmania's story. I believe every Tasmanian student should learn about Tasmania's Aboriginal history and culture. This means celebrating and embracing the history, the good and the bad, because it's a part of who we are. In partnership with the Aboriginal community, we will introduce a focus on Tasmanian Aboriginals into the history and culture component of the Australian Curriculum, taught in all our schools. This will ensure this vital chapter in our history has a place on the bookshelf in every classroom and generations to come will have a greater understanding of our history.[168]

Background

As many of us reflect on our own Tasmanian education, we recognise the false history presented to us as children – particularly that the Aboriginal people of Tasmania became extinct in 1876 with the death of Truganini. We can readily grasp the fundamental importance of education as a vehicle to ensure that all Tasmanian students learn the truth of our history of: colonial invasion and violent dispossession of land without negotiated agreement; the rounding up of remaining Aboriginal bands and their exile to Flinders Island; the resilience and survival of Tasmania's Aboriginal people despite the apocalypse to which they were subjected; the richness of culture, language, spirituality, and the deep, deep connection to Country that results from an abundant life in this beautiful place since time immemorial. Premier Will Hodgman's announcement in 2016, quoted above, was lauded by many. Any pathway to truth-telling and treaty must include a commitment to ensure that Tasmanian students are taught truths about our own history. It will come as no surprise that consistently, throughout all our consultations with Aboriginal people around the State, education was a constant focus of discussion.

We can also readily grasp the critical role of education in creating opportunity for Aboriginal people in Tasmania. We recognise that our Aboriginal students lag behind non-Aboriginal students in all measures of academic attainment: percentage of students with qualifications beyond Year 10; percentage of children with post-school qualifications; school attendance rates; retention rates from Year 10 to Year 12; percentage of children assessed as 'developmentally on track'; standardised tests for reading, writing and numeracy.[169] The pivotal role of education as opportunity for Aboriginal children was raised in many of our conversations.

The Department of Education (DoE) has a dedicated Aboriginal Education Services (AES) established to:

- assist schools to enable all Aboriginal and Torres Strait Islander children and young people to reach their learning potential, and
- support learning opportunities for all Tasmanian learners to understand and value Aboriginal and Torres Strait Islander histories and cultures.[170]

AES operates within Tasmania's Aboriginal Education Framework, provides advice on and development of strategies, policies and guidelines for DoE, and employs Aboriginal Early Years Education Workers (AEYEWs), Aboriginal Education Officers (AEOs) and co-funds (with individual schools) Aboriginal Education Workers (AEWs) around the State. The AES team is a dedicated and professional group of educators clearly committed to, and working hard in the pursuit of, its two objectives. A major AES initiative emerging from the 2016 Resetting the Relationship Agenda was the development of the multimedia tool *The Orb*[171]– an online resource to assist the teaching of Tasmanian Aboriginal history and cultures. We have both been impressed by the quality of the content and the professionalism of its presentation.

We also recognise the importance of education to build capacity amongst Aboriginal people to acquire knowledge and develop skills in a whole range of areas of endeavour (trades, professions, management, policy); to undertake programs of study for appointment to professional positions; and to complete higher-level qualifications for appointment to more senior positions and/or to become recognised subject matter experts.

There has been progress and some good outcomes have been achieved but there is still much to be done. Education was a focus of so many of our conversations.

168 Hodgman, above n 88.

169 See Saul Eslake, 'The Economic Benefits of 'Closing the Gap' in Tasmania' (Presentation to Reconciliation Tasmania Forum, 29 October 2021), slides 5, 6 and 7 <https://www.saul-eslake.com/the-economic-benefits-of-closing-the-gap-in-tasmania/>.

170 Department of Education, 'Aboriginal Education Services' <https://www.education.tas.gov.au/parents-carers/school-colleges/aboriginal-education-services/>.

171 Department of Education, 'The Orb' <https://www.theorb.tas.gov.au/>.

What we heard

Education as truth-telling

One key objective of Aboriginal Education Services (AES) in Tasmania is to enable all Tasmanians to learn about Aboriginal history and culture. A number of people explained that the pursuit of this objective through education is a positive development although much more could be done to embed Aboriginal Studies into the curriculum to ensure a more consistent, systematic and comprehensive approach. We met with the AES team in Lindisfarne and also with AES staff – AEYEWs, AEOs and AEWs in different parts of the State.

We heard from the Aboriginal staff at AES that there is significant sharing of Aboriginal perspectives occurring in the course of their work which often involves the whole school community – both Aboriginal and non-Aboriginal students, teachers and other school staff and parents and friends of school families. Schools and child-care centres in which these staff are employed are often more sensitive to Aboriginal issues and principals are usually supportive of raising cultural awareness – by flying the Aboriginal flag, hosting NAIDOC week events, and, in one school, the hosting of a mutton-bird festival etc. Some staff informed us that students are eager to learn about Aboriginal issues and that the staff often deliver content to all students rather than exclusively to Aboriginal students because of the level of interest from non-Aboriginal students. We also met with some people who are delivering content in the Catholic and Independent School system. We learned that these schools are often better resourced to engage Aboriginal educators and that there is an openness and commitment to learn from Aboriginal presenters and to take students on to Country with Aboriginal guides and teachers.

It is positive that so much is already happening in the delivery of Aboriginal content – much more than was the case in past generations – and that there is such an openness and receptivity to learn about Aboriginal issues and to involve Aboriginal presenters to educate and to share their perspectives. That demand for Aboriginal Education Services continues to grow at such a rate is indicative of a positive and encouraging trend. But it is also frustrating for AES that there is so much unmet demand for Aboriginal content that the availability of resources to respond to the growing demand lags to such a glaring and increasing extent.

