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Discussion paper: Improving the model for returning land to the Aboriginal community

Background

Aboriginal people have a profound connection to the Tasmanian landscape. Connection to country, the health of land and water, and a responsibility to care for it, is central to Aboriginal culture and identity. For Aboriginal people, this relationship to land and country is much deeper than contemporary notions of land ownership and use.

The return of land to Tasmania's Aboriginal people has been an important way to progress reconciliation between Aboriginal and non-Aboriginal Tasmanians. To date, the Tasmanian Government has returned 55,617 hectares of culturally and historically significant Crown land to the Aboriginal community. This includes significant sites at *putalina* (Oyster Cove), Risdon Cove, Wybalenna and Cape Barren Island (see Table I – Land vested, or acquired through the Aboriginal Lands Act 1995, or involving the Indigenous Land Corporation).

The *Aboriginal Lands Act 1995* (the Act) is the key Tasmanian legislation providing for the return of land and its management. The Act establishes the Aboriginal Land Council of Tasmania (ALCT) as a statutory authority with responsibility for the use and sustainable management of statutorily defined "Aboriginal land", which it holds in perpetuity for all Aboriginal Tasmanians. The Act outlines the functions and powers of ALCT and establishes a mechanism for electing members to the Council.

Under the Act, significant land returns require the Act to be amended by the Parliament. Since the initial return of land in 1995, only a small number of additional land parcels have been returned to the Aboriginal community under the Act. In 2012 and 2013 attempts to return Crown land including sites at *larapuna* (Eddystone Point) and Rebecca Creek failed to pass the Legislative Council.

The political and social landscape in which land return and management is progressed in Tasmania has changed significantly since the Act passed in 1995. It has become more common for some Aboriginal organisations to enter into their own property acquisition arrangements with partner organisations outside of the Act. For example, Kings Run, a 338 hectare site between the Arthur River and Marrawah, was purchased by the ALCT through a collaborative funding arrangement with other organisations. This approach has occurred with other ALCT property acquisitions.

The return of more land to its original custodians forms a crucial part of the Tasmanian Government's *Reset Agenda*. Reviewing the model for returning land to the Aboriginal community is the first step in this process. This review will identify barriers to returning land, and seek options to improve the land return process.

The review of the model of land return also presents an opportunity for Tasmania to explore Aboriginal rights to sea and freshwater country, consistent with proposed changes to expand the remit of the Indigenous Land Corporation (ILC) to include economic development on sea and freshwater country.

Table I - Land vested, or acquired through the *Aboriginal Lands Act 1995*, or involving the Indigenous Land Corporation (ILC) – By Status

Property name / location	Aboriginal name	Total area (ha)	Year	Status	Title Holding Body	Process
Oyster Cove	putalina	31.00	1995	Returned	ALCT	Aboriginal Lands Act 1995 (ALA)
Mt Cameron West	preminghana	525.00	1995	Returned	ALCT	Aboriginal Lands Act 1995
Mt Chappell Island	Hummocky	325.00	1995	Returned	ALCT	Aboriginal Lands Act 1995
Steep (Head) Island		22.00	1995	Returned	ALCT	Aboriginal Lands Act 1995
Kuti Kina Cave	kutikina	152.00	1995	Returned	ALCT	Aboriginal Lands Act 1995
Ballawinne Cave	ballawinne	560.00	1995	Returned	ALCT	Aboriginal Lands Act 1995
Wargata Mina Cave	wargata mina	156.00	1995	Returned	ALCT	Aboriginal Lands Act 1995
Badger Island		1,244.00	1995	Returned	ALCT	Aboriginal Lands Act 1995
Babel Island		460.00	1995	Returned	ALCT	Aboriginal Lands Act 1995
(Great) Big Dog Island		331.80	1995	Returned	ALCT	Aboriginal Lands Act 1995
Risdon Cove	piyura kitina	78.95	1995	Returned	ALCT	Aboriginal Lands Act 1995
Cape Barren Island (Wombat Point)	truwana	718.00	1995	Returned	ALCT	Aboriginal Lands Act 1995
Wybalenna	Wybalenna	138.60	1999	Returned	ALCT	Aboriginal Lands Act 1995
Cape Barren Island	truwana	42,706.00	2005	Returned	ALCT	Aboriginal Lands Act 1995
Clarke Island	lungtalanana	8,149.00	2005	Returned	ALCT	Aboriginal Lands Act 1995
Bruny Island (part)	pungkatina	9.00	2006	Returned	ALCT	Crown Land Assessment and Classification Project via Section 35A of the ALA 1995
Eddystone Point	larapuna	10.40	2006	40 year lease	ALCT	40 year lease issued by DTAE
Nirmana Nala Cave (upper Derwent Valley)	nirmana nala	0.53	2015	Returned	ALCT	Hydro Tasmania (150826/1: 0.1864ha); Mr Ian Edwards (139332/1: 0.3426ha)
	Sub Total	55,617.28				

