



TRANSCRIPT OF DAY 3 – PUBLIC HEARING

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MS SUE-ANNE HUNTER, Commissioner
MR TRAVIS LOVETT, Commissioner
DISTINGUISHED PROFESSOR MAGGIE WALTER, Commissioner
THE HON ANTHONY NORTH KC, Commissioner

WEDNESDAY, 27TH OF MARCH 2024 AT 10 AM (AEDT)

DAY 3

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<THE HEARING RESUMED

CHAIR: Good morning. Welcome to today's hearing of the Yoorrook Justice Commission. We are continuing our inquiry into the land injustice. This is our
 5 second day in Hearing Block 6 at Collingwood. I would like to mention we do have the ABC briefly for the beginning of this, just a brief time with us, and before we get underway, I would like to invite Commissioner Hunter to do the Welcome to Country, please.

10 **COMMISSIONER HUNTER:** Thank you. Before I give the Welcome to Country, I would like us to stand for a minute's silence for those that have fought for this country, particularly our people, those - the past during the frontier wars due to colonisation and genocide. So if we could have a minute's silence.

15 Thank you. Let me acknowledge that we are on the lands of my ancestors, the Wurundjeri, and pay respects to Elders past and present, pay respects to those that come before us, the caretakers of land, knowledge and culture. Those that allow us to sit here today and have voice. So Wominjeka, walk gently on the land and, dare I say it, be kind to yourselves with the information that we hear and the truth we
 20 hear over the coming days and yesterday, and the truths we heard out on Gunditjmara Country. It's going to be a hard to tell, hard to listen but the truth needs to be told. So Wominjeka. Thank you.

CHAIR: Counsel, I will have appearances, please.

25 **MS MCLEOD:** If the Commission pleases, I appear with Ms Fitzgerald to assist you this morning. Can I also thank Commissioner Hunter for your welcome and acknowledge the Wurundjeri people and all First Nations people who are here and are following the work. I acknowledge Elders and all of those who have continued
 30 the fight for justice over the centuries. Can I invite Ms Cafarella to offer her acknowledgements too.

MS CAFARELLA: On behalf of the State of Victoria, I would like to thank
 35 Commissioner Hunter for her Welcome to Country. The State acknowledges that today's hearing is being held on the lands of the Wurundjeri people and I acknowledge them as the Traditional Owners of this unceded land. The State pays deep respects to Wurundjeri Elders past and present. I also acknowledge all Aboriginal Elders and all Aboriginal people who are here today or who are watching online. The State acknowledges that today we will hear further evidence
 40 of the history of violent dispossession of First Peoples in this State. The evidence will be given by First Peoples, Elders and experts and academic historians.

The State acknowledges that this evidence is painful to First Peoples and that
 45 giving and hearing this evidence comes at a cost to First Peoples. The State also acknowledges that throughout the history of the place that is now called Victoria, First Peoples have a proud history of resilience and resistance. Thank you.

CHAIR: Thank you, Counsel.

MS MCLEOD: Thank you, Chair. Today we are commencing with a panel of eminent academics: Distinguished Professor Marcia Langton, who's here in the room with us, and Emeritus Professor Henry Reynolds, who is here on the screen. We are going to step through the research, especially Professor Reynold's research on the early history of the colony and discuss measures of protections and control, including a touch on the human remains and the topics of eugenics. We note, Commissioners, this evidence is confronting and may cause distress and for those following the Commission, there are resources available to those who wish to use them posted on the Yoorrook website.

Later today, we will hear evidence from Uncle Jim Berg and Uncle Robbie Thorpe that has been recorded earlier. I just note that Professor Reynolds has another commitment, so wherever we are up to at 12 pm, we will adjourn briefly and - if we haven't finished at that time already and will continue with Professor Langton's evidence after that short adjournment.

So can I start, Professor Langton, with you. Could I say your full name for the panel, please.

PROFESSOR LANGTON: Marcia Lynne Langton.

MS MCLEOD: Do you agree to give truthful evidence today to the best of your knowledge?

PROFESSOR LANGTON: Yes, I do.