Some people lamented the lack of systematic and comprehensive coverage of Aboriginal Studies within the national cross-curriculum priority of 'Aboriginal and Torres Strait Islander Histories and Cultures'. We heard from AES staff that team members had prepared extensive feedback on the recent national curriculum review and that although a majority of State and Territory Education Ministers (including Tasmania's) had agreed to 'significant and positive changes' (including, for example, applying a truth-telling lens to the teaching of Australian History and to incorporate Aboriginal History into the teaching of Ancient History), there were also conservative, even racist, comments about a shift to more comprehensive coverage of Aboriginal issues in the national curriculum which some staff members found demoralising.

We heard that it would be a major advance if history, cultural education, connection to Country and Aboriginal Studies were built into the school curriculum from the beginning. One hundred percent of students at the Cape Barren Island school are Aboriginal and so all are immersed in language, culture and cultural practices but that is of course not the case for school students across the State. It was suggested that Aboriginal people be consulted and paid to provide the history and knowledges to teach students and also to train teachers to be confident in teaching the truth of Aboriginal history in schools around the State.

One key negative effect of limited resources to meet growing demand is an ever-present threat of staff burnout. AES colleagues explained to us that most AEWs are currently engaged as casual staff (so no salary during school holidays etc) or on 60 week contracts (no ongoing job security) at salary Band 2 but are expected to operate at a significantly higher level of responsibility (Band 4 or 5 – or, in some cases, to teach classes for non-Aboriginal teachers who do not feel confident with Aboriginal content and so ask the Aboriginal workers to deliver to their classes instead) without being paid at the appropriate level. Aboriginal staff are expected to apply a range of multi-disciplinary skills (as teacher, support worker, teaching assistant, cultural adviser) without being valued, or appropriately remunerated, for this multi-skilling/multi-tasking role. We heard that these factors result in high staff turnover and we experienced AES staff processing notification of the resignation of one of their colleagues through over-work while we were meeting at the AES Offices. AES has pushed hard and hopes to employ two full-time AEWs at Band 2 for the first time commencing 2022.

We heard that a State-wide approach to truth-telling through education is necessary. However, long-term systemic change will be required to transition from the current over-reliance on Aboriginal Education Officers and Workers in the delivery of content to ensure that all teachers are confident both in their understanding of subject matter and in their responsibility to deliver content. Achieving this objective would require a significant commitment from the Government (particularly the DoE Executive Team) and the Teachers Registration Board (TRB) that assesses the professional requirement of 'know the content and how to teach it'. Teachers are expected to promote the teaching of truth-telling and reconciliation but the TRB currently has no Aboriginal members to assess what is culturally appropriate. Achieving this systemic change will require a substantial effort in the upskilling of the existing teacher cohort (and AES capacity must be further bolstered to be the vehicle for this transformation) as well as a substantial commitment to the education of future teachers in developing and delivering cross-curriculum education. We were told that the overwhelming majority of new teachers in Tasmania are University of Tasmania graduates and so there is an opportunity to engage with the University as a major partner in pursuit of this objective. We heard that there is a desire to engage more openly with the Faculty of Education at the University of Tasmania on the training of future teachers on Aboriginal content.

While we heard from a number of people that the content of *The Orb* is excellent, we also heard repeatedly that access to *The Orb* is not user-friendly. One AEW also told us that the content does not integrate easily with the current national curriculum. One very impressive Year 10 Aboriginal student leader we spoke to had never heard of *The Orb*. We heard from AES staff that additions are planned for the learning platform for *The Orb.* Following their publication, a restructure of the user-interface is anticipated to render the resource more user-friendly. That will be a welcome development.

AES staff articulated their desire for an Indigenous Education Consultative Body (IECB) in Tasmania. They explained that IECBs exist in a number of other States and Territories and play a significant community advocacy and advisory role for Aboriginal and Torres Strait Islander education in their respective jurisdictions. Tasmania is missing out on greater engagement with the national coalition of State and Territory IECBs because we do not have one operating in Tasmania. We currently do have the Tasmanian Aboriginal Reference Group which is supported by AES but it has limited authority and minimal impact. AES staff told us the Reference Group was established to gain the support of the Aboriginal community for the development of *The Orb*. IECBs in other States and Territories have registered with the Office of the Registrar of Indigenous Corporations (ORIC) to gain credibility and to have access to Commonwealth funding for the delivery of services. Establishing a Tasmanian IECB would facilitate Tasmanian participation on national working groups and advisory bodies more systematically than currently occurs. Such an entity would also have authority to influence Aboriginal education policy and the implementation of new government initiatives in Tasmania.

Education as opportunity

Another key objective of AES in Tasmania is to support Aboriginal students to reach their learning potential through the Tasmanian school system. We heard from AES staff that retention rates of Aboriginal students to the end of Year 12 are improving. That increased retention is a positive development although anecdotally, the percentage of Aboriginal students awarded their Tasmanian Certificate of Education Certificate is significantly less than for non-Aboriginal Year 12 students.

