Aboriginal Land Council of Tasmania

Submission of Aboriginal Land Council of Tasmania in response to Consultation Paper on proposals for change *An Improved Model for Returning Land to Tasmanian's Aboriginal People*

24 July 2022

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United Nations Declarations on the Rights of Indigenous Peoples (UNDRIP)

This submission will refer to the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). UNDRIP is the most comprehensive international instrument on the collective rights of indigenous peoples the world over.

UNDRIP establishes a set of minimum standards for the 'survival, dignity and well-being of the indigenous people, further, it elaborates on existing human rights and fundamental freedoms as they apply to the special case of indigenous people'[1].

When UNDRIP went before by the United Nations General Assembly on 13 September 2007, Australia, was amongst 4 Nations out of 159, that voted against its adoption (Canada, New Zealand and the United States being the other three). However, in 2009, Australia reversed its position on UNDRIP and has now formally adopted the instrument.

Since 2009, Australia has repeatedly committed to taking measures to implement the UNDRIP, although tangible action to enshrine UNDRIP in a domestic sense has been slow. On 29 March 2022 the Australian Senate referred an inquiry into the application of UNDRIP in Australia to the *Legal and Constitutional Affairs References Committee* for inquiry. The findings of this inquiry are due to be handed down in September this year.

Australia's formal adoption of UNDRIP creates a moral obligation for all levels of Australian government to observe and uphold the rights set out in the instrument.

As Aboriginal people, Australia's adoption of UNDRIP affirms to us the Nation's commitment to our fundamental rights as Aboriginal people. This includes our right to self-determination, to make our own decisions and to be in control of our own affairs, organisations, and institutions.

ALCT submit much of what is proposed in the Consultation Paper '*An Improved Model for Returning Land to Tasmania's Aboriginal People*' stands to expunge our rights as set out in UNDRIP. It will also impugn the State's obligation to take the appropriate measures, including legislative measures, to achieve the ends of the UNDRIP (Article 38).

A complete copy of the UNDRIP is annexed to this submission.

[1]https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html

Clarifying the Scope and Intent of the Act:

The *Aboriginal Lands Act 1995* is how the State of Tasmania observes Aboriginal people's inherent right to redress in accordance with Article 28 of the UNDRIP. As the substitute title holder of Aboriginal land, on behalf of the Tasmanian Aboriginal people, the Aboriginal Land Council of Tasmania is the body created to facilitate this redress and as such plays a vital role in ensuring the just and equitable administration of the State.

Inclusion of an objective:

The Aboriginal Land Council of Tasmania (ALCT) supports the addition of a clear and unequivocal objective being added to the *Aboriginal Lands Act.* However, we say that any objective must be authored in the spirit of truth-telling and be direct as to the purpose of the legislation. An example of an appropriate objective could be:

> *An Act to return lands to the ownership of the Aboriginal people of Tasmania in the spirit of justice and reconciliation to remedy the historical legacy of violent dispossession.*

'Historic and cultural significance'

All land in Tasmania is historically and culturally significant to Aboriginal people.

As a matter of fact, Aboriginal people once owned the entirety of the Tasmanian landscape – our ancestral beings have left scatterings of our culture, art and language for us to find, rekindle and pass on, and our living ancestors, who owned the entirety of this land, are buried within its folds. Our history of dispossession is one of 219 years, whereas our history of ownership stretches back in time much longer. When the land is considered in this context, it is impossible to categorise any particular parcel of land as having more or less historic or cultural significance. Aboriginal assertions of ownership of the Tasmanian landmass have been consistent since European arrival. The consistency of these assertions was acknowledged by the then Premier, the Hon. Ray Groom, during his second reading speech of the Aboriginal Lands Bill 1995.

> *'On a number of occasions in the past, members of the Tasmanian Aboriginal community have asked monarchs and governments for a return of some land. As far back as 1846, Aborigines at Wybalenna petitioned Queen Victoria, seeking to become more independent and self-sufficient and requesting a land grant. In 1848 Thomas Beeton applied for a lease of Badger Island. In 1878 Aborigines from the Bass Strait islands petitioned to reserve Flinders Island for the Aboriginal community, and in 1922 and 1989 for the reserve and recreation oval respectively at Cape Barren Island'*

A further example can be found from 1883, when the heads of all the leading Aboriginal families living in tayritja/Bass Strait, being John Smith, John Maynard, Tom Mansell, George Everett, Henry Beeton Snr, and Philip Thomas publicly petitioned the government:

> *"We are under no obligation to the government. Whatever land they have reserved for our use is a token of their honesty, inasmuch as it has been given in lieu of that grand island (Tasmania) which they have taken from our ancestors*"[2]

The qualifications of 'historic and/or cultural significance' suggest that for land to be returned it must be viewed through the lens of the last 219 years of recorded history, whereas ALCT submits that an Act designed to redress the past injustice of forced dispossession and exile must be sensitive to the plight of the Tasmanian Aboriginal people, which is that our ownership of Tasmania was absolute, included the whole of the Tasmanian landmass and surrounding waters (not just parcels that were culturally significant or had historical value) and stretches far back in time.

[2] Tasmanian (Launceston, Tas: 1881 – 1895) Saturday 2 June 1883, page 593.

As such ALCT support the submission that the qualifiers of land being culturally or historically significant are unnecessary and reiterate our position that the objective of the Act should be simply to return land to Aboriginal people in the spirit of justice and reconciliation to remedy the historical legacy of violent dispossession, without the need for qualification. This approach is consistent with Article 26 UNDRIP.

'A broader definition of land'

Given the nature of the tenure to which the Act applies (that being land owned by the Crown) it would seem unnecessary to include a wider definition of 'land' within the Act as such a definition already exists within the *Crown Lands Act 1979* (Tas).

The *Crown Lands Act 1976* (Tas) defines land in the following terms:

> ***land*** *includes land covered by the sea or other waters, and the part of the sea or those waters covering that land.*

Defining the relationship or 'deeper understanding' Aboriginal people have to land

It is not necessary for the legislature to attempt to define, and subsequently, enshrine in legislation the 'deeper understanding' Aboriginal people have of land.

It must be remembered that the objective of the Act should be aimed at informing decision-makers. That is, guiding the Tasmanian Parliament and/or the administrative arm of government in how to return land to the Aboriginal people, and perhaps even why they should return it, but it should stop short of seeking to include a definition of why and/or how land is important to Aboriginal people.

In the words of renowned non-Aboriginal academic W E H Stanner:

> '*No English words are good enough to give a sense of the links between Aboriginal [people] and their homeland…A different tradition leaves us tongueless and earless towards this other world of meaning and significance. When we took what we call 'land' we took what to the [Aboriginal people] meant health, home, the source and locus of life and everlastingness of spirit*'[3]

There is a danger inherent in attempting to legislate what land means to Aboriginal people or seeking to define the relationship Aboriginal people have with land, and that is, if the definition is too prescriptive, it has the potential to create a set of legalistic elements, or test, which must be met for Aboriginal people to have land retuned to them.

Attempting to prescribe the relationship Aboriginal people have with land sits outside of the scope of the legislature. It is a relationship that is far to profound and personal to be reduced to piece of legislation. To Aboriginal people our land is sacred. Seeking to reduce the relationship we have to our land to a legal definition disregards the sacrosanctity of our connection. It is difficult to think of another instance in Australian law where the legislature has attempted to define the elements of any other kind of sacred relationship. This could mean that attempting to do so in the Tasmanian case might be grounds for Aboriginal people to seek the protections offered by anti-discrimination laws.

As Aboriginal people we are entitled maintain our sacred beliefs and customs with an element of privacy. We are entitled to exercise these rights free from any kind of discrimination, particularly our rights which are borne from our Aboriginal identity, which we submit is inextricably linked to our relationship to land. This is in line with Articles 2 and 12 of UNDRIP.

