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Aboriginal Lands Act Review 2022

Introduction

There has been no impediment to the return of land to the Tasmanian Aboriginal community except for a lack of will of successive Governments to do so. This is in stark contrast to the efforts of Liberal Premiers Ray Groom and Tony Rundle and Labor Premiers Jim Bacon and Paul Lennon where commitment and leadership resulted in successful land returns. Much nonsense has been repeated about 'reasons' for the failure of governments to return land including purported difficulties with management of returned land and an alleged "vexed question" of white people expecting their ORIC registered organisations to be the recipient of management responsibilities even when they have not applied to be managers.

Basis of Aboriginal Land Rights

The return of land to the Aboriginal people is based in the undeniable fact that our ancestors were in and of this land since time immemorial before Captain James Cook declared the eastern seabord to belong to the English Crown in 1770 followed by Lieutenant Bowen's landing at piyura kitina (Risdon Cove) in 1803. The status of Aboriginal control and ownership of the land in Australia was considered thoroughly in the Gove Land Rights Case (Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141) by Justice Blackburn of the Northern Territory Supreme Court. Justice Blackburn considered himself bound by legal precedent in deciding that the common law doctrine of native title did not apply in Australia. It was not until the High Court of Australia handed down its Mabo decision in 1992 that native title was recognized as forming part of the law of Australia. Meanwhile, other forms of land return were being recognized in legislation throughout the Australian States.

Aboriginal land legislation in Tasmania was a relatively late phenomenon with earlier legislation having been passed in South Australia (Aboriginal Lands Trust Act SA 1966), Victoria (Aboriginal Lands Act Vic 1970), Western Australia (Aboriginal Affairs Planning Authority Act WA 1972), New South Wales (Aborigines (Amendment) Act NSW 1973) and Northern Territory (Aboriginal Land Rights Act 1976).

It was in that context that the Aboriginal community in Tasmania, led by the Tasmanian Aboriginal Centre, undertook a campaign to have land returned. After only one year of campaigning an Aboriginal Land Rights Petition was considered by the Tasmanian Government. The Government of

the day made the same mistakes then as it has recently and appointed a white 'Study Group' to investigate and report – Aborigines being excluded to ensure an "unbiased" and hence fatally flawed report. It took another 20 years of community effort before land return legislation was passed by the Tasmanian Parliament in 1995.

Aboriginal land legislation in Tasmania

There was extensive debate within the Aboriginal community in Tasmania in the 1970s, 1980s, and early 1990s about the best form of land return. Some considered that any form of legislation would be a betrayal of Aboriginal sovereignty as it would represent a gift from the white invaders. Others considered that legislation of the Tasmanian Parliament would be the easiest and most convenient form of land return. The debate then focused on whether the land title holding body should be the Aboriginal community controlled Tasmanian Aboriginal Land Council (later renamed Tasmanian Aboriginal Land and Sea Council, not to be confused with the body of that same name established by Rodney Dillon and John Clark in 2021). TALSC decided it did not want to be the land holding body, even if governments would agree it should be. The Aboriginal community therefore decided it should accept land being owned on its behalf by a statutory Aboriginal Land Council as long as its members were elected by the Tasmanian Aboriginal community and not appointed by government.

The Aboriginal Lands Act 1995 became an agreement negotiated with the Aboriginal community. It was the best agreement possible at that time even though it did not bestow all the land that was sought nor all the rights sought to be attached to that land – in particular, rights over the sea adjoining the returned land areas and exclusive fishing zones were rejected.

Scope and Intent of the Act

Our view is that whatever definition is adopted should be designed to enable the largest possible scope for return of what was once in our uncontested domain. We also consider it is not the role of government to define the significance of land to the Aboriginal community.

All land on this island was Aboriginal land, not contested by others until the English invasion. The distinction between land and sea is an invention of English law. The produce of the land, seas, and waterways was always part of the survival or our people. Our attempts to have that recognized in the 1995 Aboriginal lands legislation did not succeed. This review is an opportunity to correct that failure.