We heard from a number of people about the importance of engaging with Aboriginal students through culture, history and connection to Country. Some expressed the view that that sort of engagement with students helps preserve culture generally and empowers students individually by building confidence and pride in culture. Some people told us that engagement with culture also draws the community together through the activities the children are engaging in at school. We heard that increasing cultural awareness around certain practices such as bush foods and cultural fishing (and not overfishing) has a flow-on benefit of improving physical and mental health and wellbeing within the Aboriginal community. We also heard that the re-introduction of a cultural arts program in one district school (because of the skills and strengths of the AEO at that particular school) has made a notable difference to the engagement of the children in learning (it is a precondition to participate that students attend school and maintain basic standards of academic progress) and in their connection with culture. Aboriginal students participating in the cultural arts program have noticeably more confidence and pride in their culture, are more willing to take on leadership responsibilities and attend school more regularly. One AEO expressed frustration that her school can't get funding to teach palawa kani as part of the language program whereas other languages, such as French and Japanese etc, are cemented in the curriculum.

One respected Elder expressed the view that, while an emphasis on Aboriginal culture and history in Tasmanian schools is important and valuable, it should not be at the expense of delivering content and building skills that will help Aboriginal students complete school, find a job and/or prepare for a successful transition to tertiary study.

Education as a builder of capacity

One person asked us to imagine the skills that might be required of Aboriginal people to implement Government decisions in response to our Report. Without prejudging our recommendations this particular person said hypothetically: 'if the Government handed back the TWWHA and takayna imagine the skills-base needed to manage this land.'

We heard from AES staff, for example, that the most common qualification available for Aboriginal Education staff is the TasTAFE teacher's assistant (TA) course (which now costs $3,000 but was previously only $300 with a government subsidy). One AES staff member lamented a government failure to think beyond TA work and about a broader range of other work options for Aboriginal staff. There could be a range of more appropriate qualifications developed and delivered by any registered training organisation (RTO) – not necessarily only by TasTAFE.

On truwana / Cape Barren Island we visited the local school and heard about the central role the school plays in preserving culture and nurturing the young people as the next generation of knowledge-holders. Some people we spoke to explained that there are no school-based vocational educational opportunities beyond Year 10 at the school and that there is a significant opportunity on the island for this sort of capacity building. The truwana Rangers expressed their excitement about a recent decision of the Tasmanian Fire Service to establish a junior cadet traineeship on truwana / Cape Barren Island. In another meeting one person made the observation that, given the reliance of the Aboriginal island communities on light aircraft, an innovative capacity building initiative would involve traineeships for Aboriginal pilots who could meet the future needs of these communities.

We heard from the TLC that they plan to implement a paid internship arrangement with the pakana Rangers to provide capacity building through training in land management for young Aboriginal rangers. We were encouraged to hear an organisation such as the TLC asking itself 'how can we find more professional development opportunities for young Aboriginal people and equip them to become leaders in their field?'. We were also pleased to learn about the Aboriginal not-for-profit pakana Services which won the 2019 Landcare Tasmania Indigenous Land Management Award.[172] pakana Services was created to build skills through training and mentoring to increase opportunities for meaningful long-term employment for Aboriginal Tasmanians in natural resource management, agriculture and other industry sectors. The organisation has provided placements to more than 20 people, 'many of whom have had a history of long-term unemployment but following their placement with pakana services have gone on to find employment'.[173]

One respected Elder told us that Aboriginal people regularly participate at major events as speakers, performers and/or contributors and that is an encouraging development. But this Elder's view was that Aboriginal people do not yet have substantial capacity in organisational, management and facilitation skills and much more could be done to rectify this relative weakness. This same Elder also expressed their desire to see more Aboriginal women like Fiona Maher on truwana / Cape Barren Island involved in land management and not only in cultural burning and on Country work but also in more senior roles including development, adaptation and application of new technologies and flora/fauna mapping.

We were told that agencies and organisations sometimes create identified employment positions for Aboriginal people and recruit a successful applicant to the role without thinking through what it might take to ensure that new employee is supported professionally and culturally. We spoke with one Aboriginal employee, for example, who feels isolated from communal support in her identified role because she is the only Aboriginal staff member in her area of work. The AES team have included that employee in their team to provide some support even though the new colleague is employed by another government Department (i.e. not the Department of Education). The new employee explained to us that they are attempting to complete two unfinished university degrees but do not receive study leave from their place of employment to work towards completion of both degrees.

172 Landcare Tasmania, '2019 Tasmanian Landcare Awards Dinner' *Landcare News* <https://www.landcaretas.org.au/2019_tasmanian_landcare_awards_announced>.

173 pakana Services, 'About Us' <http://www.pakanaservices.com.au/about-us/>.

We also heard from senior staff at one large enterprise that they had created an identified trainee position, recruited a young, talented and engaged Aboriginal person into the role and then failed to adequately support the trainee who left the organisation after 12 months. The organisation recognised several factors that combined to make the traineeship difficult: the trainee was not deployed on Aboriginal issues; they had no other Aboriginal colleagues; and they did not feel culturally safe. The organisation is now rethinking their approach to traineeships and capacity building for Aboriginal people and expressed their desire to do things differently next time.

Several people expressed their frustrations at the bureaucratic imposition of white structures, policies and processes reflective of white ways of thinking that Aboriginal people and organisations are required to navigate and comply with – particularly, for example, the writing of grant applications. The people expressing these frustrations asked 'how can we minimise the imposition of bureaucratic processes to help achieve equitable access to grant funding?'