[3] WEH Stanner, *White Man Got No Dreaming: Essays 1938-1973*, ANU Press, Canberra, 1979 at 230

The question of a Preamble

It is conceded that a preamble has little value in the strict sense of the law, however, it can be a useful tool to assist decision-makers in understanding the essence of the Act and give a piece of legislation moral grounding (similar to how someone might refer to a second reading speech).

A preamble could assist decision-makers in contextualising the ethical and moral obligation to return land to Aboriginal ownership. An example of a preamble being used this way can be found in the equivalent legislation from Queensland[4]. However, unlike the Queensland example, which uses insensitive language such as 'European settlement', any preamble authored in the Tasmanian context, must be done in equal partnership with Aboriginal people, must use suitable language and must be written in the spirit of truth-telling. From 1803 to 1833, the Aboriginal population of Tasmania was reduced from an estimated 10,000 people down to 300[5]. In all of history, Tasmanian's shocking treatment of Aboriginal people is among the worst ever recorded[6] and a preamble, if one is to be included with the amended Act, must be reflective of that truth.

An example of a suitable preamble could be:

1. *Before European arrival, Tasmanian Aboriginal people owned the whole of the Tasmanian landmass, its islands, and its waters, both inland and offshore.*

2. *After European arrival, Tasmanian Aboriginal people were dispossessed of their land by force and violence.*

3. *Many Aboriginal people died in the defense of their land; others were exiled from it on the promise that one day their land would be returned to them.*

4. *Since that time, Tasmanian Aboriginal people have continuously asserted they are the rightful owners of Tasmania, and have sought to remind the Parliament, and all the people of Tasmania, of the promise that their lands would be returned to them.*

5. *The Parliament, on behalf of all the people of Tasmania, recongises the enduring spiritual, social, cultural and economic importance of the land to Tasmanian Aboriginal people and by virtue of this legislation, seeks to honor the promise to return to the Aboriginal people of Tasmania some of the land and waters which were stolen from them.*

[4] Aboriginal Land Act 1991 (Qld)
[5] 2013 ALCT submission – Improve the Model for Retuning Land to Aboriginal People
[6] *ibid*

Revision to ALCT Elections:

There is much to be said about the question of Aboriginality in Tasmania. It is a difficult and complex issue and has been addressed in many official documents as such. The *Pathway to Treaty and Truth-Telling Report*, referred to it as '*The Vexed Question of Aboriginality*[7]' and Dr Gardiner-Garden's 2003 Briefing Report to the Australian Parliament called '*Defining Aboriginality in* Australia' dedicated a chapter to it titled '*The Crisis in Tasmania*[8]'. It is a topic that is uncomfortable for non-Aboriginal people to engage with, and it is one that elicits unbridled passion from Aborigines.

The intent of ALCT in drafting our response to this section of the Consultation Paper is to stay out of the broader debate around Aboriginality (as much as possible) and focus our efforts at looking at the law, and the current justifications being championed to change it in the case of the *Aboriginal Lands Act 1995.*

What is being proposed is a change in the law which determines eligibility to participate in the ALCT election process. It is not strictly about the uncomfortable topic of determining Aboriginality. Although, as can be expected the uncomfortable topic of Aboriginality does necessitate some discussion in this context. No amount of clever legislative drafting will ever change whether someone is Aboriginal or not. That is an objective truth. However, what clever drafting *can* do, is render someone who is not Aboriginal eligible to use services and participate in processes which are set up to meet the needs of the Aboriginal community.

We are concerned the current amendments proposed by the Tasmanian Government stand to do just that.

Proposal to removal of s10 (c) (3) and changing the definition of an Aboriginal Person:

The current legislative approach:

At its heart, s10 (3) (c) of the Aboriginal Lands Act 1995 is about ensuring those who wish to participate in the process of standing and voting in ALCT elections are eligible to do so. It is also about ensuring Aboriginal people can scrutinise their own electoral process. Eligibility to participate in the ALCT process is made up of three requirements which are enunciated under s9 (1) of the current Act.

The current eligibility requirements are:

> 9. Who is entitled to be on the Roll
>
> A person is entitled to have his or her name entered on the Roll if the person –
>
> (a) is an Aboriginal person; and
>
> (b) resides in the electoral area in respect of which the person applies to have his or her name entered on the Roll; and
>
> (c) has attained the age of 18 years.

An Aboriginal person is defined at s3A of the Act:

> 3A. Aboriginal person
>
> (1) An Aboriginal person is a person who satisfies all the following requirements:

[7] Warner, K. McCormack, T. Kurnadi, F. *Pathway to Truth-Telling and Treaty* November 2021 at page 10.

[8] Gardiner-Garden, J. *Defining Aboriginality in Australia*. Current Issues Brief no 10 2002-03, Social Policy Group, Parliament of Australia (3 Feburary 2003)

(a) Aboriginal ancestry;

(b) self-identification as an Aboriginal person;

(c) communal recognition by members of the Aboriginal community.

(2) The onus of proving that a person satisfies the requirements referred to in subsection (1) lies on that person.

Section 10 (3) (c) states that

10. Preliminary Roll

…

(3) The Electoral Commissioner is to cause to be published in the Gazette and in 3 daily newspapers published and circulating in the State and by such other manner as the Electoral Commissioner considers appropriate, at least 60 days before nominations are called for election of members of the Council, a notice–

…

(c) stating that objections to the transfer of the name of a person from the Preliminary Roll to the Roll on the basis that the person is not an Aboriginal person may be lodged with the Electoral Commissioner before such date as is specified in the notice, being a date not earlier than 28 days after the publication of the notice.

As previously mentioned, Section 10 (3) (c) is a scrutineering provision. It exists to safeguard the integrity of the democratic process by ensuring those who wish to participate are eligible. This is not an unusual provision as far as democratic processes are concerned. For example, a person wishing to establish eligibility to enrol for Local Government elections is required to:

a person wishing to establish eligibility to enrol for local government elections is required to:

a) To be on the State roll for an address in a municipal area,

b) To own or occupy land in the municipal area or are the nominated representatives of a corporate body which owns or occupies land in the municipal area, are also eligible to enrol, but must lodge an application with the General Manager.

The underlined criteria for voting or standing in Local Government elections are subject to scrutiny and can be challenged. We say, a similar level of scrutiny should be afforded to the eligibility for participation in the ALCT election process. It should not be a free-for-all. Failure to provide the Aboriginal community with the same protections for election integrity as those afforded to non-Aboriginal people could be said to enliven anti-discrimination protections. Further, this approach most certainly impugns Articles 2, 5 and 27 UNDRIP.

Under the current Act, the objection process is overseen by the Tasmanian Electoral Commission which is a public institution beyond influence, and it is an institution that carries out all other official Tasmanian elections, without fear or favour. The ALCT election process is no different in this respect. The process in establishing eligibility is a transparent one, with the Tasmanian Electoral Commissioner preparing guidelines for establishing the eligibility requirements outlined in section 3A of the Act (that being the definition of Aboriginality) and those guidelines being made available to anyone who requests them. However, Just as an Italian citizen cannot vote or stand in the Australian election[9], so it should be that a non-Aboriginal person cannot vote or stand in the ALCT election.

[9] Re Canavan [2017] HCA 45

Although the Consultation Paper states that there is no comparable process in establishing eligibility in any other Australian jurisdictions, we say a similar process in establishing eligibility on the basis of ancestry exists for the Australian Senate.