Thule (on Flinders Island)		2,054.14	2005	ILC Granted	FIAAI	
Modder River Station (on Cape Barren Is)		1,007.83	2010	ILC Granted	ALCT	
Trefoil Island	titima	115.78	2010	ILC Granted	ALCT	
17 Mella Road, Smithton	trawmanna	6.07	2012	ILC Granted	Circular Head AC	
Rothsay Circle, Goodwood	Karadi	0.49	2015	ILC Granted	Karadi AC	
(formerly Gowan Brae)	trawtha makuminya	6,750.00	2012	ILC Granted	ALCT	
Murrayfield & Kirkby Lodge, Bruny Island	Murrayfield	4,097.00	2016	ILC Granted	weetapoona AC	
	Sub Total	14,031.31				

Panatana	panatana	234.88	2015	ILC Held	ILC lease	ILC lease to Six Rivers AC
	Sub Total	234.88				

Kings Run (between Bluff Hill Point and Arthur River)		338.00	2017	ALCT Held	ILC Grant	ILC Grant to ALCT
	Sub Total	338.00				

Total 70,221.47

Purpose

Purpose of the discussion paper

The purpose of this Discussion Paper is to provide information about Tasmania's current model for returning land to the Aboriginal community, and to facilitate discussion about improvements or changes to this model.

The Discussion Paper is structured around the following sections:

1. Objectives of land return
2. Land acquisition
3. Land management
4. Governance

How you can contribute

Each section of the Discussion Paper concludes with a series of questions. You may address some or all of the questions in your written submission. Submissions may also address any other related issues even if they are not mentioned in the Discussion Paper. All written submissions must be received by close of business Thursday, 20 September 2018.

Written submissions can be forwarded to:

Email: csr@communities.tas.gov.au

Mail: Communities, Sport and Recreation, Department of Communities Tasmania, GPO Box 65, HOBART TAS 7001.

Submissions will be treated as public information and will be published on the Department of Communities Tasmania's website at www.communities.tas.gov.au at the end of the consultation period, unless you request otherwise.

No personal information other than an individual's name or the organisation making a submission will be published. In the absence of a clear indication that a submission (or part of the submission) is intended to be treated as confidential, Communities Tasmania will treat the submission as public.

Further information on confidentiality and the *Right to Information Act 2009* can be found at the end of this Discussion Paper, along with a summary of the consultation questions.

Next steps

The outcomes of this consultation process will be detailed in a Stakeholder and Community Consultation Report that will be made publicly available following the consultation period. This information will be used to inform a final report making recommendations to improve the model for returning land to the Aboriginal community in Tasmania.

Land Return

Objectives of land return

The objective of Tasmania's *Aboriginal Lands Act 1995* (the Act) is stated in its long title:

An Act to promote reconciliation with the Tasmanian Aboriginal community by granting to Aboriginal people certain parcels of land of historic or cultural significance.

This objective takes a narrow view of land return and does not refer to the many other benefits of land return such as improved social and health outcomes, as well as economic empowerment.

The objectives and scope of land return models used in other Australian jurisdictions vary. For example, the New South Wales *Aboriginal Land Rights Act 1983* is a compensatory regime that recognises land was traditionally owned and occupied by Aboriginal people and that their access to land has been reduced without appropriate compensation. It also recognises that land is of spiritual, social, cultural and economic importance to Aboriginal people.

The preamble to the Queensland *Aboriginal Land Act 1991* also recognises that land is of spiritual, social, historical, cultural and economic importance to Aboriginal people. It states that the intention of the Act is to "...foster the capacity for self-development, and the self-reliance and cultural integrity, of the Aboriginal people of Queensland".