<MARCIA LYNNE LANGTON, AFFIRMED

MS MCLEOD: Professor Langton, you are the Redmond Barry Distinguished Professor at Melbourne's School of Population and Global Health and the Foundation Chair of Australian Indigenous Studies at University of Melbourne. Your background is in anthropology and human geography. Can I invite you to introduce yourself to the panel and those following this hearing.

PROFESSOR LANGTON: Thank you. I acknowledge the Wurundjeri Traditional Owners and their Elders. And thank you, Commissioner Hunter, for your welcome. So, I am the granddaughter of a Yiman man. My grandmother spoke a number of languages. I believe that one of them was Bidjara from south-west Queensland. Yiman is a language of Central Queensland. And I was born and raised in Queensland.

I have a Bachelor of Arts with First Class Honours, did a double major in Anthropology and a PhD from - Doctorate of Philosophy from Macquarie University in Human Geography. My thesis was examined by anthropologist, an anthropologist-linguist and a political scientist.

So, I've been at the University of Melbourne since early 2000. I was in the faculty of Arts for seven years and I have been in the faculty of Medicine since then. I work on a number of research projects, and I'm the Associate Provost at the
5 University of Melbourne.

MS MCLEOD: Thank you, Professor. Professor Reynolds, would you state your full name, please?

10 **PROFESSOR REYNOLDS:** Yes, Henry Reynolds.

MS MCLEOD: Do you agree to give truthful evidence today to the best of your knowledge?

15 **PROFESSOR REYNOLDS:** Yes.

<HENRY REYNOLDS, AFFIRMED

20 **MS MCLEOD:** Professor, you are Professor Emeritus of History at University of Tasmania and a leading authority on the issues that we are considering from a historical perspective, and I invite you likewise to introduce yourself to the panel.

25 **PROFESSOR REYNOLDS:** Well, let me first say how impressed I am by your proceedings. I think this is a very encouraging thing for the rest of Australia, particularly after the defeat of the referendum when it appears that there is a reaction against many of the reforms that were being proposed, of treaty-making and truth-telling and I think this is a very, very encouraging development and I hope the proceedings do become widely known, not just in Victoria but
30 throughout the whole country.

35 My background is I grew up in Tasmania and eventually ended up in North Queensland many years ago. And as a result of coming into contact with a part of Australia I had known nothing about and, indeed, a part of Australia where not only were there very large numbers of First Nations people but the violence of the past still lived on, as did much of the pretty blatant racism.

40 So, in coming to teach my students, I had to learn something about this, and because at that stage - this is in the mid-1960s - there was very, very little in the history, in the traditional history, the main book that I was given to teach from didn't mention First Nations people at all. So, I had to begin doing my own research. And I spent 10 years all over the country, and in Britain, and that eventuated in my first major book *The Other Side of the Frontier* in 1981.

45 And since then, I have, of course, worked in many other areas, related areas, and published a large number of books, and indeed still find the subject compelling. It is still so profoundly important for the Australian Australia as a nation and for

Australian people, and I just finished, before I was thinking about what I should talk to you about, writing some introductory chapters for a book based on Rachel Perkins' three-part documentary series for SBS.

5 So, I'm very engaged and, as I say, I'm very, very honoured to be giving evidence to this Commission.

MS MCLEOD: Thank you very much, Professor. Just a question around your research and in writing the books you do as a historian; can you describe in a very
10 general way the nature of the source material that you are reviewing and the historical methodology that you bring to your work?

PROFESSOR REYNOLDS: Well, as I say, I spent 10 years in the initial period and that means reading everything. I mean, I read something like 60 newspapers
15 from all around Australia in the 19th century. I would have read every, or at least looked at and read much of, almost all the books that were published in the 19th century about Australia. This was done in an extraordinary library in London, the Royal Commonwealth Society's library. I read all the parliamentary papers of this period after 1856 when the colonies gained self-government. I read all the papers of
20 the missionaries who worked in Australia in this period.