The 45th Parliament was thrown into turmoil after a number of sitting Senators were found to have been ineligible to stand as candidates due to their ancestry. As a result the *Commonwealth Electoral Act 1918* was amended in 2019 to require candidates to complete a checklist relating to eligibility under section 44 of the Constitution as part of the nomination process. The Australian Electoral Commission is required to provide the documents relating to all successful candidates to the respective Houses for tabling. The Senate subsequently established a Register of Senators' Qualifications. The Register includes the material provided by the Australian Electoral Commission, as well as the citizenship statements made by Senators.

Case study: The Australian Senate (1998 – 2017) Comparable process
The identity crisis that hit federal politicians between 1998 and 2017 saw 15 people resign or removed from parliament for not being entirely Australian. Jacqui Lambie resigned for being Scottish; Barnaby Joyce was a Kiwi and Eric Abetz escaped scrutiny on a technicality for being German. To overcome this identity problem - the constitution defines eligibility as those who are Australian not having any allegiances to another country - the Senate installed a Register that places the onus on Senate candidates to prove their eligibility to stand. Candidates are now required to prove their place of birth, and supply details of their parents and grandparents.

It is further proposed in the Consultation Paper to substitute the definition at s3A of the Act with that of the '*broader more inclusive'* definition commonly adopted in Tasmania. In Tasmania, the definition of an Aboriginal person for the purpose of accessing Tasmanian Government services provided for Aboriginal people is enunciated on the Department of Communities, Office of Aboriginal Affairs website[10] . That website specifies that to be eligible to access Aboriginal Government programs one must:

1. Have Aboriginal ancestry, and
2. Self-identify as an Aboriginal person, and
3. be recognised as an Aboriginal person by the Aboriginal community in which they live or have lived.

On the face of it, the current criteria for establishing eligibility for participation in ALCT elections would appear to mirror this definition. However, in practice, the Tasmanian Government ignores its own criteria for establishing Aboriginality and adopts a different approach all together. In 2016, the Tasmanian Government announced it would change the Aboriginality criteria. The then Premier Will Hodgeman stated that "The major practical change of the new approach is that to access most Tasmanian Government services, Aboriginal people will no longer have to present documentary evidence of their Aboriginal ancestry"[11]. Since 2016, to qualify as being Aboriginal for the purpose of the Tasmanian Government an individual must submit a statutory declaration self-identifying that they are Aboriginal. This statutory declaration must be accompanied by 'Confirmation from an Aboriginal organisation.'[12] It is submitted in the Consultation Paper that the current Tasmanian approach is consistent with the Commonwealth Government's approach in defining an Aboriginal person. ALCT reject that submission. It is stated in the Consultation Paper that the proposed amendments will bring Aboriginal eligibility requirements in line with the 'general practice of the Commonwealth and other States and Territories', however, ALCT submit that the requirements to:

1. submit a statutory declaration, and
2. Provide proof of organisational membership

[10] www.communities.tas.gov.au [accessed 23 July 2022]
[11] Will Hodgeman online at www.preminer.tas.gov.au/releases [30 June 2016]
[12] Tasmanian Government Aboriginal Eligibility Form

do not form part of the criteria in establishing Aboriginality in any other State or Territory in Australia, including the Commonwealth, and in fact, providing proof from an organisation which derives its only authority from directors, has been categorically rejected as sufficient evidence for meeting the Commonwealth definition of being an Aboriginal person[13]. As it stands, the current Aboriginal eligibility criteria adopted by the State of Tasmania expunges the rights of Aboriginal people articulated at Articles 2, 3, 4, 5 and 33 of UNDRIP

The counter position that is often put to the Aboriginal community's complaint that the Tasmanian Government's definition of Aboriginality is weak, is that making a false statutory declaration (which is an element of the Tasmanian definition) is a serious criminal offence, and that this will act as deterrent for anybody considering making a false claim. However, since the introduction of the '*new inclusive Aboriginality policy*[14]' in 2016 there has not been a single prosecution bought by the State of Tasmania against any individual for making a false statutory declaration relating to a claim of Aboriginality. Curiously, ABS census figures show the Tasmanian Aboriginal population jumped from 23,572 to 30,186 in the same timeframe.

The proposed changes will mean if a person claims to be Aboriginal using the Tasmanian Government's Aboriginality criteria, they will automatically be entitled to participate in the ALCT elections without any course for review from anyone, much less the Aboriginal community as it our right articulated in Article 33 UNDRIP. Our experience is that the Tasmanian Government's current criteria/definition of what it is to be an Aboriginal person has led to the appropriation of Aboriginality by people that have no substantiative evidence of lineage and ancestry. It is a policy that is supported and facilitated by registered 'Aboriginal organisations' that have a vested interest in increasing their constituency as it supports their case for funding. Implementing this policy in the context of ALCT election process will, without a doubt, condemn the body to a future of conflict and unworkability when non-Aboriginal people are elected to represent the Aboriginal community. Given the astronomical jump in the numbers of people self-identifying as Aboriginal as a result of the Tasmanian Government criteria, we submit our concern is this scenario is not just a possibility, but an inevitability.

The current proposal to delete s10 (3) (c) and amend the definition of who is an Aboriginal person in the Aboriginal Lands Act will undermine the integrity of ALCT as a body, as well as:

- expunge our right as Aboriginal people to determine our membership and the membership and structure of our own institutions (Article 33 UNDRIP)
- expunge our right to determine, develop and maintain our own institutional structures in accordance with our customs (Article 34 UNDRIP)

The Consultation Paper proposes to reduce the involvement of the Tasmanian Electoral Commission. However, it is our firm position that the current structure and oversight from Tasmanian Electoral Commission, which includes an appeals process to the Supreme Court of Tasmania, observes our inherent right to have access to fair, independent, open, and transparent processes as articulated in Article 27 UNDRIPP. Whereas the current proposal completely extinguishes this right altogether with the result being that the ALCT electoral roll will be kept from the Aboriginal community and our ability to scrutineer our own democratic processes being abolished.

Although it is reported in the Consultation Paper that there is a '*widespread perception'* that the determination of Aboriginality under the Aboriginal Lands Act 1995 is '*restrictive and inequitable'*, the converse is in fact true. In theory and practice, the process for ALCT electoral participation is open, transparent, and public. If a dispute arises about eligibility, arbitration is conducted by independent public institutions such as the Tasmanian Electoral Commission in consultation with members of the Aboriginal community and the Tasmanian State Archivists, with the Supreme Court of Tasmania articulated as the forum for an aggrieved party to lodge an Appeal as specified in section 10 (7) of the Act. Both the Tasmanian Electoral Commission and the Supreme Court of Tasmania are well versed in carrying out their duties impartially and any claim to the contrary should be further substantiated lest it verges on being derisive.

[13] *Helmbright v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (No 2) [2021] FCA 647

[14] Will Hodgeman online at www.preminer.tas.gov.au/releases [30 June 2016]

The current Act applies equally to everybody and cannot be said to be restrictive or inequitable unless it is held that the onus of establishing one's eligibility to participate is somehow 'inequitable' and 'restrictive'. As it currently stands, **any** interested person can place their name on the preliminary roll to nominate and vote in an ALCT election, but to ensure the integrity of the body is maintained, that process has one condition, and that is, **if** an objection is raised as to a person's eligibility, the burden of establishing eligibility - on the balance of probabilities - falls to the person. Importantly, it should be noted that ability to object to an individual being placed on the ALCT roll is also an open, transparent, and public process. The preliminary roll is open for public inspection as specified in public notices, and objections can be lodged by anyone – it is completely unrestricted and can be accessed equally by any person in both seeking enrolment and lodging an objection. How such a process could accurately be described as restrictive and inequitable is difficult to comprehend.