These objectives influence how the legislation functions and is administered. For example, in the case of both Queensland and New South Wales the legislation includes a mechanism to enable claims to be made over specified areas of land, which is consistent with the legislation's broader objectives.

The inclusion of clear objectives in legislation can support the identification and prioritisation of land suitable for return to the Aboriginal community. For example, an objective that recognises the social and economic importance of land may enable the return of land suitable for Aboriginal enterprises such as tourism or agriculture.

1. In what ways should the understanding of 'land' in the *Aboriginal Lands Act 1995* as being of 'historic or cultural significance', be expanded? Should the Act refer to health, wellbeing, housing and economic outcomes?

Legislative land return process

Under the Act, Crown land can be returned to the community with the agreement of the Parliament, by a mechanism that transfers the title to ALCT, which then holds the title in perpetuity for Aboriginal people. The arbitrary nature of parliamentary approval for land return can make the process somewhat unpredictable.

The uncertainty of the land return process was noted by the Legislative Council's Select Committee on Aboriginal Lands, whose final report recommendations in 2013 included: "a process should be created to allow any future claims or proposals to be removed from the political arena and to be fairly assessed by an independent body".

The Act itself does not provide any guidance or criteria against which any potential parcel of land can be assessed for its suitability for return. Nor does it contain any mechanisms, such as a set of criteria against

which land could be identified and prioritised, for the Aboriginal community to ‘trigger’ government assessment of the suitability of a parcel of land for return. In the current scenario, the trigger is generally an approach by ALCT.

Aboriginal land legislation in other states and territories provides significantly more guidance on the process for land return. For example, Queensland’s *Aboriginal Land Act 1991* provides a structured process for determining claims made by Aboriginal people for specific parcels of land, and also for the transfer of State land to another entity. Neither of these processes require parliamentary approval.

In Queensland, land claims can be made on the basis of historical association or traditional affiliation and are heard by a Land Tribunal, which then makes a recommendation to the relevant Minister. When State land is identified for transfer, the Minister publishes a notice stating this intention and invites written submissions. The land transfer takes effect once a gazettal notice is published in accordance with the legislation.

In addition to the statutory vesting mechanism, the Act gives power to ALCT to acquire, hold and dispose of property (except land declared as Aboriginal land under the Act). The declaration power (section 35A) was introduced in 2005 to allow ALCT to acquire land outside of the Act, and for that land to be declared ‘Aboriginal land’ and to fall under the protections of the Act.

The transfer of *nirmena nala*, a culturally and spiritually significant site in the Derwent Valley, in 2013 from Hydro Tasmania to ALCT, is an example of a Government Business Enterprise (GBE) returning land to the Aboriginal community. The site was subsequently declared to be ‘Aboriginal land’ under the Act. This example suggests that GBEs could benefit from further reductions to their land management burden, particularly where land is surplus to operational requirements.

2. How could the land return process under Tasmania’s *Aboriginal Lands Act 1995* be improved? If the process was to be more independent from Parliament, what form could it take?

3. Should Tasmania have a set of criteria to assess the suitability of land for future return? What should the criteria include? What would this criteria-based approach achieve?

Other approaches to land acquisition

Some Aboriginal organisations have acquired land and title outside the Act by entering into partnerships with other organisations such as the ILC. In this scenario, the ILC acquires land and holds the title on behalf of a local Aboriginal organisation, which must demonstrate the capacity to sustainably manage the land. At this point, the ILC grants the land directly to the organisation, with a caveat preventing its sale. Land acquired this way is generally subject to the management, control, and use by specific Aboriginal organisations rather than the broader Aboriginal community.

Many Aboriginal organisations in Tasmania also maintain a range of other property interests. While most relate to administrative or program related facilities, some include property of cultural and heritage significance.

Rights and fetters on Aboriginal land

Section 35(A) of the Act enables any land acquired by ALCT outside the statutory process to be declared Aboriginal land and thus held by ALCT in trust for Aboriginal persons in perpetuity. There are a number of other rights and fetters that apply to Aboriginal land, including:

- The vesting of land under the Act is exempt from stamp duty (section 34);
- Aboriginal land must not be mortgaged or used as any form of security (section 30);
- Land is vested to a depth of 50 metres and includes rights to minerals other than oil, atomic substances and geothermal substances (section 27(2)).