We were challenged to think about the problem of white institutions, particularly government and university research institutions, failing to take seriously the acquisition of knowledge and expertise from practical observation and experience. We heard that Aboriginal wisdom and insight can be readily dismissed because the knowledge-holder lacks a recognised academic qualification. One glaring example of this emerged from our meeting with a Tasmanian Aboriginal commercial periwinkle fisher (discussed above under 'Sea and Water Rights'). He told us that because he does not have a PhD, he is not always taken seriously by marine research scientists.[174]

One Aboriginal teacher told us that their purpose in life is to help create opportunities for young people. There are so many talented Aboriginal people and apparently so few mentors to nurture and develop that talent. This particular person shared the view that the University of Tasmania was not doing enough to develop Aboriginal talent and seemed more focussed on numbers of Aboriginal students. One clearly talented Aboriginal student currently undertaking honours at the University of Tasmania told us that they had been invited to undertake a PhD at the University of Tasmania but there were no Aboriginal staff in their discipline who could act as academic supervisor and personal mentor. Significant institutional capacity-building needs to occur to change this situation.

We spoke with Professor Greg Lehman, Pro-Vice Chancellor, Aboriginal Leadership, at the University of Tasmania and heard about four recent appointments to identified academic positions in accordance with the University of Tasmania *Strategic Plan for Aboriginal Engagement*.[175] The Strategic Plan acknowledges the relatively low levels of Aboriginal staff at the University of Tasmania – academic and professional – and that there will need to be a significant increase in identified positions at all levels to be able to develop and deliver effective programs to achieve the aims articulated in the Strategic Plan.[176] Increasing the number of identified positions and recruiting qualified Aboriginal people to fill them will be a major advance for the University. But the institution also needs senior non-Aboriginal academic staff to embrace the notion that their contribution to the University's goals will involve a commitment to facilitate and support the emergence of Aboriginal subject matter experts. We were encouraged to meet with Associate Professor Rebe Taylor and hear precisely that sort of commitment. Professor Taylor is currently supervising a number of significant PhD projects by Tasmanian Aboriginal research higher degree students on topics such as: Tasmanian Aboriginal activism in cultural institutions; an auto-biographical account of Tasmanian Aboriginal activism; a biography of Dalrymple (Dolly) Briggs; Aboriginal identity; and Indigenous language reconstruction. Rebe sees her role as one of capacity building – of assisting and encouraging these Aboriginal leaders to equip themselves for more senior leadership roles or for deeper contributions to their own people and to society more broadly.

174 Brian Denny quoted in Catherine Norwood, above n 136.

175 University of Tasmania, 'Strategic Plan for Aboriginal Engagement 2021-2024', *Aboriginal Business* <https://www.utas.edu.au/aboriginal-business/strategic-plan>.

176 University of Tasmania, *University of Tasmania Strategic Plan for Aboriginal Engagement 2021-2024* (Final Draft) 11 <https://www.utas.edu.au/__data/assets/pdf_file/0003/1546221/SPAE-2021-2024-FINAL-DRAFT.pdf>.

Recommendations

Recommendation 23: Strengthening capacity of the Aboriginal Education Services

We recommend that the Government strengthen the capacity of the AES to ensure it has the resources and the personnel to be able to develop the required professional learning material, develop a strategic plan for the comprehensive delivery of the material and have the personnel to deliver the professional learning material around the State.

We believe that education is key to Tasmanian society moving towards a more mature understanding and appreciation of the Aboriginal history and culture of our island home. We agree with the goal articulated by then Premier Hodgman in 2016 and quoted above.

The major milestone achievement in pursuit of Premier Hodgman's goal has been the development of the multi-media resource *The Orb*. We understand that work is well underway to make access to the content of that resource more user-friendly. We are encouraged to hear of that work because a number of people we spoke with lamented the complexities of access to the resource. Given that there has been significant progress since 2016 on the development of content, the next challenge is a systemic one: how to effect a paradigm shift away from the prevailing over-reliance on Aboriginal Education Services staff around the State to deliver content on Aboriginal issues, to have all teachers confident and willing to deliver content themselves.

There will need to be a comprehensive program of professional learning across the State to train teachers in the delivery of the subject matter. The primary resource and expertise to develop that program of professional learning and to roll it out is the AES.

Recommendation 24: Establishment of a Tasmanian Indigenous Education Consultative Body

We recommend that the Government establish a Tasmanian Indigenous Education Consultative Body (IECB) and that the Government consider establishing such a body as a portfolio committee of a broader whole-of-Government Aboriginal Consultative Council.

We were somewhat concerned to learn that despite past efforts, Tasmania currently lacks an IECB. This lack of an IECB precludes Tasmania from systematic engagement with the national coalition of State and Territory IECBs and also diminishes the level of consultation with Aboriginal people on our own State Education System – Government, Catholic and Independent schools, early learning years, primary and secondary school, vocational studies and tertiary studies. We believe that the establishment of an IECB would facilitate greater engagement with and influence into the development and the implementation of Tasmanian Government Education Policy. We also believe that the establishment of an IECB would facilitate Tasmania's engagement with Aboriginal and Torres Strait Islander education in other States and Territories and with developments and input into Commonwealth Education Policy as it relates to Aboriginal and Torres Strait Islander issues.

We are conscious, however, that the creation of a new consultative body for education will likely become siloed within the parameters of the portfolio of Education and so we believe it would be preferable to establish an IECB as a portfolio-specific committee of a broader whole-of-government Aboriginal Consultative Council. It seems to us that to achieve substantial progress towards truth-telling and treaty while also working towards Closing the Gap objectives, it will be both necessary and desirable for senior Aboriginal Leaders to be consulted on whole-of-government approaches to the development and the implementation of Government policy. One obvious model would be to establish an Aboriginal Consultative Council to meet once or twice a year for consultations on whole-of-government policy on Aboriginal issues and to have several portfolio committees of that Consultative Council on issues such as Education, Health, Housing etc. (see Recommendation 7 above). The committees could meet more regularly and report to the broader Consultative Council at the meetings of the Council. The Education Committee of the Consultative Council could be designated as Tasmanian IECB for the purposes of participation in the National Coalition of IECBs.