The position put in the Consultation Paper is that the onus of establishing one's eligibility is '*unnecessarily adversarial*'. However, it is ALCT's position that it is a reasonable expectation of the Aboriginal community that individuals participating in ALCT elections are, as a matter of fact, Aboriginal, and can meet the Act's current definition of being so. It is not unfair or unjust that those individuals who seek to be involved in the ALCT democratic process are able to provide proof - on the balance of probabilities - that they are Aboriginal if they are asked to do so, equally it is not unfair or unjust to insist those who vote in Local Government elections live or own property in the municipality in which they cast their vote.

The importance of being able to establish eligibility/Aboriginality is incredibly important when it is considered what ALCT represents. ALCT as a body was created to hold title of returned lands on behalf of the Aboriginal people themselves. This is because it is a legal impossibility to issue to each and every Aboriginal person a title for land returned collectively to them. Concerns about the low voting numbers should be allayed by the knowledge that those who do participate in the ALCT electoral process, either as voters or nominees, are truly representative of the Aboriginal people. Conversely having large voting numbers is a meaningless measure of success if the majority of those votes are from people who are not able or willing to sustain their eligibility to participate on the balance of probabilities.

It is further put in the Consultation Paper that there has been concern that a *'key, decision-making Aboriginal body can be chosen by such as small proportion of the Aboriginal population'* but there are currently 626 Aboriginal people who appear on the ALCT roll and who must, by the very fact of their enrolment, find the process satisfactory. How many people claim the body is unrepresentative is not offered. Meaning, it is not immediately clear if the numbers outweigh the number of Aboriginal people currently engaged in the process. However, we note only .025% of respondents to the initial community consultation identified the current legislative process in establishing eligibility for participation in ALCT elections as an issue. A resounding 99.975% of those who participated in the community consultation either supported the current eligibility process or were silent on it. This is despite all participants being asked the explicit question - 'How could the current ALCT electoral process be improved to enable participation by greater numbers of Aboriginal people? The numerical data of those who are offended by the current Act is an important consideration, as if the criticism extends to only a handful of people, taking steps to change what is already an open, public, and transparent legislative regime to placate them would be disproportionate, and sets a dangerous precedent of a willingness to undertaking legislative change to facilitate the satisfaction of a few.

ALCT again reiterate our position, that the current ALCT process is open, transparent and public – those people who have concerns about the lack of representation and who are genuinely eligible to participate can and should proactively engage in the ALCT electoral process, if they do not wish to engage in the process as it is, despite their claim of being able to do so, their criticism becomes moot.

One justification championed in the Consultation Paper as to why the changes to the current Act are required is to bring the definition of what is an Aboriginal person in line with the Commonwealth and all other jurisdictions (see below). However, ALCT's position is that the definition in the Act is already consistent with Commonwealth definition in both substance and application, and any change to the Act could potentially open it up for challenge by virtue of Constitutional challenge.

The current legislative definition adopted by the Commonwealth under section 4 of the Aboriginal and Torres Strait Islander Act 2005 (Cth) is

> Aboriginal person means a person of the Aboriginal race of Australia

This definition was recently expanded on in the High Court of Australia in the case of *Love v The Commonwealth of Australia; Thoms v The Commonwealth of Australia* [2020] HCA 3, when the Court confirmed the tripartite test adopted by Brennan, J. in Mabo (No 2)[15]. That test, which is analogous to what is known as the 'working definition of Aboriginality' states that '*membership of the indigenous people depends on biological decent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority*'[16]. The tripartite test was again reaffirmed in the 2021 case of *Helmbright v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (No 2) [2021] FCA 647. This case is particularly relevant to Tasmania, as it involved an Applicant who was seeking to avoid deportation by claiming he enjoyed a special right to remain in Australia on account of being Tasmanian Aboriginal. Given the legislative definition of what it is to be an Aboriginal person at the Commonwealth level, and the case law interpreting that definition, we categorically reject the assertion made in the Consultation Paper that the eligibility criteria to participate in ALCT elections under the current Act is inconsistent with Commonwealth law. It is clear on the case law, that the Commonwealth definition of an Aboriginal person calls for those claiming it to establish:

> (a) they have Aboriginal ancestry;
>
> (b) they self-identify as an Aboriginal person;
>
> (c) they enjoy communal recognition by members of the Aboriginal community, which constitutes recognition by those who have a standing of traditional authority, and not just directors of Aboriginal corporations. (which clearly has ramifications for the current definition used by the Tasmanian Government).

Furthermore, when one or more of these elements is in doubt, the onus of proving that element falls to the person claiming Aboriginality. In this way, it would appear to us that the current definition of who is eligible to participate in ALCT elections as defined under section 9 read in conjunction with section 3A is perfectly consistent with the Commonwealth approach.

The Consultation Paper is deliberately deceptive in the statement that the findings of the Pathway to Truth-Telling and Treaty report 'are consistent with the Government's proposals[17]'. This is demonstrably not the case, with recommendations 8 and 9 of the Pathway to Truth-Telling and Treaty Report being completely different to what is proposed by the amendments to the Act.

The Treaty and Truth Telling Report found the following[18]:

> *"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*

[15] Mabo and Others v Queensland (No. 2) [1992] HCA 23

[16] Mabo and Others v Queensland (No. 2) [1992] HCA 23 at [69]

[17] Consultation Paper on Proposals for Change. *An Improved Model for Returning Land to Tasmania's Aboriginal People*, Message from the Minister, page 3.

[18] Warner, K. McCormack, T. Kurnadi, F. *Pathway to Truth-Telling and Treaty* November 2021 at page 10.

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"

It is clear to us that the authors of the Treaty and Truth-Telling Report were taking care not to expunge the right of Aboriginal people to determine their own membership in line with the Article 33 UNDRIP, whereas the current amendments proposed expunge this right completely.

Case studies: Aboriginality

More broadly, we say, the continuation of this utilising the current approach to establishing Aboriginal eligibility adopted by the Tasmanian Government is likely to be become increasingly problematic, and has implications which reach much farther than the Aboriginal Lands Act as will be shown by some of the following case studies.

Case Study: Marianne Watson 2001[19]

Establishing eligibility – Aboriginality

In 2001 Ms Marianne Watson lodged an appeal in the Supreme Court of Tasmania against the decision of the Tasmanian Electoral Commission to accept the three objections lodged against her inclusion on the ALCT electoral roll on the basis that she was not able to substantiate her claim that she was eligible.

Ms Watson appeared before the Chief Justice of the Supreme Court of Tasmania and provided evidence as to why she should be accepted on the roll. Ms Watson's evidence consisted of her own assertion that she was Aboriginal, her understanding of her family history and several affidavits from known Tasmanian Aboriginal elders stating that Ms Watson's photos of her ancestors '*looked like Aboriginal people*' and that when they had met members of her family, they '*looked like Aboriginal people*'.

In investigating whether to accept the objections to Ms Watson's inclusion on the ALCT roll the Tasmanian Electoral Commissioner appointed the advisory committee in line with the public guidelines at the time. That panel consisted of 8 Aboriginal people, including a representative of the Office of Aboriginal Affairs (which was then responsible for the administration of the Aboriginal Lands Act 1995) and also the State Archivists, Mr Ian Pearce, and the Senior Archivist of the State Archives, Ms Robyn Eastley, who had special expertise in the area of Aboriginal genealogy.

Ms Watson was not able substantiate her eligibility to be included on the roll and the Tasmanian Electoral Commissioner's objection to her inclusion on it was upheld by the Court.