It's hard to think where else. I mean, also, many, many private papers, private letters, speeches given in Parliament and in public. I tried to read everything that
25 was available in 19th century Australia about the relations between the white settlers/invaders and the First Nations. It is, it was indeed a very, very large amount of material.

Now, in terms of, in doing this, I was trying to understand what happened but also to understand why it happened and to try and think myself into the way in which
30 people of the past thought and saw the world. So that's why my first three books were the fruit of this. The first one was a book trying to understand what all this meant for the First Nations people. It was *The Other Side of the Frontier*.

My second book was *Frontier*, which turned the lens around and looked at what
35 the Europeans were saying and thinking and talking about. Then the third one was, indeed, perhaps less commonly known called *With the White People* and this was a study of the First Nations people who became part of the settler society, and their contribution to the colonisation of Australia.

40 **MS MCLEOD:** Particularly for that third book, did that involve conversations with First Peoples in Victoria?

PROFESSOR REYNOLDS: Yes, indeed. I mean, I started doing that. I mean, this seemed to be essential, and it began more or less as a hobby, but working with
45 my very good friend and my family friend, Eddie Mabo, we went around and talked to people, and we started off just jotting down material on notes. We then

started recording. So, it was the beginning of what became a significant collection of oral history that still held in the library in James Cook.

5 **MS MCLEOD:** Thank you, Professor. Yesterday, we heard some evidence from a panel of the early history of the district of Port Phillip, now known as Victoria, and that journey before statehood. I want to just step you through some of the important landmarks in that early colonial history, so perhaps starting with the first permanent white settlement at Portland in 1834. Before I come to that, is there anything that you wish to say to the Commissioners in relation to the creation of
10 the district of Port Phillip and what was happening globally and locally before settlement, white settlement?

15 **PROFESSOR REYNOLDS:** Yes. Well, I think it's important to realise that the history of Port Phillip Victoria was very, very distinctive and unusual. That is, the - I mean, the two convict colonies, Van Diemen's Land and New South Wales, obviously had been operating for 50 years or so, and apart from, for a very brief period, the expedition that actually settled Hobart under Collins had actually spent a short time in Port Phillip but decided to then transfer to Hobart.

20 But the development of the settlement, the conquest, whatever words you choose, of Victoria, came very specifically in a particular period and that was the period from the mid-1830s up to the 1850s. A mere 15 years. But this was, I mean, before the gold rushes, this was the great story of Australian history, that is, the squatting rush.

25 The government of New South Wales, the imperial government, was very, very strongly of the view that they had to try and contain the spread of settlement. In 1829 they established the area within 300 kilometres or so of Sydney and this was to be the limit of location, that is, if you tried to go beyond this, then you had no
30 legal justification for doing so. It was illegal to take up land beyond the limits of location.

35 And Tasmania of course was very limited. They'd occupied the usable land by that period, and so this was the story that, bit by bit, and in a great rush by the mid-1830s, the settlers in both colonies came into what was to become Victoria. They came from the north, across the Murray and down into Victoria. They came across by sea from Hobart into the southern parts of Victoria.

40 And it was an extraordinary development. It was an extraordinary development because of its speed, extraordinary development because of the incredible way in which these people came, particularly with their sheep and cattle. And by the 1840s there had been 700 stations established in New South Wales, including, obviously, the southern part of New South Wales. And something like five or six
45 million sheep had also gone out into the wilderness.

Now, there's nothing like this in the history of European colonisation, and this was recognised at the time. It became a theme of great romantic importance in white

Australian history. But for those who took part and participants, it was, well, firstly, for the British, it was, in a way, a disaster which they knew they couldn't control. There's no way, and they said, "we would need an army 10 times what we have got and even then, we couldn't hold back the squatters of New South Wales.
5 They will go wherever they please and we can't stop them."

This presented two problems to them. The first was, what do you do with people squatting illegally on land, which belongs, as they saw it, to the Crown. Now, their first concern was to find a mechanism by which - they knew they couldn't bring
10 them back, they couldn't stop this, but they had to find a way to make sure that these squatters would not eventually become the owners of the land by using the law, the common law doctrine of adverse possession against the Crown.