We are conscious that increasing the number of Aboriginal consultative bodies will involve yet more demands on the time of already stretched Aboriginal leaders. We acknowledge that there is a significant challenge for all of us to help build the capacity of the next generation of Aboriginal leaders. We were encouraged to meet a number of talented young Aboriginal people who aspire to future leadership roles. Those people need to be nurtured, supported and encouraged in pursuit of their educational goals, to be offered opportunities for experience, growth and development and to be mentored by experienced leaders and role-models.

APPENDICES

APPENDIX A: ANALYSIS OF CASES ON THE DETERMINATION OF ABORIGINALITY

1998 Federal Court of Australia case of *Shaw v Wolf*

The issue in *Shaw v Wolf* was similar to that in *Gibbs v Capewell*. Justice Merkel was required to rule on challenges by two petitioners to the eligibility of 11 candidates nominated for election to the Hobart Regional Council of ATSIC pursuant to s 132 of the ATSIC Act. ATSIC was constituted by members elected to Regional Councils by Aboriginal and Torres Strait Islander people enrolled to vote around the nation. 'Aboriginal persons and Torres Strait Islanders' were eligible to nominate for election to the Regional Councils and the two petitioners in this case challenged the Aboriginality of the 11 respondents. Justice Merkel had to decide whether or not each of the 11 respondents satisfied the definition in s 4(1) of the Act: 'a person of the Aboriginal race of Australia'. Clearly, if any of the 11 respondents was not an Aboriginal person, they would be ineligible for election to ATSIC.

Justice Merkel relied upon earlier case law interpreting and applying the ATSIC legislative definition of 'Aboriginal person' to confirm the three-part test for determining eligibility to run for election to ATSIC: descent, self-identification and communal recognition. The parties to the case did not agree on who carried the onus of proof. The respondents argued that the petitioners carried the onus of proving that the respondents were not Aboriginal and the petitioners argued that once they established a *prima facie* case, it was for the respondents to discharge their onus of proving that they were Aboriginal. Justice Merkel decided that this case would proceed as an adversarial civil proceeding and, on the basis of a 1907 authority from the High Court of Australia sitting as the Court of Disputed Returns in relation to a case arising pursuant to the Commonwealth *Electoral Acts 1902-05*,[177] he determined that the onus of proof fell on the petitioners to establish to the requisite standard that the respondents were not Aboriginal.[178]

177 *Blundell v Vardon* (1907) 4 CLR 1463.
178 (1998) 163 ALR 205, 215.

Usually in civil proceedings the requisite standard of proof is on the balance of probabilities. However, in cases involving particularly serious allegations or particularly important and grave consequences flowing from a particular finding, the so-called *Briginshaw* Principle may need to be applied. The name of the principle is derived from the High Court judgment of Justice Dixon in *Briginshaw v Briginshaw* that:

> The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved ...[179]

Because all the respondents had identified as Aboriginal for some time, they had all developed family and community ties as Aboriginal persons and were involved with one or more Aboriginal organisations, the importance and gravity for any of them in finding that they were not Aboriginal led Justice Merkel to find that the *Briginshaw* Principle should be applied. That meant that the standard of proof on the balance of probabilities would not be lightly applied and, so, it would be more onerous for the petitioners to establish their case.

Justice Merkel applied the three-part test to each of the 11 respondents and found that the petitioners had failed to discharge their onus of proof to the requisite standard in relation to nine of the respondents but had successfully done so in relation to the other two respondents. One of those two respondents, Debbie Oakford, had been elected to the Hobart Regional Council and the other, Lance Lesage, was not. As a consequence of Justice Merkel's determination that Ms Oakford was not an Aboriginal person for the purposes of the ATSIC legislation, he ruled that she was ineligible to stand for election. We will return to the specific case of Debbie Oakford below.

Intriguingly, seven of the nine respondents Justice Merkel decided were eligible to run for election to the ATSIC Regional Council traced their Aboriginal ancestry to people outside the Bass Strait islands, Cochrane-Smith or Briggs-Johnson groups – hence the petitioners' challenge to their eligibility for election. Justice Merkel referred to:

> the 'competing hypotheses' of the petitioners and respondents in relation to the respondents' ancestries and acknowledged many doubts and uncertainties in the historical records, both documentary and oral. But ultimately the judge argued, following the Briginshaw principle, that he should not 'lightly' prefer the hypotheses of the petitioners about ancestry over those of the respondents. In each case he found that the petitioners had not established, to the standard of proof required, that the respondent in question was not an Aboriginal person.[180]

Unsurprisingly, Justice Merkel's decision generated intense interest in Tasmania and around the nation because of its implications for the determination of Aboriginality generally as well for the specific interpretation and application of the ATSIC legislation in relation to eligibility to run for office. Some commentary was critical of aspects of the decision. Rachel Connell of the NSW Department of Aboriginal Affairs, for example, claimed that:

> A comparison of the respondents' 'biographies' as detailed by the judge reveals the difficulties in being consistent in judicial determinations of Aboriginality, and the nuanced and complex nature of biographies when told through different filters. The case indicates the difficulties in presenting historical evidence of family trees. The judgment is problematic and raises a number of issues which need further consideration. Of particular concern are the Court's determinations in relation to the discharge of the onus and the standard of proof.[181]

179 (1938) 60 CLR 336, at 362.