The Chief Justice ultimately found: '*In order for someone to be described as an 'Aboriginal person' within the meaning of that term in the Act, some degree of Aboriginal descent is essential, although by itself a small degree of such descent is not sufficient*'

'In the present case, there is no documentary evidence of Aboriginal descent, there is no evidence of an oral history connecting the appellant to any historical personage and very little oral history of any connection with an Aboriginal group or tribe, such little history being the rather vague reference to [Ms Watson's ancestors] having come from the [Furneaux] Islands in an open boat. To my unpractised eye, the photographs are not definitive and according to the members of the advisory committee, they were not satisfied that the persons depicted were persons with Aboriginal ancestry'.

Members of Ms Waston's family have subsequently written public articles on the validity of the finding from the Supreme Court of Tasmania and concurring with the finding that their family are not of Aboriginal decent[20]

This case demonstrates, that if the current amendments to the Aboriginal Lands Act go through as proposed, a person with similar circumstances to Marianne Watson, who was not able to satisfy the Supreme Court of Tasmania that she is Aboriginal on the balance of probabilities, would still be eligible to stand and vote in ALCT elections, and the Aboriginal people of Tasmania would have no avenue to dispute his eligibility to participate

[19] Re The Aboriginal Lands Act 1995 and Re Marianne Watson (No 2) [2001] TASSC 105 (27 August 2001

[20] Seaborn, L. *A Mixed Up Family* [Online] https://lindaseaborn.medium.com/a-mixed-up-family-5e17a7a65c97 (accessed 24 July 2022)

Case study: Tony Brown 2006[21]

Establishing eligibility – Aboriginality

In 2006, Ms Ann Bleathman submitted several objections to people who had placed their name on the ALCT preliminary roll on the basis that they were 'not Aboriginal'. Most of these objections were answered by those to whom the objections related, and the objections were subsequently dismissed by the Tasmanian Electoral Commissioner.

One objection related to Mr Tony Brown. Mr Brown was a known member of the Tasmanian Aboriginal community; however, he did not respond to the Tasmanian Electoral Commissioner's request for further information to be considered in establishing in his eligibility to be included on the ALCT roll. The Electoral Commissioner, then consulted the advisory committee appointed in accordance with the *Aboriginal Lands Act 1995,* including the two state archivists to seek advice as to Mr Brown's eligibility. The advisory committee confirmed Mr Brown's eligibility and the Tasmanian State Archivists did not offer any information to the contrary. As such, the Tasmanian Electoral Commissioner was satisfied that Mr Brown was eligible to be placed on the ALCT roll.

Ms Bleathman was advised of this outcome and appealed the decision to the Supreme Court of Tasmania. Ms Bleathman objected to Mr Brown's inclusion of the ALCT roll on the basis that advice from the advisory committee and the state archivists was not sufficient to discharge the burden of proof at s3A of the Aboriginal Lands Act, and that burden could only be discharged by the individual who sought enrolment, and not through the advice of the advisory committee and state archivists.

However, the Court found that provisions s3A(2) and s10(4A) do not indicate an intention on the part of Parliament that the Electoral Commissioner should never base a decision to reject an objection solely on material from sources other than the person seeking enrolment. Finding 'It *is important to bear in mind the object or purpose of the legislation… Obviously the object of this legislation was to create a workable system for the enrolment of Aboriginal persons, and not others, for the purpose of electing the Council…*'

This case demonstrates that the Act in its current form should be constructed to be workable, while still allowing a for an element of scrutiny. It also demonstrates that in a case of objections, the Tasmanian Electoral Commissioner will engage with the process in as non-adversarial manner as possible to dispute eligibility to participate.

[21] *Bleathman v Taylor* [2007] TASSC 82

Case study: Kenrick Helmbright[22] (2021) claiming Tasmanian Aboriginality

Commonwealth definition of Aboriginality and standard applied

This case involved Mr Kenrick Helmbright, who was born in New Zealand and was a New Zealand citizen. Mr Helmbright was attempting to avoid deportation under section 501A(2) *Migration Act 1958* (Cth) - commonly referred to as 'failing the character test' by claiming he had special immunity from deportation in accordance with findings in the *Love and Thoms*[23] case. That case found that Aboriginal people could not be deported from Australia and were not *within the reach of the "aliens" power conferred by s 51(xix) of the Australian Constitution.*

Mr Helmbright's assertion of Aboriginality was supported by the melythina tiakana warrana Aboriginal Corporation (mtwAC).

However, Justice Mortimer found that Mr Helmbright's acceptance as an Aboriginal man by 'melythina tiakana warrana Aboriginal Corporation' did not satisfy the third limb of the tripartite test as set out in Mabo (No 2). Justice Mortimer held that although Mr Helmbright was recognised mtwAC he had not proven his recognition extended beyond the directors of that particular organisation and as such failed to establish that he was recognised as a Tasmanian Aboriginal man by Tasmanian Aboriginal 'elders or others enjoying traditional authority.' The court held that membership of mtwAC was determined by directors, who only had to be over 18 years of age and themselves qualified as members, and there was no evidence that the directors were 'elders' as traditionally understood. As such, the Court held they alone could not be considered to have the authority to bestow upon an individual the status of enjoying Aboriginal community recognition.

This is a particularly relevant example in the Tasmanian context, as the finding reiterates that Aboriginality in the Commonwealth context is contingent upon Aboriginal community recognition by those with traditional authority, and not upon confirmation of organisational membership as is currently the case in Tasmania.

If the current amendments to the Aboriginal Lands Act go through as proposed, a person with similar circumstances to Kenrick Helmbright, who stands to be deported for failing to establish that they are Aboriginal in accordance with Commonwealth law, would still be eligible to stand and vote in ALCT elections, and the Aboriginal people of Tasmania would have no avenue to dispute his participation

[22] *Helmbright v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (No 2) [2021] FCA 647

[23] *Love v The Commonwealth of Australia; Thoms v The Commonwealth of Australia [2020] HCA 3*

Case study: Shane Martin [24](2020) and claiming Tasmanian Aboriginality

Commonwealth definition of Aboriginality and standard applied

On 15 February 2020, Shane Martin, father of famed AFL footballer Dustin Martin, re-entered Australia after being deported sometime in 2016 pursuant to s501 (3) of the *Migration Act 1958* commonly, referred to as 'failing the good character test'.

Mr Martin was stopped at the airport by immigration officials who refused to issue him an entry visa ordinarily available to New Zealand citizens based on his 'character'. In the absence of being granted a visa, Mr Martin lodged an urgent application in the Federal Court of Australia seeking to prevent any further action that would see him removed from Australia based on the claim that he was a Tasmanian Aboriginal person.

If Mr Martin was in fact Aboriginal, his deportation would be unlawful in accordance with the decision of the High Court of Australia in *Love v The Commonwealth; Thoms v The Commonwealth* [2020] HCA 3. That decision found that Aboriginal people could not be deported from Australia and were not *within the reach of the "aliens" power conferred by s 51(xix) of the Australian Constitution.*

Mr Martin presented as proof of his claim of Aboriginality a signed letter, on letterhead from an Aboriginal organisation which was registered at the time the letter was authored.

The Federal Court of Australia rejected Mr Martin's case to remain in Australia based his claim of Aboriginality. The Federal court accepted the submission made by Counsel representing the Federal Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs that certification was but one part of establishing a person's Aboriginality, the other two parts of the test are that a person has Aboriginal decent and that they self-identify.

It can be assumed that Mr Martin would qualify as self-identifying given the nature of the claim he made before the Federal Court, and he had certification from a registered Aboriginal organisation that he was recognised as Aboriginal, but he did not present any evidence of Aboriginal ancestry.

If the current amendments to the Aboriginal Lands Act go through as proposed, a person with similar circumstances to Shane Martin, who stands to be deported for failing to establish that they were Aboriginal in accordance with Commonwealth law, would still be eligible to stand and vote in ALCT elections, and the Aboriginal people of Tasmania would have no avenue to dispute his eligibility to participate.