So they had to find a way to impose Crown control, and so in the mid-30s they introduced squatting licences, annual licences, which meant that the squatters had
15 some sort of legal standing on the land because they had a licence, and that continued well into the 1840s when eventually they created a system of leases.

So the problem of land, and I'll come to that again later, that's the problem of land.
20 If you can't stop them, you have to have some sort of control over them. Now, the second thing which certainly deeply concerned the British government was the fact that there's no doubt, no doubt whatsoever, that this period saw a rapid increase in the destruction of traditional society.

Partly, simply by the presence of millions of animals that stormed into the country and, in a way, took over the country in a way that wasn't done in a human sense, simply by the animals occupying the land. And quite distorting, quite upsetting the way in which the local people could live there. But there was also no doubt in the mind of the British that this was leading to a great increase in the frontier violence,
25 the conflict and the killing of First Nations people.
30

In a way, it represented both the privatisation of the killing and the vast dispersion of it. By the 1840s, from the Darling Downs far into western New South Wales, right down into Victoria and across into South Australia, this was the land that had
35 been taken up by the squatters. And there's no doubt that this was probably one of the most tragic periods for First Nations people, both because of the speed of the occupation and undoubtedly the amount of violence and the killing that took place in this period.

40 **MS MCLEOD:** Professor, just to pause there and pick up some threads of what you just said. Of course, the colony of New South Wales included the area known from 1851 onwards as the State of Victoria, in that time, the early time. So, when we talk about New South Wales, the 700 stations and the five or six million sheep, you are also talking about the area known as Victoria now?

45 **PROFESSOR REYNOLDS:** Absolutely. Absolutely. That was the area which had seen nothing but the squatters. I mean, elsewhere in New South Wales and

Tasmania, there was a proper government and an administration and control because they were convict colonies with a very, very powerful, well organised government. But Victoria was occupied by individuals, by renegades, by squatters, over which the government had no control whatsoever.

5

MS MCLEOD: Just going back to your reference to the limit of location, 300 kilometres from Sydney, obviously, all of Victoria was outside that limit of location?

10 **PROFESSOR REYNOLDS:** Yes, indeed. And that's why, as I say, in Victoria, unlike the other colonies, it was above all the creation of the squatters.

MS MCLEOD: So just picking up some threads there, could we have some slides. And I'll bring up the first slide from the State Library of Victoria records. I just want to check, Professor, when that slide comes up, whether you can see this anywhere on your screen or -

15

PROFESSOR REYNOLDS: Yes, it has come up. That's good.

20 **MS MCLEOD:** We don't see it yet. There we go. So, this is a quote taken from the State Library of Victoria website and it concerns the Henty settlement at Portland that we have heard evidence about, being the first white settlement in Victoria in 1834. And you will see the quote notes that the Henty father, that's Thomas Henty, father of Edward and Stephen:

25

"...petitioned the British government in London three times to settle in the Port Phillip district but was rejected each time. The British authorities forbade the settling of land that was not easily accessible from Sydney. The Hentys then decided to settle the Port Phillip district illegally. They did so in the belief that they would eventually be granted the land."

30

So is that a reflection of the broad matters that you've been describing in terms of the illegality of the squatters' claims?

35 **PROFESSOR REYNOLDS:** Absolutely. It's a very, very good case, and the Hentys were obviously well to do and educated and actually petitioned the British government. Most squatters simply regarded it as their right to go out into the wilderness and take up land as much as they wanted, but above all, occupied the sources of water. I mean, Australia, even southeastern Australia, isn't arid but there isn't an abundance of water, so the race was on to grab river frontages and any other source of water.

40

So, the Hentys, that does represent exactly the situation of going out and finding your own piece of country.

45

MS MCLEOD: We're aware as well, the Commissioners are aware of the Batman and Gellibrand petition.

PROFESSOR REYNOLDS: Yes.

5 **MS MCLEOD:** The land in Port Phillip in 1827 and their claim to have purchased land from Aboriginal owners in 1835 through treaties. So, what was the general intention of those parties who were seeking to negotiate treaties at that time compared with those who were simply seeking to take land without treaties or agreements?