180 Sanders, above n 66, 3.

181 Rachel Connell, 'Who is an 'Aboriginal Person': *Shaw v Wolf*' (1998) 4(12) *Indigenous Law Bulletin* 20, 21.

Criticism of Justice Merkel's decision was not, of course, limited to interstate observers. The TAC, for example, would certainly agree with Connell's criticisms about 'the discharge of the onus and the standard of proof'. One consequence of the judgment was that three of the respondents deemed to have been validly elected to the ATSIC Regional Council did not trace their Aboriginal ancestry to the Bass Strait, Cochrane-Smith or Briggs-Johnson groups. While the TAC undoubtedly agreed with Justice Merkel's decisions in relation to Lance Lesage and Debbie Oakford, they did not agree with the decisions in respect of the 'successful' respondents – particularly the three elected ATSIC Regional Councillors. According to Sanders, 'in the judgment of the core group within the Tasmanian Aboriginal community, these findings were both incorrect and inadequate. The court case had, in their view, been a 'failure'.'[182]

Justice Merkel's view though was that the TAC was not the exclusive body to determine the vexed question. He stated that:

> A difficulty with the petitioners' "community" submissions is that they assume that there is only one Aboriginal community in Tasmania and on the evidence before me this assumption cannot be accepted. I accept that as a result of its central role in Tasmania in relation to Aboriginal affairs, if an individual is recognised by the TAC as being an Aboriginal person, then, subject to descent, they are likely to be an Aboriginal person. I am not satisfied, however, that if the TAC does not recognise an individual as Aboriginal the converse is true and that they are not an Aboriginal person. There is also a difficulty in placing too much weight on the opinions of individual persons, as to whether they recognise or do not recognise particular respondents as being Aboriginal. Opinions as to an individual's membership of the Aboriginal community will be based on highly subjective personal, social and political reasons and consequently vary from person to person. As a result of the complexity inherent in defining an Aboriginal community in Tasmania, throughout these reasons I have referred generally to community recognition, or to recognition by a section of a community, rather than to a defined community.[183]

2002 Administrative Appeals Tribunal (AAT) decision of *Patmore (and Others) and the IIAC*

In the AAT Decision of *Patmore and Others v Independent Indigenous Advisory Committee*, 131 applicants (Bruce William Patmore was the first named of them) appealed against a decision of the IIAC to uphold the objections that had been made to the Council against each of the 131 applicants for enrolment to vote in the 2002 Tasmanian Regional Council to elect representative members to ATSIC. The *Aboriginal and Torres Strait Islander Commission Act 1989* (ATSIC Act) provided for the establishment of Regional Councils constituted by specified numbers of members elected from the Aboriginal and Torres Strait Islander people registered to vote on the electoral roll in each Council region. For the purposes of the 2002 ATSIC elections, Tasmania was designated a Region for the election of Council members and approximately 1300 people enrolled to vote in the elections.

Pursuant to s 113 of the ATSIC Act, the Minister was empowered to make rules for the conduct of Regional Council elections. The *Aboriginal and Torres Strait Islander Commission (Regional Council Election Rules)* were adopted in 1990 and included a specific Part on the Rules for the conduct of the Tasmanian Regional Council elections. Those Rules provided for both an assessment process to determine eligibility to vote and an appeal process against an adverse determination. The assessment of eligibility was undertaken by the IIAC – constituted by the Minister's appointment of nine Aboriginal people who then selected their own chairperson from amongst themselves. Consistent with the Rules, the Committee received a Provisional Roll of electors from the Electoral Commission and then made the Provisional Roll available for public inspection and the opportunity to object to the inclusion of people on the Roll on the basis of 'an honest belief that an applicant enrolled on the provisional roll [was] not an Indigenous person'.[184]

There were a large number of objections to people on the Provisional Roll and the Committee worked its way through those objections. Primarily on the basis of known descent and/or endorsement of claims of Aboriginal ancestry from the records of the Archive Office of Tasmania, the Committee approved approximately 700 people on the Electoral Roll and rejected the rest. 55 of those who the Committee did not approve for inclusion on the Roll appealed against the Committee's decision to the AAT. Before the AAT had concluded its hearing, the number of applicants had increased to 131.

182 Sanders, above n 66, 4.
183 (1998) 163 ALR 205, 218-219.
184 Rule 148.

The key issue for determination in both cases was the same: did the relevant individuals satisfy the requirements to be 'Aboriginal persons' within the meaning of s 4(1) of the ATSIC legislation or not? Only those who met the definition were entitled to vote in ATSIC elections and/or to nominate for election to an ATSIC Regional Council. That is probably the only similar feature of the two cases.

Obviously, the institutions themselves were different. Litigation in the Federal Court is significantly more formal than is review of an administrative decision in the AAT. Both cases involved parties to the dispute but there was no equivalence in the nature of proceedings. It is also true that the AAT was operating under a massive time constraint with the need to complete the hearing and deliver reasons for the decision literally within days so that those deemed eligible to vote in the looming ATSIC elections were free to do so. The AAT decision-makers themselves conceded that:

> We would have appreciated the opportunity to devote more time and space in our reasons both to the general discussion of the issues and the analysis of each application. However, in the end, our task is to decide who shall be included on an electoral roll for one election. If we do not give our decisions now they will have no utility because they will be too late. We must recognise, however, that our reasons will suffer from the speed and urgency with which they have been produced. We are in no doubt as to the correct result in every case but we must recognise that the recording of our fact finding and reasons is not as thorough and complete, and possibly not as accurate, as it would have been if we had had more time.[185]