[24] *Martin v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCCA 3627

Case study: Tony Young (2006)

An Aboriginal organisation recognising an individual as being Aboriginal who is not Aboriginal

On 23 March 2006, a photo of Tony Young appeared on the front page of the Advocate under the heading *'Devonport man keen to renounce his Aboriginal status - I am not black'*[25]. The story involved a '*Devonport man who wished to renounce his recognition as an Aborigine because he has no Aboriginal blood in him*'.

Mr Young had been recognised as Aboriginal by the Circular Head Aboriginal Corporation (CHAC) in 2004, but after conducting research into his family history, found he was of Scottish decent. Mr Young stated in the article "*I feel like a Clayton's Aborigine at the moment….I just want to set the record straight*"[26]. Mr Young came to learn of his Scottish heritage after he sought to join another Aboriginal organisation that requested he provide a more thorough family history than had be accepted by CHAC. In response, Mr Young engaged the services of qualified genealogist who was able to clarify Mr Young's ancestry. Mr Young immediately sought to revoke his claim to Aboriginality and tendered a resignation of his membership with CHAC.

Extraordinarily, when CHAC were approached about the matter by The Advocate the spokesman for the organisation disputed Mr Young's claim that he was not Aboriginal, stating that CHAC had been able to trace Mr Young's ancestry back to an *'unknown'* Aboriginal. The spokesperson further stating '*As far as I'm concerned, he is Aboriginal*'[27]

In May that same year, the Advocate featured another story on the matter titled '*Still in the dark – Ancestry puzzle lingers*'[28]. In that article Mr Young is reported as having requested all his personal information back from CHAC. Again, Alan Wolf, spokesperson from the organisation disagreed with Mr Young's assertion that he was not Aboriginal, stating '*.. I am fairly certain he is Aboriginal*'. The article states that Mr Young was considering legal action stating "*If they have evidence of my Aboriginality, then they should produce it or admit it never existed*"[29].

If the amendments to the Aboriginal Lands Act go through as they are currently proposed, a person with similar circumstances to Tony Young, who is not Aboriginal and who knows they are not Aboriginal but continues to self-identify and is accepted by an Aboriginal organisation, would be eligible to vote and stand in ALCT elections, and the Aboriginal people of Tasmania would have no avenue to dispute his eligibility to participate.

[25] Agatyn, M '*I am not black*'. The Advocate, 23 March 2006. Pg 1.
[26] ibid
[27] ibid
[28] Author unknown '*Still in the dark – Ancestry puzzle lingers*'. The Advocate, 30 April 2006 Pg. Unknown
[29] ibid

Foreseeable consequences:

Throwing ALCT elections open to anyone without challenge or scrutiny would allow persons unknown to take over the Aboriginal Land Council from Aborigines because of their greater numbers. In 2021 census data based on the 2016 eligibility policy shows more people claim Aboriginality in Tasmania, by proportion of population, than any other state in Australia, and over five times more than its most comparable state, Victoria. Should ALCT elections be open to anyone who identifies as Aboriginal and is accepted by an Aboriginal organisation, the following consequences would almost certainly take place:

a) The new Council could change access arrangements on Aboriginal land and refuse permission for Aborigines to enter those lands. Anti-discrimination laws can be circumvented by land being handed over to organisations which allow access only to members. Such a legal move would close down the mutton birding islands and deny around 200 Aborigines annual access to the mutton bird islands;

b) Aborigines could be charged with trespass and be removed by police from Aboriginal land;

c) Internalised conflict and division about Aboriginal identity within ALCT rending the body disfunctional. The make-up of the elected Council would potentially include people who are unable to substantiate their Aboriginality. This will make decision making and other statutory functions impossible.

d) Investments in buildings and equipment by current land managers would be jeopardized. The new Council could order all infrastructure built by Aborigines at Preminghana, Badger and the four mutton bird islands to be removed;

e) Current leases and licences to both Aboriginal and non-Aboriginal people on Badger, Big Dog and Cape Barren could be jeopardized (see list attached);

f) Almost certainly, the Tasmanian government would be taken to court for demands for compensation for compulsory acquisition without compensation.

Simplification of method used to return land and Land management to local Aboriginal or regional Communities.

Disallowable instrument:

ALCT strongly support of the creation of a new disallowable instrument to return land to Aboriginal ownership. In the 219 years since European arrival, the Aboriginal community have experienced a 15-year period when we collectively enjoyed recognition of our right to own our land.

Since 2005, Aboriginal land return has ceased in the state of Tasmania. ALCT remain hopeful that amending the Act to allow land return via a disallowable instrument will enliven land return once more and the Aboriginal Lands Act can again be utilised the way it was intended. Put plainly, the aim of the Act is to remedy the historical legacy of dispossession of Aboriginal people. As stated by then Premier of Tasmania, the Hon. Ray Groom in his second reading speech of the Aboriginal Lands Bill 1995:

> *…the fact remains that to date no significant areas of land have been granted to the Aboriginal community by a Tasmanian government. For the first time in history, the circumstances are right to achieve tangible results. This bill amounts to an important social advance, not only for the Aboriginal community of Tasmania but for the broader Tasmanian community. Indeed, I consider that this bill is one of the most historic and culturally significant pieces of legislation to have been introduced into this Parliament.*

Conditions generally

Generally, land ownership means possessing and exercising rights over land to the exclusion of all others. In the special case of Aboriginal land, there are exceptions to this notion as evidence by all sections under Part 3 of the *Aboriginal Lands Act 1995.*

While Aboriginal land is not public land, the tenure classification falls short of providing the same rights enjoyed by those who hold freehold title. For example, every single parcel of Aboriginal land returned under the Act since its inception, has been returned with a condition that affords some level of public access.

Despite being the legal owners of the land, once land is returned and/or declared Aboriginal land, the Aboriginal community cannot move to sell or mortgage the land, rather we are obligated to hold the land in perpetuity. In return, the Aboriginal community are not liable for stamp duty when title is vested with ALCT on their behalf. These compromises are significant for both the State of Tasmania and the Aboriginal community, but they have been necessary to ensure that the model for Aboriginal land return is workable within the modern State.

However, what appears to be proposed in the Consultation Paper is that future land returned to the Aboriginal community will be returned with a suite of conditions, many of which will sit outside ensuring public access. It is ALCT's position that it is the State's responsibility to make possible Aboriginal land return, not to dictate the terms on which the land should be managed or utilised once it is returned. Such a proposal stands to impugn our inalienable right as Aboriginal people to be self-determining in the governance of our affairs and manage our land as we see fit (Articles: 3, 4, 5, 18, 19, 20, 25, 26, 27, 32, 33, 34, 35, 38 and 40 UNDRIP).

It must be remembered that the objective of Aboriginal land return (and subsequently Aboriginal land tenure) is rooted in remedying past injustice of dispossession, and it is ALCT's position that this carries with it an obligation that the land be returned with as many intact ownership rights as possible – this includes allowing Aboriginal people the right to decide how and who should manage the land on their behalf. This is in accordance with our most fundamental right to self-determination (Article 3,4,5 UNDRIP). Observing unconditional returns, in so far as practicable and reasonable, is especially important in the case of Tasmania, where it is accepted that because of the extent of the attempted genocide and dispossession of Aboriginal people from 1803 onwards, our common law Land Rights, including Native Title Rights are extinguished.