10 **PROFESSOR REYNOLDS:** Yes, well, the Tasmanian example is quite interesting. There's no doubt that the Tasmanians knew that Governor Arthur was already saying, as he was saying in correspondence with London and elsewhere, that the great problem of what had gone wrong in Tasmania was there wasn't a treaty; that there should have been a treaty to begin with and he recommended
15 that this be done in both South Australia and Western Australia. And there's no doubt in my mind that this recommendation was what, in effect, led to the Treaty of Waitangi because he was in London at the time when they were deciding what to do about New Zealand.

20 So, Batman and those associated with him clearly knew that the idea of treaties was being seriously discussed in Tasmania. What people don't appreciate, of course, is that an individual person can't make a treaty. A treaty is something which, you know, the Crown, the executive government can only do. What Batman, basically, did was to try and come to an agreement and that - no doubt,
25 something like that happened in many parts of Australia eventually, where the local people and the squatters came to some sort of local agreement. And, in a way, that was the first example of these many such agreements.

30 **MS MCLEOD:** Can you say why that attempt at forming a treaty with the local people there and the requests of the Henty brothers, or Father Henty for recognition of his claims were refused at the time?

35 **PROFESSOR REYNOLDS:** Well, no doubt a variety of things. One was, remember, we are still dealing with two convict colonies and they were - I mean, remember these were open-air convict - you know, open-air prisons. Most convicts were not in jail. They were working in the community everywhere, and the British government felt absolute an essential thing was to keep control of two colonies largely made up of convicted felons. You know, we know that many of their crimes were very minor but, nonetheless, for them, control was all-important
40 and they did not want the Australian colonies to just be able to spread out without control, beyond the reach of police, beyond the reach of religion, beyond the reach of education.

45 So, they had no desire to be saddled with much larger colonies than they had as it was and found an expensive operation. I mean, they also became concerned, particularly after the example of Tasmania, about the fact that this spread of settlement was almost certainly going to lead to the killing of Aborigines. It's

important to remember that by this period, the humanitarians had become the most significant force in British politics. This had led to the abolition of slavery in 1833, and the great reformers who brought slavery to an end then turned their attention to the fate of the Indigenous people all over the British empire, and they
5 had no sympathy with white settlers who were renegades.

You know, it's not as if - you know, they did become deeply concerned about the fate of the Indigenous people, all over the empire, and they felt that unless they showed some concern it would be, you know, a hated stain on the reputation of
10 Britain as a coloniser.

MS MCLEOD: Could we bring up slide 2 please. Professor, this is the 1835 proclamation of Governor Richard Bourke, that the British Crown owned the land and held the sole right to buy and sell that land. The next slide, please. So could
15 we just zoom in on the text on the screen. So, Governor's Bourke's proclamation followed shortly after or some short years after the Batman Treaty.

PROFESSOR REYNOLDS: Yes.

20 **MS MCLEOD:** And addressed:

*"...other treaty, bargain or contract with the Aboriginal natives, declaring them void and of no effect, and that all persons found in possession of such lands without licence or authority of his Majesty's government will be considered as
25 trespassers."*

So, what's the effect of this proclamation and what then happened to the rights asserted by squatters to own land by possession?

30 **PROFESSOR REYNOLDS:** Yes. Two things. One, Bourke was merely reiterating the doctrine that had been there from the very beginning, from specifically Phillips' proclamations of 7 February 1738. And from that time on, remember this was in an extraordinary thing to do, given what had been happening for 100 years before in North America, that the native people of Australia didn't
35 exercise any form of sovereignty over the land and, therefore, Britain gained, you know, an original sovereignty, not a derived one.

And, secondly, that the First Nations people of Australia did not actually occupy the land. They merely ranged over it. And, therefore, this was not sufficient to
40 establish any claim by possession. And, therefore, all the land became - the Crown became the beneficial owner of half of a continent. It was an extraordinary claim and which had no real justification in the international law of the time. But it became the law of Australia. So, Bourke was merely – he wasn't inventing this. This was simply the law as it stood and had been confirmed already in colonial
45 courts.