The purpose of the legislation is to provide the means for the return of land to its rightful and original owners. It would serve no useful purpose to attempt to define any particular meaning of land to the Aboriginal community at this particular point in time especially given that the community's relationship with its land and heritage continues to evolve.

ALCT elections

We do not support the proposed changes to the current process as it will allow non Aboriginal people to join what is supposed to be an ABORIGINAL Land Council. If there is a better way to achieve this outcome rather than an objection process, we would be pleased to consider it. If the government intends to increase the role of the Aboriginal community in deciding who is eligible to

vote then we would reconsider our objection; otherwise the role of the independent Electoral Commissioner remains an acceptable compromise.

If the Hodgman government's new "eligibility criteria" are allowed to determine who can vote in ALCT elections, it will almost certainly cease to be an Aboriginal body. New "reset" criteria do not require any proof of the most fundamental fact – that a person has Aboriginal ancestors. All that is required is for a person to sign an affidavit – and there has never been a penalty imposed on anyone for making a false declaration under this policy. This is despite the overwhelming evidence that people do most certainly claim to be Aboriginal when they are not.

There has been no better system suggested for determining who can vote than the current system under the supervision of the Tasmanian Chief Electoral Officer. The Aboriginal community agreed to that system knowing that governments would not approve any system under the total control of Aboriginal people. Now that the system has not returned the results wanted by government, even the independent office of Chief Electoral Officer is being called into question.

Despite the suggestion that the Chief Electoral Officer disagrees with the current system, we can find no evidence for that assertion. The Warner/McCormack report says the Chief Electoral Officer would prefer the system to enable objections to be lodged at any time rather than in a short time-frame immediately before an election. We support that suggestion.

The reasons given in the Discussion and Consultation papers, and in the Warner/McCormack report, of the need for a different system of determining eligibility for ALCT voting do not stand up to scrutiny. One claims there is a requirement for growing up in culture that many cannot do which deters people; the other claims it is the insult to be asked to give details of ancestry that deters voters. With no information about who is making these claims, it is impossible to refute the assertions – although we do know most Aboriginal people are happy to say which family they belong to. None of the people who now claim traditional family ownership of the Tasman Peninsula, far north west, and far south, give any evidence of direct ancestry. Some even claim traditional family ownership of the far north west whilst also claiming direct ancestry from people of the north east, all without naming even one known Aboriginal ancestor.

Another reason given for changing the criteria for voting in ALCT elections is the low enrolment and voter participation. Our explanation for this in the first round of consultations did not make it to any feedback summary nor indeed to this second round of consultation. There are several explanations including:

- The often boring nature of governance meetings;
- The impost on the time of individuals who receive no compensation for their time;
- The intrusion onto the time of Aboriginal families with meetings often being held at weekends;
- The financial cost of participation in voluntary committees;
- A trust by Aboriginal community in the integrity of those they know in putting themselves forward for election;
- A reluctance to choose between Aboriginal candidates of equal value;
- Confusion between which 'Land Council' (now 3 different entities in recent years);
- Lack of staff and resources for ALCT to encourage wider participation;
- Voluntary voting (which we support);

In addition, the 'low voter enrolment' alleged for ALCT says more about the authors of the consultation papers than about the interest of the Aboriginal community. If governments really wanted to know about the voting aspirations of Aboriginal community members, it would have been a simple matter to commission surveys on that matter.

A quick look at voting and member participation from publically available records in other registered organisations in this State reveals that:

- Statewide and Commonwealth funded Aboriginal Corporation of Tasmania Legal Services has 7 members , 6 of whom are the Board Directors
- Statewide ORIC registered Land and Sea Aboriginal Corporation Tasmania has 8 members and 7 Board Directors, 5 of whom are also Directors of the first mentioned organization. This was the organization gifted abalone quotas by the Tasmanian government recently
- 2 of those member/directors, Prouse and Dillon, are also Directors of Weeta Poona Aboriginal Corporation along with Dillon's wife and his wife's daughter
- Dillon and his son are also Directors of SETAC
- Membership of the first two organisations listed above is restricted to members of TRACA organisations thus further excluding the vast majority of the Aboriginal community.