This was addressed by (then) Premier, the Hon Ray Groom in his second reading speech of the Aboriginal Lands Bill:

> *"There is… a deep understanding of their past connection with the land despite the severe cultural disruption which has occurred in the past two hundred years of European settlement. The Government wants to achieve progress in this area but believes that neither broad-based land rights which apply in a number of States nor native title would provide an effective answer in Tasmania. Native title exists in accordance with the laws and customs of indigenous people where those people have maintained their connection with the area and where their title has not been extinguished by acts of Government. The concept of native title is determined according to traditional laws and customs of titleholders…Native title is a legal right that can be protected, where appropriate, by legal action. It does not constitute freehold title but, in terms of acts that may be committed over land subject to native title, it confers on the holders equivalent rights to those enjoyed by freehold owners. All the advice we have received suggests that the continuing connection factor and the history of the Aboriginal community in this State makes it highly unlikely that a claim for native title could be sustained in Tasmania"*

It is our position, that in this context land returned should come with as little Government interference as is possible to facilitate a workable situation, and any conditions to be imposed upon the land should come with the free and informed consent of Aboriginal people as to not impugn or expunge Articles 3,4,5, 10, 19 and 32 UNDRIP.

'Local group' management conditions

ALCT reject the assertion that there are limited opportunities for local Aboriginal people to play a role in managing Aboriginal land. This is simply not true. Almost all current Aboriginal land managers live locally to the land they manage. What is most troubling with this mistaken, yet often repeated complaint, is the inherent premise that the local Aboriginal people who currently manage Aboriginal land are somehow not deserving of their position or are less deserving than those making the complaint.

As previously outlined, it is not the place of the Parliament or administrative arm Tasmanian Government to dictate who should be responsible for managing Aboriginal land once it is returned to Aboriginal ownership. This is paternalism at its worst and suggests that Aboriginal people cannot be trusted to manage their own land on their own terms. Imposing any conditions, much less a condition of who should be charged with who should manage Aboriginal land on behalf of the Aboriginal community, as a condition of its return expunges Articles: 3, 4, 5, 18, 19, 20, 25, 26, 27, 32, 33, 34, 35, 38 and 40, and also potentially impugns Articles 10 and 31 UNDRIP.

The evidence upon which the authors of the Consultation Paper appear to rely in establishing this assertion as fact seems to be limited to three submissions provided to the Legislative Council Select Committee in 2012-2013 in relation to the proposal to return Rebecca Creek. Those three submissions included

- one from Circular Head Council,
- one form Circular Head Aboriginal Corporation (CHAC),
- one from Circular Head Aboriginal Corporation employee, Mr Alan Wolf.

The weight that can be given to those submissions is limited given that they mainly consist of opinion and conjecture. The other 9 submissions received by that committee related to potential return of larapuna/Eddystone Point and can be summarised as being against Aboriginal land return of that area generally.

ALCT categorically reject the position often put by organisations such as CHAC (and their supporters) that their members are excluded from accessing Aboriginal land and/or excluded from participating in the ALCT electoral process. The strongest evidence ALCT can offer against this commonly expressed, and often repeated complaint, is that one of ALCTs current elected representatives for the North-West Coast region is a registered member of Circular Head Aboriginal Corporation. That Councillor has recently gone into their second 3-year term as a representative on ALCT.

Case study: local Aboriginal land management

All Aboriginal land is managed by Aboriginal people who live locally to the land.

Most Aboriginal land is remote and difficult to get to, however, ALCT make every endeavor to ensure Aboriginal land managers live locally to the land they manage. For example, all managers responsible for the care of preminghana are local to the North-West Coast area. They have all grown up in the area and are now raising their own families there. They are passionate about the land that they manage and have deep intergenerational connections to the area.

On truwuna/Cape Barren Island, all Aboriginal land managers are permanent residents of the island. truwuna/Cape Barren Island is unique as it is the only parcel of Aboriginal land to sustain a full-time, residential population. The Aboriginal land managers on turwuna/Cape Barren Island, are employed by the Aboriginal Land Council of Tasmania through a Commonwealth Government grant. This program commenced in 2014, and in 2021 funding was increased to continue to program through to 2028. The truwuna/Cape Barren land management team range in age from late 20s to late 50s and 6 out of 7 of the land managers employed by the program attended school on the island. The team have an intricate knowledge of the land they manage and have deep intergenerational connections to the island

In summarising his connection to different parcels of Aboriginal land one senior Aboriginal land manager explained:

'*My family and I have extensive experience and connection to the mutton bird islands and have birded nearly every island in tayritja/Bass Strait Islands. Mutton birding has been in [my] family for generations. My great grandfather and great grandmother had a shed and birded Babel Island, my grandfather birded many islands and was considered a great birder and my uncle had a commercial lease on titima/Trefoil. My older brothers, my father and my uncles have all worked on many of the islands, from Big Dog, Steep Head, Walkers, Three Hummock and titima/Trefoil just to name a few. [I wish to] continue this connection with the islands and to share the cultural harvest with my children so it can be continued in my family and other Aboriginal families to come*[30].'

Confusion around section 27

Although ALCT concedes that s27 of the current Act could be considered confusing as highlighted in the Consultation Paper, we reject to the proposition that public access conditions authored as a part of a disallowable instrument will go any way to ameliorating such confusion.

To the contrary, ALCT submit that having public access conditions authored as a part of a disallowable instrument, and then gazetted will likely cause further confusion for those wanting to ascertain rights of access to Aboriginal land. For example, where would one go to find a copy of the disallowable instrument and as such the conditions of public access attaching to a parcel of land? Hansard? A Government Department? A local member? The Land Council? How does one go about finding the correct copy of the Government gazette in which such conditions of access to Aboriginal land are to be published? How does this differ from accessing the Act online or contacting the Land Council directly?

ALCT submit that if indeed there is any confusion created by the current drafting of s27, it could be overcome by amending in-text references to the legislative Schedule and Central Plan Register references to include the names of the parcels of land to which each of the provisions refer. For example:

[30] David Lowery - senior land manager on his connection with tayritja/Bass Strait Islands through mutton birding.

27 (5) There is reserved to the public during daylight hours over the land referred to as ***piyura kitina/Risdon Cove***, as listed in item 11 of Schedule 3, a right of access, except when a significant Aboriginal cultural event is being held on that land.

Or

27 (6) There is included with the areas referred to as ***kutikina Cave, Ballawinne Cave*** and ***Wargata Mina Cave***, being items 5, 6, and 7 of Schedule 3, a right of access on foot over any Crown land between each of those areas and the nearest point of public access.

In terms of land returned to the Aboriginal community in the future, it is ALCTs submission that it would make little material difference as to where and/or how the public access conditions attached to land are published – whether in a piece of legislation or in a disallowable instrument, the general public's ability to be informed about their right of access to Aboriginal land would be best served by picking up the phone and contacting ALCT. By and large, this is the process that is followed now by many members of the public and Government departments.

As previously stated, it is ALCTs position that any land returned to Aboriginal ownership should come back with as few conditions as possible, public access (within reason) being the exception.

Case study: Access to Aboriginal land 2020-2021

Non-Aboriginal people and gaining access to Aboriginal land.

Below are some key examples in the last 24 months when advice on conditions of access has been sought by non-Aboriginal people in relation to accessing Aboriginal land.

Royal Australian Navy – Military exercise

In late 2021, the Royal Australian Navy contacted the Aboriginal Land Council of Tasmania requesting permission to go ashore on Badger Island and stay overnight for the purpose of a military exercise. Permission was granted and an offer was made for military personnel to access to ALCT infrastructure should they require.