But, as I say, one, the British didn't want settlers to go everywhere because they would then be responsible for what was happening. But above all, they did not want these people to be able to make a claim against the Crown because they'd occupied the land. I mean, I forget now precisely, if you occupy the land at this stage for 20 years and the Crown hasn't asserted its ownership, you can get the land by adverse possession.

So that was what their worry was. So they had to impose some sort of control, and that's why they introduced the idea of annual licences because at least that maintained the Crown's right to actually control and own the land.

MS MCLEOD: In terms of the information that was before the imperial parliament, could we bring up slide 3, please. This is a report of the British parliamentary or imperial parliamentary Select Committee on Aboriginal Tribes, and the reprint that we have includes some comments by the Aborigines Protection Society. If we could go to page numbered 1, which is about 13 pages in, and just zoom in on the top of that page, please. Professor, do you see that on the screen?

PROFESSOR REYNOLDS: Yes. Yes.

MS MCLEOD: And you see there the Select Committee, it's noted, is:

"...appointed to consider measures to be adopted in order to secure to them.."
Being native inhabitants of different colonial countries, including Australia"

"...in order to secure to them the due observance of justice and the protection of their rights, to promote the spread of civilisation among them and to lead them to the peaceful and voluntary reception of the Christian religion."

Further down it's noted in the next paragraph:

"...the importance of fixing the rules of our conduct towards them. We apt to class them under the sweeping term of savages and perhaps in doing so to consider ourselves exempted from the obligations due to them as our fellow men, and this assumption does not however, it is obvious, alter our responsibility."

So, what was the imperial parliament considering with this committee inquiry and what was the end result of it for New Holland or New South Wales?

PROFESSOR REYNOLDS: That's important. As I say, this was very much - once the great movement, the reform movement that ended the abolition of slavery, those very influential humanitarians immediately turned their attention to what was happening. And this is partly because they received information back from Australia and quite specifically back from Tasmania, by particularly the

Quaker reformers James Backhouse, wrote letters to the most important people in Britain about the terrible things that had gone wrong in Tasmania.

5 So that's why this committee of the parliament wanted to reform the relationships
between Britain all over the world - I mean, we're talking about an international
movement here - and influence the character and the destiny of millions of the
human race. And perhaps the single most important thing that Buxton, who was
the great driver of this, was to overwhelmingly stress the fact that people who live
10 on the country must be considered to be the owners of the country and have
property rights.

Now, this shouldn't - this wouldn't have come at a surprise at the time because this
is what had been happening in America, in both Canada and then the states of the
United States. This is what had been happening throughout the 18th century. What
15 we must appreciate is the anomaly of what had happened in Australia. The sheer
anomaly of it all.

And that's why I think - and this is somewhere you may not want to go, is that
I would think any inquiry into this should indeed point to the original sin of
20 Australian colonisation, that is, the refusal to recognise that the First Nations
people had property rights; that it was their land, they were in occupation. And
there is no doubt in my mind that the story would have been quite different if this
had been done. So -

25 **MS MCLEOD:** Professor, can I just pause you there in the chronology for
a moment to invite Professor Langton to respond to the comments you've just
made.

30 **PROFESSOR LANGTON:** Thank you. So, I think it was in 1832 when the
Marshall cases were heard in the colony of Virginia, and there, the court found
that the people, the local people, the Native Americans, had had their sovereignty
damaged by British sovereignty. But the court said that they retained a domestic
dependent sovereignty with British sovereignty overruling theirs.

35 So, I mean, if you look at the timeline, those cases were in 1832 and then the
colony of Victoria becomes a troublesome violent place and, you know, invaded
by squatters, as Professor Reynolds has pointed out. And I am not sure why - and
I'd actually like to hear what Professor Reynolds has to say about this - why was it
40 that, as a result of the domestic dependent sovereignty ruling in the Marshall
cases - or Johnson, McIntosh, Marshall, I'm trying to remember the name of the
case - the, you know, treaties followed and, of course, this is where the
British - you know, the British court said that the only dealing with land that's
legitimate is Crown dealing with land and the locals - so the locals there were
45 trying to make a treaty with the Native Americans and the court overruled them
and said only the Crown could do so.