Another key difference between the two cases involved the party carrying the onus of proof. In *Shaw v Wolf* the petitioners were appealing to the Federal Court to uphold their objections to the respondents nominated for election to the ATSIC Regional Council but in the AAT Decision the applicants were appealing to the AAT to overturn the decision to exclude them from the ATSIC electoral roll for the Tasmanian Regional Council. In the Federal Court the objectors were the petitioners and they carried the onus of proving that the respondents were not eligible to run for ATSIC Regional Council elections. In the AAT decision, those objected to (the 'objectees' one could say) were the petitioners and they (and not the IIAC) had the onus of establishing their entitlement to enrol to vote in the ATSIC Regional Council elections. It would be easy to assume that this single difference would have made it harder for the objectors in *Shaw v Wolf* than for the objectors in the AAT case to successfully preclude participation in ATSIC elections. Any such assumption is fallacious.

The AAT overturned the decision of the IIAC in the cases of 130 of 131 applicants and the only reason for the outlier was that that one particular applicant, Peter James Clements, did not appear in person for the hearing. Rather than decide that Clements chose not to appear and, therefore, to dismiss his application, the AAT decided his case on the basis of the documents before them. Those documents were insufficient to substantiate Clements' claim of Aboriginality and so the AAT upheld the decision of the IIAC. Clements subsequently successfully appealed the decision of the AAT to the Full Court of the Federal Court and the AAT decision was overturned.[186] However, the Full Court of the Federal Court indicated that it could not overturn the adverse decision of the IIAC against Clements because it could only do so by engaging with the facts and the material Clements tendered to the Court in support of his appeal. The Full Court of the Federal Court explained that it could not do that because the purpose for the creation of the electoral roll (and the decisions of the IIAC in relation to objections to some applying to register to vote in the 2002 elections) had now passed.[187]

The AAT results should be contrasted with the results in the Federal Court where the objecting petitioners carried the onus of proof to disprove the eligibility of the respondents who all nominated for election to the ATSIC Regional Council. The petitioners were able to satisfy the *Briginshaw* test and discharge their burden of proof against 2 of the 11 petitioners. It is true that 1 of those 2 unsuccessful respondents, Lance Lesage, did not appear before the Federal Court. That non-appearance made the petitioners' task easier. However, the case of the other unsuccessful respondent, Debbie Oakford, is instructive.

The specific case of Debbie Oakford's Aboriginality

In 1998 Justice Merkel found that the petitioners established to the requisite standard that Ms Oakford was ineligible to stand for election to the ATSIC Regional Council and yet, just 4 years later, the AAT found that this same Ms Oakford was eligible to vote in the 2002 elections for the ATSIC Regional Council. How was it possible that those two apparently irreconcilable outcomes could both have been achieved? The judicial decision-makers in both courts accepted Ms Oakford's evidence of self-identification and community recognition. The key difference lay in the approach of the respective judges to the question of Ms Oakford's Aboriginal descent.

185 AAT Decision [46].

186 *Clements v Independent Indigenous Advisory Committee* [2003] FCAFC 143.

187 Ibid [49] and [50].

Debbie Oakford claimed two distinct lines of Aboriginal descent – that her father was descended from Wottecowidyer (who had children with the sealer James Thompson) and that her mother was descended from Teekoolterme (who had children with John Thomas). It is uncontested that both Wottecowidyer and Teekoolterme were daughters of Mannalargenna. Ms Oakford's claims of lineage were consistent in both the Federal Court and the AAT.

On her father's side Ms Oakford traced her ancestry to Grace Brown who she claims was the daughter of Thomas Thompson Brown, a son of Wottecowidyer and James Thompson. Justice Merkel discussed this claim in some detail and explained that neither the historical records nor the material Ms Oakford produced in Court supported her descent claim. Of particular significance to Justice Merkel were the records indicating that Wottecowidyer's son Thomas Thompson travelled to Port Philip with George Augustus Robinson and did not return with Robinson to Van Diemen's Land (or that if he returned at some later date, he was not the father of Grace Brown). This version of the historical records was supported by the testimony of both Ms Robyn Eastley from the Archives Office of Tasmania and by the historian Dr Cassandra Pybus. Justice Merkel found that the petitioners had established that Thomas Thompson, son of Wottecowidyer, was not Ms Oakford's ancestor and, accordingly, that Ms Oakford did not have Aboriginal ancestry on her father's side.

On her mother's side Ms Oakford traced her ancestry to her great grandmother, Alice May Thomas, who she claimed was the daughter of James William Thomas and Margaret Weber and that James William Thomas was the son of Teekoolterme and John Thomas. Ms Oakford produced a family tree which included records of baptisms in the Wesleyan Church in Hobart and listing James William Thomas as a son of John Thomas and Ann Thomas. The petitioners agreed that Teekoolterme did have a son named James Thomas but that that person did not marry Margaret Weber. The marriage records of St David's Cathedral indicate that Margaret Weber married a John Thomas (of similar age to James Thomas's son of Teekoolterme) and Robyn Eastley from the Tasmanian Archives testified that in her view James Thomas and John Thomas were different people. Justice Merkel found the evidence of Ms Eastley persuasive and noted that Ms Oakford had not produced any evidence to contradict Ms Eastley's version of the ancestry of John Thomas. Accordingly, Justice Merkel found that the petitioners had established that John Thomas who married Margaret Weber was not a son of Teekoolterme and, therefore, that Ms Oakford did not have aboriginal ancestry on her mother's side.