This domination of Aboriginal corporations by prominent members of the TRACCA Alliance with accountability only to themselves should surely be a greater concern to the Government than the 135 people who voted in the last ALCT election. It could be seen that the dominance of Clark, Dillon and their families and associates is the equivalent of the 'branch stacking' in political parties that has caused the ire of Integrity Commissions, where they exist.

In light of this almost monopoly of organisations by the same small number of individuals (John Clark and family, Diane Baldock, Rodney Dillon with wives and children, Patsy Cameron nominee Rod Anders, Hall family of Tasman Peninsula with a few others added) it is clear that the voting numbers of ALCT represent far greater Aboriginal participation than the recently incorporated bodies represented by TRACA (and its constituent organisations usually representing themselves as independent organisations and hence having many more than one voice in the recent round of government consultations.)

Government funding of an Aboriginal community survey and education campaign would make much more sense than removal of the requirement for voters to be Aboriginal people if the aim of the proposal is to increase the number of Aboriginal people voting in ALCT elections.

In anticipation of an assertion that Courts and Tribunals have found people to be Aboriginal on the basis of oral histories rather than historical or genealogical evidence, we say again that it is impossible to prove a negative and the onus should remain on those asserting Aboriginal ancestry to prove it. In the only court case that has adopted that standard way of proceeding, the applicant failed to prove Aboriginal ancestry before Chief Justice Cox of the Tasmanian Supreme Court (Re: Watson (No 2) [2001] TASSC 105.

Other sources of historical information relevant to enquiries about the Aboriginal ancestry of 'local communities' include the many books about the north west and Circular Head by ex-Advocate reporter and author Kerry Pink; Robyn Friend, We Who Are Not Here, about the Huon Valley; and the 7 books about the history of Port Cygnet by David Coad. With his books spanning several decades of local history, the only Aboriginal people Kerry Pink refers to are the mutton birders from the Furneaux Islands who did seasonal birding on Titima/Trefoil Island; Robyn Friend gives stories from known Aboriginal families together with others claiming to be Aboriginal but with the same

stories and allowing them to remain anonymous and not open to genealogical nor proper oral history scrutiny; and David Coad's extensive studies give no indication of the long-hidden history of the recently created Melukerdee descendants who seem to make up the majority of current SETAC members.

Simplification of land transfer process

The proposal to simplify the return of Crown land to ALCT is supported in principle as long as it is not accompanied by further restrictions on ALCT's management powers; and the case for an increased ability to have land declared as Aboriginal land is not made out.

The rationale for the proposed change causes concern that this proposal is more about making it easier for government to impose conditions on the return of land. There should be no need to impose any conditions on land returns especially if it is accepted that the return of land is intended as some small compensation for the original invasion and dispossession of all land on the islands.

There are existing mechanisms for the transfer of Crown land that can be easily used by governments that have the will and the leadership to return to us just a small part of what was once ours.

Land management role for local or regional Aboriginal community organisations

While none of the documents define these terms, it is clear that the intention is for government to specify in the new instrument of transfer which group must be given management of each parcel of returned land. This consequence would remove any need for ALCT to exist given its role is to hold title and oversee management of land on behalf of all Aboriginal people.

The intention to specify "consolidated details of access rights" is vague and unclear. The reference to land being "freely available to access" both assumes, wrongly, that is not already the case and ignores the need for land managers to actually manage land on behalf of all Aboriginal people.

The history of parochial disputes about the return of land to the Aboriginal community has not been documented in the government documents associated with this review. That has enabled the expansion of the view that ALCT has ignored the voices of 'regional and local communities' in their role of land owners on behalf of the entire Tasmanian Aboriginal community.

The Flinders Island Aboriginal Association opposed the return of Wybalenna to ALCT on the grounds that they believed the land should be returned to their organization. That view ignored the fact the entire Tasmanian Aboriginal community has connections to Wybalenna and ignored the scheme of the Act that vests title to land in ALCT and management to local bodies.