Australian Hydrographic Office - Oceanic floor mapping

In mid-2021, the Australian Hydrographic Office contacted the Aboriginal Land Council of Tasmania requesting permission to land a helicopter on lungtalanana/Clarke Island and leave some sensors on the island for a short period to assist with an exercise in oceanic floor mapping. Permission was granted and offer was made for officers undertaking the mapping to access infrastructure on the island should they require.

lungtalanana/Clarke Island - Private holiday

In late 2020, a private group of 5 non-Aboriginal people contacted the Aboriginal Land Council of Tasmania requesting permission to holiday and explore on lungtalanana/Clarke Island. Permission was granted, and arrangements were made for the group to access to accommodation quarters. This included requesting the current land managers checked the gas, checked the water in the tanks, checked the wood supply prior to groups arrival and ensured there was motor vehicle available for the group upon arrival.

"Make greater use of the ability to declare land as Aboriginal land"

All land returned to the Aboriginal people of Tasmania via the parliamentary process to date has been returned under the guise of it being Aboriginal land.

All land gifted to the Aboriginal people of Tasmania by private benefactors or purchased with the direct involvement of the Aboriginal Land Council of Tasmania (acting on behalf of the Aboriginal people of Tasmania) has been declared Aboriginal land. Given this, it is unclear what is being proposed in the Consultation Paper about

'*making greater use of the ability to declare land as Aboriginal land*'. As it stands, the Aboriginal Land Council of Tasmania has proven since inception, with all the various configurations of the elected members who have sat on the Council over the last 27 years, that when title is vested with ALCT, a declaration is sought from the Minister to declare that land Aboriginal land.

Seeking such a declaration is both a legal and moral obligation, as ALCT was set up to hold land on behalf of all Aboriginal people[31]. Seeking a declaration of Aboriginal land is also pragmatic consideration. ALCTs abysmally low funding levels would render us unable to meet any obligation to pay annual rates on any land not so declared, as addressed in the Pathway to Treaty and Truth-Telling Report:

> *"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. 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 [from this budget] ... 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[32]"*

If what is being proposed in the Consultation Paper is that other corporate bodies, individuals and/or Government departments should be able to seek a declaration for land to be classified as Aboriginal land, be it as a freehold title or a parcel of reserved land, ALCT strongly reject that position.

It is our firm position Aboriginal land is a special tenure which is required to be owned collectively by all Aboriginal people, not by organisations, individuals and certainly not by Government departments who act as an agent of the Crown. This is because land return is seeking to remedy the forced dispossession of a people. The land was stolen from the Aboriginal people, and therefore the remedy must be enjoyed by the Aboriginal people, not by organisations, individuals, or Government departments. Article 28 UNDRIP addresses how the right to redress for stolen land attaches to people and not institutions. As such, given ALCT's special category as the entity which stands as a substitute for the Aboriginal people of Tasmania to hold title, it follows that ALCT must hold the title to a parcel of land **before** a declaration Aboriginal land can be made.

[31] s18 Aboriginal Lands Act 1995

[32] Warner, K. McCormack, T. Kurnadi, F. *Pathway to Truth-Telling and Treaty* November 2021

Identification of land suitable for transfer and Governance issues

Clear identification of the values and significance to Tasmanian Aboriginal people, of any land proposed for transfer:

ALCT have previously addressed the dangers of the legislature attempting to define how or why land is important to Tasmanian Aboriginal people in this submission and see no benefit in repeating those concerns here.

ALCT take exception to the position that there has been insufficient justification for the choice of land identified for return to Aboriginal ownership. All land that has been returned to Aboriginal ownership since 1995 has been 'culturally or historically' significant. Moreover, ALCT's most recent submissions identifying suitable parcels for return include:

- An area which sits on the boarder of the Tasmanian Wilderness World Heritage Area known as kooperoona naira. It should be noted that the TWWHA is listed as such because of its incredibly rich Aboriginal heritage.

- The Lagoons on Flinders Island, which contains the unmarked graves of our people. The Lagoons was the original site our people were imprisoned on Flinders Island before they were sent to wybalenna.

- wukalina/Mt William National Park - which sits within the homelands of the great chief Manalakina's homeland.

"Public Consultation on draft of any conditions specific to a certain return".

ALCT submit that land return should be from the Tasmanian Government, as agent of the Crown and acting on behalf of the people of Tasmania to the Aboriginal Land Council of Tasmania, acting on behalf of the Aboriginal people of Tasmania. The obligation of Parliament and administrative arm of government to return land to Aboriginal ownership arises out of a moral obligation to remedy the historical dispossession of the Tasmanian Aboriginal people, honouring this moral obligation is a demonstration of responsible Government.

ALCT remain cautious of the concept of public consultations which stand to impact on the terms of Aboriginal land return given that it was such a public consultation which stood to block the return of Rebecca Creek and larapuna/Eddystone Point to Aboriginal ownership. We are acutely aware of the racist sentiment that is often expressed as a part of public consultation processes surrounding land return.

Case study: Comments received during public consultation about the return of Rebecca Creek and larapuna/Eddystone Point to Aboriginal ownership (2012/2013.)

"One of my concerns if this land hand-back goes ahead is broadly the cost to the taxpayer and loss of income to the Government, Council and general community" – *Lindsay Dawe, Rosevale*

"Care of European heritage will never be a value of that culture. To that end, if Aboriginal people do continue to inhabit the area there will need to be long term, sustainable strict controls and supervision by an outside body…" *J Bicanic for Anson's Bay Progress Association*

"I was horrified to witness firsthand the denigration that occurred when the Aboriginal people first moved into the buildings. Consequently, despite the money that has been spent there in more recent times to tidy the area, I have little faith in the long term care unless there are strict controls and supervision" – Jenny Bicanic, Scottsdale

"if the Rebecca Creek Quarry and surrounds are handed back to the Tasmanian Aboriginal Land and Sea Council, it would be locked up and no longer available for the local community and not kept in the beautiful state it needs to be" – *Circular Head Aboriginal Corporation, Smithton*

The circular head Council believes that the Mount Cameron West land hand back has been an adjuct failure. The Broader community has been locked out if the area since it was manifested and a considerable amount of support resources (plant, equipment, infrastructure and financial) have been apparently wasted" – *D Quilliam Circular Head Council, Smithton*

"Ones ethnicity is determined by ones genetic make-up, and is not a matter of choice. It is determined for us by our parents. It is even more bizarre that anyone with less than 50% of the relevant DNA can legitimately choose to be "of the lesser" ethnic contribution. Of course people can believe what ever they wish to believe, but these flawed arguments should not be used as the basis for government policy in the form of hand-backs and donations extracted from the public purse. I have a small proportion of German blood in my ancestry, and have had a lifelong love of German classical music. If I were to claim German citizenship on these assertions, I would be regarded as a complete eccentric or worse!" – *Denis Lisson, Launceston*

"Present Government policies such as further land grants are encouraging division and the situation will get much worse with new Aboriginal Heritage legislation due before Parliament soon. The claim is that this follows moves for similar legislation on the mainland but ignores the fundamental fact that Tasmanian Aborigines are already urbanised and integrated into the Tasmanian Community. This is a completely different scenario to that on the mainland where there are still full blood Aboriginals living in quite different situations." – *John Coulson, Dilston*

Management plans being prepared and published:

ALCT reiterate our earlier position that Aboriginal land is a special class of tenure. It is not public land, yet Aboriginal people do not enjoy the same absolute rights that attach to hold freehold title.

Given that Aboriginal land is not strictly public land, it is difficult to understand what is gained by ensuring management plans for Aboriginal land are public documents. It is with some disappointment we note that ALCT have in the past 12 months made several approaches to our overseeing Government agencies requesting funds or in-kind support for the purpose of updating the management plans in place for all Aboriginal land. To date, no assistance either in-kind or otherwise has been forthcoming which would allow us to undertake this process.

ALCT take no issue with the requirement to publish an annual report provided we are funded to do so. ALCT would gladly welcome the opportunity to showcase to the broader Tasmanian community just how competent Aboriginal people are in managing our land.

END.