There are also provisions in a range of other acts that apply to Aboriginal land. For example:

- *Fire Services Act 1979* – local councils are exempt from contributions towards operating costs of brigades in respect of Aboriginal land which is unoccupied or occupied principally for Aboriginal cultural purposes (section 78(1)(ba)).
- *Land Tax Act 2000* – land tax is not payable in respect of Aboriginal land used principally for Aboriginal cultural purposes (section 19(c)).
- *Local Government Act 1993* – council rates are not payable on Aboriginal land used principally for Aboriginal cultural purposes (section 87(1) (da)).

It could be argued that the objective of the Act, which is to support reconciliation, justifies the rights and fetters (that is, the exemptions and controls) described above. However, if Aboriginal land is to have other uses, e.g. housing or other commercial purposes, the financial advantages granted by the Act may be anti-competitive for other businesses operating in similar markets.

The prohibition on mortgaging or using Aboriginal land as any form of security protects the underlying tenure of Aboriginal land. However, it may limit the Aboriginal community from fully benefiting from the economic value of their land. Few other jurisdictions in Australia have enabled the mortgaging of Aboriginal land. Queensland's legislation enables Aboriginal and Torres Strait Islander lands to be made freehold and then traded in the open market. South Australia's Aboriginal Lands Trust can also dispose of Trust land by transfer or grant of fee simple but it can only do so after a resolution passes both Houses of Parliament and any *Native Title Act* requirements have been met. The Northern Territory's legislation permits the mortgaging of a leasehold interest.

Tasmania's Act does not enable other Aboriginal organisations (aside from ALCT) to have the land they own be declared as 'Aboriginal land'. This means that land held by these organisations does not benefit from the same rights and fetters as land declared to be Aboriginal under the Act.

4. Are the current rights and fetters under the *Aboriginal Lands Act 1995* appropriate in the contemporary environment? If not, please suggest alternatives.

5. Should the Act allow for other organisations, aside from ALCT, to have the land they acquire declared as Aboriginal land? Should this land be bound by the same exemptions and controls as land returned under the Act?

Access and rights to freshwater and sea country

The Australian Government is currently progressing reforms to its Indigenous Land Corporation to include rights in relation to water, to bring the operations of the ILC into line with traditional understandings of country. These changes will allow the ILC to acquire water rights, provide loans and support indigenous businesses operating on sea country as well as land. To reflect this change, the ILC will be renamed the Indigenous Land and Sea Corporation.

This expanded understanding of the concept of country is becoming increasingly accepted. Reviewing the land return model provides an opportunity to explore the incorporation of water rights and the return of sea and freshwater country into Tasmanian policy and legislation.

6. Do you think the Act should incorporate the traditional understanding of Aboriginal 'country' as including freshwater and sea country? What benefits would you see as flowing from this kind of change?

Land Management

Under the Act, ALCT has primary responsibility for the sustainable management of Aboriginal land. Section 18 of the Act sets out the functions and powers of ALCT, including:

- to use and sustainably manage Aboriginal land and its natural resources for the benefit of all Aboriginal persons;
- to exercise for the benefit of all Aboriginal persons, the Council's powers as owner of Aboriginal land;
- to prepare management plans in respect of Aboriginal land; and
- to use and sustainably manage any other land in which the Council acquires an interest.

Section 18(2) of the Act states that the Council must perform its functions for the benefit of all Aboriginal persons and section 18(3) states that the Council is to have regard to the interests of local Aboriginal communities. The Act also enables ALCT to delegate any of its functions or powers to any Aboriginal group or person the Council considers appropriate. Importantly, under section 31(1) ALCT "must involve a local Aboriginal group or a local Aboriginal person in the management of Aboriginal land". These provisions enable other Aboriginal organisations or individuals to participate in the ongoing management of returned land.

"Local Aboriginal group" is defined in the Act as "...an Aboriginal group nominated by the Council for that area" (see also section 18(5)). This gives full discretion to ALCT. There is no mechanism for the Tasmanian Government to specify a particular group that it may consider has an important role in the ongoing management of a parcel of Aboriginal land. While this approach supports the Aboriginal community's right to self-determination, it has also led to disagreement on who is the appropriate local Aboriginal group to manage certain parcels of returned land.