In the AAT, these two same claimed lines of descent for Debbie Oakford were discussed. The AAT decision makers stated, *inter alia*, that:

> Grace Brown was the daughter of Thomas Thompson Brown (said to be Thomas the son of Wottecowidyer) and Elizabeth Williams. … Alice Thomas was the daughter of John Thomas (said to be James the son of Nimerana [also Teekoolterme] and Margaret Webber. … Mrs Oakford gave extensive evidence about the family's oral history of aboriginality from both lines and about the oral lines of descent. … We are entirely satisfied as to the oral history of both lines. There is no reason for us not to accept it. As usual the challenge comes from archival records. There is nothing to show definitively that Thomas Thompson Brown was the son of Wottecowidyer nor that James Thomas was the son of Nimerana. Indeed, there is reason to doubt that they were. However, as usual, this evidence does not negate aboriginality whether through the claimed lines or from some other source. We are satisfied as to aboriginal descent from the oral history and related evidence.[188]

With the greatest of respect to the AAT decision-makers and their extremely tight deadlines for the issuance of reasons for their decisions, the only possible way they could reach the decision they did in respect of Debra Oakford was to rely exclusively on oral history at the expense of archival records which, on the admission of the decision-makers themselves, suggested that the oral history was at best weak. Justice Merkel was not prepared to accord a similar weight to the same oral history: instead placing greater emphasis on the archival record and the testimony of those whose professional expertise lies in the interpretation and application of that record. One critical question here then is at what point does family oral tradition trump archival records?: in circumstances where there is a neutral absence of archival confirmation of descent?; or in circumstances where the archival records suggests a positive refutation of descent?

188 AAT Decision, [133], [134], [137] and [138]. Emphasis added.

2001 Supreme Court of Tasmania case of *Aboriginal Lands Act 1995 and Marianne Watson*

Marianne Watson appealed to the Supreme Court of Tasmania against a decision by the Chief Electoral Officer to uphold an objection to her registration to vote in elections for ALCT. Chief Justice Cox confirmed that Ms Watson carried the onus of proof in this case and so he was required to determine whether or not Ms Watson had established her Aboriginality within the meaning of the legislation.

Pursuant to the legislation, the Chief Electoral Officer had prepared guidelines on eligibility for enrolment to vote in ALCT elections. The Chief Electoral Officer outlined the same three-part test as established for ATSIC elections: Aboriginal ancestry; self-identification; and community recognition. Chief Justice Cox applied all three parts of the test for Aboriginality. Ms Watson traced her ancestry back to her great-grandmother Ellen Janet Bessell. Ms Watson believed that Ellen Bessel was Aboriginal and, while conceding that the historical record did not substantiate that view (Ellen's birth certificate listed her parents as John Bessell and Edith Bessell (nee Harris) and Ms Watson conceded that neither of them was Aboriginal), she argued that Ellen's actual mother was in fact Ada Amelia Baker (nee Harris). Ellen's marriage certificate listed her parents as Ada Amelia Baker and John Baker (not Bessell). Ms Watson argued that Ada Harris was the daughter of a Scottish convict named Janet Jamieson who, Ms Watson speculated, had had her daughter to an unidentified and unnamed Aboriginal man on one of the Furneaux Islands. Chief Justice Cox claimed that:

> With respect, it has to be said that this theory is speculative in the extreme and without any supporting evidence, documentary or otherwise. Whether Ellen was the daughter of Edith Harris or Ada Amelia Harris and the granddaughter of Janet Jamieson, there is no evidence of any connection with an Aboriginal person, let alone one who has been identified.[189]

Chief Justice Cox explained that both Justice Drummond in *Gibbs v Capewell* and Justice Merkel in *Shaw v Wolf* accepted that historical records are incomplete and sometimes inconsistent and so cannot be relied upon as the only possible evidence of descent. Justice Merkel also discussed the reality that due to racism, actual or perceived, many families were reticent to publicly acknowledge their Aboriginality such that, in some circumstances, oral history within a family may be important evidence of descent.

Chief Justice Cox observed that in Ms Watson's case, there was 'no evidence of any family oral history of descent from a known Aboriginal person and but little evidence of such a history connecting any ancestor of the appellant with an Aboriginal community.'[190] Ms Watson produced photographs of her great-grandmother Ellen and of some of Ellen's children and grandchildren. Ms Watson filed several affidavits from recognised leaders within the Aboriginal community who testified to the effect that Ellen and others in Ms Watson's family had Aboriginal features and so were Aboriginal. Affidavits to this effect were from Ida West, Mary Mallett, Merv Gower, Edmund Thomas, Brenda Hodge and Max McKercher. The Chief Justice accepted that the people in the photographs observed by those swearing affidavits were indeed Ellen and some of her children and grandchildren. The key question though was whether or not these claims were sufficient evidence of Ms Watson's Aboriginality.

The Chief Electoral Officer had established an advisory committee of 8 Aboriginal people to consider objections to inclusion on the Electoral Roll. That committee had met to consider the objection to Ms Watson's enrolment. The members of the committee met with the Chief Electoral Officer and with staff from the Tasmanian Archives and agreed 'firmly and unanimously' that the material provided by Ms Watson was insufficient to establish her Aboriginality. One member of the advisory committee, Greg Lehman, swore his own affidavit and indicated that, in his view, he did not consider the photographs of Ellen and her offspring offered any objective evidence of Ms Watson's claim to be of Aboriginal descent. Chief Justice Cox decided on the basis of all the evidence before him that Ms Watson had not established that she was entitled to be registered to vote in the ALCT elections.

189 [2001] TASSC 105, [7].

190 Ibid [8].