It also ignores the history of the development of Aboriginal community representative bodies in this State. Apart from the island community organisations, there was only one Aboriginal organization on mainland Tasmania until the individual voting scheme of the Regional Councils of the Aboriginal and Torres Strait Islander Commission led to a proliferation of registered organisations in the 1990s. It was clear that those organisations were inspired by people needing a large electorate for voting purposes and had nothing at all to do with the existence of separate Aboriginal 'communities'.

In that way a large number of small organisations came into existence which governments found convenient to call "local organisations". FIAA could also be called a "local organization" despite the

fact that it is large and has a presence outside its local area. FIAA refused to accept the delegation of management for Wybalenna and there seems to have been no call from other organisations with land management experience. This seems to have been an invented need rather than a real one.

TRACA organisations have continued at every opportunity to spread the myth that they have been locked out of Aboriginal land owned by ALCT and managed by TAC. This reached new depths in the Cameron/Dillon Talking Point published in The Mercury and available on the TRACA web sites where they accuse TAC CEO of being factually incorrect but without specifying how. It is easy enough to prove that, for example, all Aboriginal people are invited to activities and events held on Aboriginal land yet still they allege they have been prohibited from attending. This serves their political purposes but is demonstrably untrue.

The mere repetition of false allegations might be persuasive to some politicians seeking re-election but that does not make them true. The Consultation Paper says there was a "significant concern" about local groups being excluded from Aboriginal land and its management and this is said to be backed up by references to the same allegations made to a Legislative Council Select Committee and in the untested conversations held with Warner and McCormack. We say in return that Dillon, Cameron, Six Rivers, and FIAA have never been excluded from land managed by TAC and this proposal is entirely unnecessary. It would be a very significant breach of Aboriginal self determination.

The Consultation Paper has a perplexing reference to land that has local or regional significance as opposed to land that is of interest to all Aboriginal people in the State. This false dichotomy reveals a very real lack of understanding of the Aboriginal community's attachment to land by the authors.

The proposal to put further restrictions on Aboriginal ownership of returned land is also firmly opposed. The requirement of public access has caused considerable friction between Aboriginal people and others, quite unnecessarily. Now that our ownership of some land is uncontested, it is quite usual for the public to seek access in the same way they would seek access to purely private land, that is, by request to the owners or managers. That method has been used very effectively where Aboriginal title to the land has been respected rather than used as a political tactic as it was in the early days of the return of land in the north west.

A significant barrier to the government proposal on this matter is the lack of funding by the State Government for the management of Aboriginal land. We would be heartened if the Tasmanian Government decided to change its practice of decades to start funding the management of Aboriginal land in this State. It is now only the Commonwealth Government that funds Aboriginal land management and it is only the land managers which are funded, not ALCT in its land holding capacity. Even given that scenario, the Tasmanian Government still insists on competing with the Aboriginal community controlled sector for the limited land management funds available from the Commonwealth. There is no mention in the papers of the funding the State Government is prepared to commit to achieve its stated purposes.

Identification of land suitable for transfer

The proposal is for the identification of values and significance of land proposed to be returned, criteria for evaluation of other land proposed for return, and statements of local and regional or Statewide significance. We disagree with the proposals.

The criteria suggested would be more relevant to a land fund to which groups could apply for funds to purchase land not available for direct return such as occurs with the Indigenous Land and Sea Corporation.

The Aboriginal community has, for the most part, come to accept that it is only unallocated Crown land that can be available for return to the original owners. Of course it is entirely possible for governments and others to purchase land for the Aboriginal community. While some individuals have done exactly that, the major funders return land on strict conditions including the requirement for conservation covenants. While this is usually quite acceptable for land held under inalienable title, there are other circumstances in which the community would prefer land to be more commercially usable, for housing and agriculture for example. In those cases, the benefits of having land declared as Aboriginal land would likely be outweighed by the restrictions that status bestows.