In contrast to the Tasmanian model, where a single land council is established under the governing Act, legislation in states such as New South Wales gives power to multiple Local Aboriginal Land Councils. While this approach facilitates local management of Aboriginal land, in the Tasmanian context it could also result in a dilution of land management skills and expertise as well as duplication of administrative effort.

Currently there is also no requirement for ALCT or managing organisations to report to the broader Aboriginal community on the use of Aboriginal land, although ALCT does provide an audited report to Parliament. Annual reporting, or similar, could improve the accountability of managing organisations to ALCT and to the Aboriginal and broader community. It would also provide a means of demonstrating the benefits of returned land to the community.

7. Does the Tasmanian Act include sufficient provisions for interested Aboriginal groups to participate in the ongoing management of returned land? Please outline what is currently working well and what could be improved.

8. Should organisations responsible for the management of Aboriginal land provide regular reports on the use of this land? To whom should the reports be provided?

Governance

ALCT electors roll

ALCT is established under section 5 of the Act. It comprises eight elected Aboriginal persons, two representing the South region, two for the North region, two for the North-West region and one each representing the Flinders Island group and the Cape Barren Island group. Under the Act, to be entitled to vote in ALCT elections an individual needs to be on the ALCT Electors Roll, which is prepared and maintained by the Tasmanian Electoral Commissioner under section 8. The Act provides that to be on the Electors Roll a person must:

- be an Aboriginal person within the meaning of the Act; and
- live in the electoral area for which they wish to be enrolled; and
- be 18 years of age.

The definition of an Aboriginal person under section 3A of the Act is similar to the three part test that also guides the Tasmanian Government's Eligibility Policy. However, under section 3A(a) of the Act the onus of proving that a person satisfies the requirements lies on that person. The different requirement by the Act, has historically proved difficult for those individuals with poor or non-existent formal documentation to support their claim to Aboriginality. Section 9(3) of the Act gives the Electoral Commissioner, "in consultation with such persons as the Electoral Commissioner considers necessary", authority to prepare guidelines concerning the requirements referred to in Section 3A. Similar consultation is provided for in cases of an objection to an application for enrolment (section 10(4)). It has been the practice for the Electoral Commissioner, in accordance with the guidelines, to establish a Review Committee for consultative purposes, consisting of eight Aboriginal people from the Electors Roll, and including people who are knowledgeable of, and widely accepted in the Aboriginal community and people who have particular expertise in the fields of Aboriginal genealogy and history. The Electoral Commissioner also consults where necessary with the Archives Office.

Enrolment on the Electors Roll ultimately rests with a determination made by the Electoral Commissioner.

The number of Aboriginal people registered on the Electors Roll has typically been small in comparison to the number of individuals identifying as Aboriginal in the Census. This has also flowed on to low election participation rates. For example, in the 2017 South region by-election only 52 ballots were returned from the 241 people registered in that region.

9. How could the current ALCT electoral process be improved to enable participation by greater numbers of Aboriginal people?

ALCT processes and procedures

To support self-determination and the community-driven management of Aboriginal land, the Tasmanian Government has a relatively 'hands-off' approach to ALCT's operations under the Act. This has fostered a perception that ALCT could be more transparent and accountable in its operations and decision-making.

The following sections of the Act guide ALCT's governance processes:

- Part 2, Division 4 – provides for the ALCT to employ staff;
- Part 2, Division 5 – establishes the ALCT funding and other financial provisions;
- Section 36 – disclosure of pecuniary interests;
- Section 37 – disqualification from office;
- Schedule 1 – provisions with respect to membership of the ALCT; and
- Schedule 2 – provisions with respect to meetings of the ALCT.

The Act also provides processes for reviewing Council decisions with respect to the involvement of local Aboriginal groups or persons in the management of Aboriginal land (section 19); the granting of an interest in Aboriginal land (section 29); or other matters likely to significantly impact on Aboriginal land (section 19 (1)).

The Act does not prescribe a code of conduct or governance training for ALCT members. Also, it does not contain a mechanism for the dismissal of members, unlike similar legislation in other states and territories, which provide a range of guidance on the expected standards of good governance for land councils.