So, you know, I have two theories: One, that the British thought, well, we can't have this happening everywhere else in the other colonies, and number two, that they did as your earlier quote pointed out, regard Aboriginal people as savages with no property rights and so, therefore, you know, as we've seen with the
 5 doctrine of terra nullius people with whom it's not possible to negotiate a treaty.

But I'm curious as to whether or not this terra nullius theory and the wasteland - you know, regarding Victoria as a wasteland, for instance, wasn't a concoction, a confection, if you like, in response to the Marshall cases.
 10

MS MCLEOD: Can I come back - you sent us through an extract in terms of land tenure last night from the book of John Quick.

PROFESSOR LANGTON: Yes.
 15

MS MCLEOD: I will come back to that, if I may, in terms of his observations of land tenure and how Victoria moved from claims to licensing, essentially.

PROFESSOR LANGTON: Well, you know, there must have been people in
 20 London thinking about this. How could they, you know, ex post facto, if you like, justify what happened in Australia? Well, the simple answer is pretend that the natives had no legal system, no property system. So that's an obvious answer. But, you know, I don't know if Professor Reynolds has any views on that.

MS MCLEOD: Just while Professor Reynolds is considering his answer, could we bring up page 10 of this same document, the Committee Report. It's numbered 10 and the heading is New Holland. If we zoom in on the first two paragraphs, you will see the language of the time referred to:

30 *"Intercourse with Europeans casting over their original debasement a deeper shade of wretchedness."*

The next paragraph:

35 *"In the formation of these settlements, the Parliamentary committee notes it does not appear that the territorial rights of the natives were considered, and very little care has been taken to protect them from the violence or contamination of the dregs of our countrymen."*

40 Then just while I've got that page open, the bottom of the page is noted:

"I'm led..."

Then over to the next page in that bundle, but it reads:
 45

"I'm led to apprehend that within a very limited period - a few years, adds the Bishop - those who are most in contact with Europeans will be utterly extinct. I will not say exterminated but they will be extinct."

5 So, Professor Henry, can I invite your response to Professor Langton.

PROFESSOR REYNOLDS: Those cases in the American Supreme Court under Justice - one of their great leaders, John Marshall, indeed, between 1824 and 1832, gave a series of judgments that were profoundly important in defining those two
10 things. One, that the American Indians were domestic dependent nations and they had a form of sovereignty which allowed them to continue to use their laws and have internal self-government, but also that they, indeed, had property rights and they had had them from the start. And that these property - so this was standard, middle of the road North American jurisprudence in both United States and
15 Canada.

And it goes back to what developed as the tradition in these situations. And the really big question is why didn't the British continue to operate with these principles in Australia? And the answer is because they - well, one, they knew
20 almost nothing about Australia. It was a rushed colonisation. Joseph Banks had said it's very likely that the vast interior is uninhabited. So, they arrived in a very, very rushed manner with the assumption that the native people, the First Nations of Australia, were too primitive.

25 And that was the foundation of Australian law, and that's what I think is the original sin of the British, to make that decision that they didn't have to concern themselves about the rights of the native people in Australia.

30 So, yes, those - but by - as I say, by the time this committee was sitting, the humanitarian movement in Britain had realised that things had gone terribly wrong in Australia. And as I've said elsewhere, as a result of the squatting rush, by the 1830s, in their private correspondence inside the colonial office, they were saying that this is terrible and it is likely that the Aborigines will become exterminated.

35 **MS MCLEOD:** And, Professor, not just in their private correspondence, but in this public report there is a note of concern of extermination of First Peoples.

PROFESSOR REYNOLDS: Yes.

40 **MS MCLEOD:** There is a note of passing of acts disposing of lands without averting to the native population. There is reference made to vengeance killings. And such matters were clearly before the Imperial Parliament in 1837, weren't they?