In the past we have had to identify specific values as part of the need to convince politicians that the land should be returned. Even that did not work in the case of Larapuna and Rebecca Creek where Legislative Councillors Rattray and Forrest, amongst others, voted in accordance with some wishes expressed within their own electorates rather than in the interests of the Aboriginal community overall. This is a good indication of the need for Aboriginal electorates to represent Aboriginal community interests in Parliament and other goals consistent with Treaty.

There is no justification for the claims of lack of transparency and clarity alleged in the Consultation Paper. On several occasions we have already identified areas of Crown land for return.

We suggest the following statement by white Australian author Xavier Herbert as the appropriate framework to guide decisions about land returns:

> "Until we give back to the black man just a bit of the land that was his and give it back without provisos, without strings to snatch it back, without anything but complete generosity of spirit in concession for the evil we have done him – until we do that, we shall remain what we have always been so far: a community of thieves."

Governance issues

The proposal is for ALCT to be required to publish an Annual Report and Management Plans for each area of Aboriginal land. This proposal ignores the resource implications of such requirements and the current reporting obligations of Aboriginal land managers.

The government proposal to require ALCT to publish an Annual Report and land management plans makes no mention of the small amount of funding it currently gives to ALCT. The additional obligations proposed would need to be costed and funded if the proposals are to serve any useful purpose. The Tasmanian government has never funded ALCT commensurate with its responsibilities and placing further administrative burdens without funds to carry out those extra requirements would be a recipe for failure.

The Consultation Paper ignores the relationship of ALCT with its land managing delegates and the report to Government by Professors Warner and McCormack misrepresented the nature of that relationship. The allegations of some lack of propriety in the closeness of the relationship between ALCT and TAC ignores the facts that:

- TAC is funded by the Commonwealth Government under its Indigenous Protected Areas and Working on Country/Indigenous Rangers programs to manage the Aboriginal lands under delegation from ALCT; it is TAC that receives and accounts for the funds, not ALCT.
- ALCT is so poorly funded by the Tasmanian Government that the appearance of transparency through the leasing of commercial premises was imposing an unreasonable impost on ALCT finances and hence ALCT resumed its tenancy in TAC premises. In many similar circumstances, this cost saving through co-location is highly commended.
- It would be surprising to find that any other organization had sought to become the managers of Aboriginal land before or at the time of TAC being granted management responsibility and in the case of FIAA, that responsibility was refused.
- TAC has contracts with various government instrumentalities that require it to account and report on its land management functions. These reports are submitted as part of normal public funding accountability. No concerns have been raised about this reporting.
- TAC has agreed to the publication of land management updates and land management plans as part of the performance indicators for the Commonwealth funding it receives. These reports are already publicly available on the TAC web site (currently being upgraded for ease of access). No other Aboriginal land owning or land managing body in this State appears to have similar accountability; and as our accountability is under delegation from ALCT as the formal land owners, we consider this proposal to be quite unnecessary.
- It is ironic indeed that the Consultation Paper promotes education of the white community as a reason for requiring further reporting and accountability of ALCT without any commitment to funding those extra responsibilities – to the victors belong the spoils?

The Review Process

A review process that has improvement of transparency and accountability as its aims should not be so lacking in those qualities itself.

What is clear is the Government's "Reset Agenda", claimed by some to have resulted from 'love-bombing', is firmly based on denying our identity as one Aboriginal community and instead promoting the notion that there exist in this State a whole plethora of local and regional Aboriginal communities. This is demonstrably false. It is used by governments, however, to promote the notion of disagreements within the Aboriginal community and to give credibility to the demands of those organisations which seek to talk up their own importance at the expense of the needs of the Aboriginal community generally.

That process is clearly at work in the Aboriginal Lands Act review process. The process has been so complicated, convoluted and slow that it is surprising any Aboriginal community interest has been maintained. To get a proper understanding of what is now proposed, it is necessary to take into account at least 4 separate but related documents; and even then some of the changes now proposed are far from clear.