For example, the New South Wales *Aboriginal Land Rights Regulation 2014* contains in its schedules model rules and a model code of conduct for land councils. New land council board members are also required to complete two days of formal governance training within six months of being elected. In contrast to this regulatory approach, the Northern Territory's Central Land Council has a publicly available governance manual which outlines its guiding principles, code of conduct and rules for meetings. This document provides transparency to the community around the standards of behaviour they can expect from their elected land council members.

10. What changes do you suggest to enhance ALCT's governance arrangements under the Act?

11. Are there any other comments that you would like to make with regards to Aboriginal land management and return?

Important information regarding your submission

Publication of submissions

Your submission will be published in accordance with the Tasmanian Government's [Public Submissions Policy](#), which requires that all Government departments publish online all written submissions made in response to broad public consultation on major policy matters.

Accessibility of submissions

The Government recognises that not all individuals or groups are equally placed to access and understand information. We are therefore committed to ensuring Government information is accessible and easily understood by people with diverse communication needs. Where possible, please consider typing your submission in plain English and providing it in a format such as Microsoft Word or equivalent. The Government cannot, however, take responsibility for the accessibility of documents provided by third parties.

Confidentiality

If you would like your submission treated as confidential, whether in whole or in part, please indicate this in writing at the time of making your submission. Clearly identify the parts of your submission you want to remain confidential and the reasons why. In this case, your submission will not be published to the extent of that request.

Personal information protection

Personal information collected from you will be used by Communities Tasmania for the purpose of acknowledging your public submission. Your submission may be published, unless it is marked "confidential". Personal information will be managed in accordance with the *Personal Information Protection Act 2004*.

Copyright

Copyright in submissions remains with the author(s), not with the Tasmanian Government.

Defamatory material

Communities Tasmania will not publish, in whole or in part, submissions containing defamatory or offensive material. If your submission includes information that could enable identification of other individuals then either all or parts of the submission will not be published.

Right to Information Act 2009

Information provided to the Government may be released to an applicant under the provisions of the *Right to Information Act 2009* (RTI). If you have indicated that you wish all or part of your submission to be treated as confidential, your statement detailing the reasons may be taken into account in determining whether or not to release the information in the event of an RTI application for assessed disclosure. You may also be contacted to provide any further comment.

Summary of discussion paper questions

1. In what ways should the understanding of 'land' in the *Aboriginal Lands Act 1995* as being of 'historic or cultural significance', be expanded? Should the Act refer to health, wellbeing, housing and economic outcomes?
2. How could the land return process under Tasmania's *Aboriginal Lands Act 1995* be improved? If the process was to be more independent from Parliament, what form could it take?
3. Should Tasmania have a set of criteria to assess the suitability of land for future return? What should the criteria include? What would a criteria-based approach achieve?
4. Are the current rights and fetters under the *Aboriginal Lands Act 1995* appropriate in the contemporary environment? If not, please suggest alternatives.
5. Should the Act allow for other organisations, aside from ALCT, to have the land they acquire declared as Aboriginal land? Should this land be bound by the same exemptions and controls as land returned under the Act?
6. Do you think the Act should incorporate the traditional understanding of Aboriginal 'country' as including freshwater and sea country? What benefits would you see as flowing from this kind of change?
7. Does the Tasmanian Act include sufficient provisions for interested Aboriginal groups to participate in the ongoing management of returned land? Please outline what is currently working well and what could be improved.
8. Should organisations responsible for the management of Aboriginal land provide regular reports on the use of this land? To whom should the reports be provided?
9. How could the current ALCT electoral process be improved to enable participation by greater numbers of Aboriginal people?
10. What changes do you suggest to enhance ALCT's governance arrangements under the Act?
11. Are there any other comments that you would like to make with regards to Aboriginal land management and return?

Useful links

- [Aboriginal Lands Act 1995 \(Tasmania\)](#)
- [Aboriginal Affairs Planning Authority Act 1972 \(Western Australia\)](#)
- [Aboriginal Lands Trust Act 2013 \(South Australia\)](#)
- [Aboriginal Land Rights \(Northern Territory\) Act 1976](#)
- [Aboriginal Land Act 1991 \(Queensland\)](#)
- [Aboriginal Land Rights Act 1983 \(New South Wales\)](#)
- [Aboriginal Lands Act 1970 \(Victoria\)](#)