An examination of the use made of the submissions arising from the original Discussion Paper of 2018 is instructive. Those submissions were said to be summarized and analysed in the Consultation and Stakeholder Feedback Report: Improving the Model for the Return of Land to Aboriginal Communities in 2019. This second Consultation Paper is about proposals for change and is said to arise from the previous consultations. We consider it does not accurately reflect the feedback previously given, although it is difficult to establish given the submissions are not currently available.

The chart shows how many times the first Consultation Paper made reference to the submissions received. It will be interesting to see who made the most cited submissions when that information becomes available (except for the anonymous submissions).

Number of citations made by the government summary	Number of submissions cited	Submission numbers
1 citation	11 submissions	Submission Nos. 7, 10, 20, 24, 80, 81, 82, 83, 95, 109, 149
2 citations	1 submission	Submission No. 91
3 citations	2 submissions	Submission Nos. 21, 84
4 citations	2 submissions	Submission Nos. 22, 103
5 citations	2 submissions	Submission Nos. 86, 92
6 citations	3 submissions	Submission Nos. 27 ,87, 93
8 citations	1 submission	Submission No. 89
9 citations	1 submission	Submission No. 23
11 citations	1 submission	Submission No. 148
23 citations	1 submission	Submission No. 42

As the chart shows, a large number of the submissions were not referred to in the Consultation Paper. Even including the 11 submissions which were cited on only 1 occasion, only 25 of the 151 submissions were referred to at all.

A huge 38 of the citations or references to submissions made in the Consultation Paper were anonymous (submission numbers 42, 148, and 103) and the name of the submission writers as well as the content of the submissions will not be made public. This puts a very large dent in the transparency of the process.

Given this problem, is it possible that the Consultation Paper manages nevertheless to represent properly the views of those most affected by the proposed changes to the Act?

The Consultation and Stakeholder Feedback Report published in 2018 reports that 112 of the 151 submissions received on the original Discussion Paper were “form” letters and 85 of those wanted no change to the present ALCT arrangement. This contradicts the conclusion that there was a “general view” that the current model needs improvement (p. 4).

It seems clear from the Consultation Paper that the wishes of the majority of the Aboriginal people who contributed to the original Discussion Paper are ignored in this latest round of proposals for change. The nature of those changes was indicated in the former title of the review, Improving the model for returning land to Aboriginal communities. This determination to insist on the divisions inherent in the word “communities” is continued in the latest Consultation Paper which insists the proposals are an “improved model” for returning land even though that model is not supported by the Aboriginal community. To make matters worse, the Consultation Paper quite wrongly pretends that the proposals will overcome inequities and sources of conflict between Aboriginal people (p. 9).

The Minister’s message at the front of the Consultation Paper says these most recent proposals are consistent with the recommendations of the Warner/McCormack report on Treaty and Truth Telling. That is not entirely true with some recommendations ignored altogether (extra funding for ALCT for

example) and some critical areas left vague and ambiguous (changed method of determining eligibility to vote for example). Many of their other recommendations arose from what an unspecified number of people told them without others being given an opportunity to refute what amounted to allegations against them (the relationship between ALCT and TAC for example).

There is evidence to suggest the review process has been fatally flawed and should be abandoned.

We hope the following expression of attachment to country and reaction to the atrocities that have been committed throughout this country will resonate with those who now find themselves in control of our future relationship with our land and cause them to reflect on the need for change. The poem is written by Drr Sue Jean Stanton, an Aboriginal academic of Bachelor College when reflecting on travelling through massacre sites in Western Australia. It speaks to all of us and we hope it speaks to all of you.

Pinjarra

I heard the whispering through the trees
It was the whispers of old women
It was concern.
I heard the shouting
above me, around me, in me.
It was the shouting of old men, young men
It was fear.
I heard the sighing
floating, hanging in the air.
It was the sighing of young women
It was despair.
I heard the crying of the children
girls and boys.
It was the crying that comes with destruction It was the cry of war.
If you walk through this country
anytime
anywhere
You will hear those sounds,
if you care.

(Sue Jean Stanton).