45 **PROFESSOR REYNOLDS:** Yes. Yes. They had become very, very aware that something had gone terribly wrong, and they did obviously try and turn it around. And, you know, there's no doubt that they were unsuccessful. The Australian

colonies and the Australian colonists had decided that they were going to go their way, and squatting was the classic example of that. And that's why it became seen as a great Australian movement, a romantic movement. You know, opposed to the British government and opposed to the natives, they went out and conquered the wilderness. It's a terrible story.

MS MCLEOD: One of the things that was seen as necessary to protect First Peoples - and if we could bring up page 125 of this report - was the establishment of protectors. And so, if we look under the heading, 125, Australian Colonies, the duties of protectors are set out, and there's some of the duties described including employment, education, the operation of criminal laws, and the avoidance of employment of First Peoples as police. So back in 1837, that was the recommendation of this Parliamentary Inquiry, to establish protectors; correct?

PROFESSOR REYNOLDS: Yep.

MS MCLEOD: So can you both consider this question, this notion of protection and why it was necessary: Shortly before this Imperial Committee Inquiry, the British Parliament, as you've said, have passed the Imperial Abolition of Slavery Act in 1833, that applied throughout the British colonies, and whether that social context is relevant to this question about protection, and the need to impose protection for the benefit of First Peoples?

PROFESSOR REYNOLDS: Well, I mean it's also important - just before this was set up, George Arthur returned from Van Diemen's Land after 12 years and was six months in England, in London, in constant contact with the Colonial Office, and he had - this is one of the things he had recommended along with treaties.

Now, the protectors, indeed, were seen as a way to try and at least control the amount of killing; that they would be there as witnesses, and this is the important thing. The important thing about squatting was there was no one there. There was no authority. There was no one to report. There was no one to even try and bring to justice people who were known as murderers.

So, the protectors were at least some attempt to have witnesses there and to set up small stations where the local people could come and be protected from the squatters. So, they had - there were problems about them and their mission, but the protection was a serious protection of their life and limb. And as I will show later, I mean, they did play an extraordinary role and led eventually - you know, if it hadn't been for the protectors, there wouldn't have been the pastoral lease. And the pastoral lease is still there and still having an impact on Australian law and Australian society.

MS MCLEOD: Professor Langton, can I ask you for your reflection on this motivation or the genesis of the notion of protectors?

PROFESSOR LANGTON: Yeah, I agree with Professor Reynolds. There's an interesting article that I've sent to Esther by Smith McCalman, Anderson and McCarthy, I think, called *Fractional Identities* published in 2008, and they looked at Victorian population records, of which there are quite a number, and they

5 concluded that the Aboriginal people who had been sent to the reserves and settlements under the protectors formed the largest survivor group, if you like.

Although not a lot is known about those people who weren't put into the reserves and settlements under protectors and, you know, in the final paragraph, they

10 speculate that perhaps they just disappeared into the community but there's more research to be done about that.

But about the protectors, I thought it was interesting that they said - I'll just find it, sorry:

15

"..the colonial government had been quick to establish rationing stations, missions and even schools. George Augustus Robinson was appointed Chief Protector of Aborigines in 1839 in the hope of preventing the disastrous depopulation that had occurred in Van Diemen's Land. A protectorate existed

20 *until 1849.*

The select committee in 1859 led to the formation of a central board to watch over the interests of Aborigines which, by 1862, superintended seven reserves and 23 small camping places.

25

Victoria's 1869 Act, which established safe havens to protect the remnants of the tribes from the excesses of the settlers, became the model for legislation in the rest of the country decades later. It also marked, however, the beginning of a coercive native administration in Australia. From that point

30 *forward, Aboriginality and by extension a person's status under the Act, came under the jurisdiction of the magistrate. The Act controlled Aborigines' place of residence, movement outside the reserves, work contracts, money and children's welfare."*

35 So that first Act and subsequently all the similar legislation around Australia made Aborigines wards of the State, and fiduciary duties were spelt out - the State's fiduciary duties were spelt out in that legislation.

40 So, there's an interesting point – let me think – so there's an interesting point they make about the, you know, racial scientism, you know, the false theory that Aborigines would simply disappear because they were an inferior race because that's how, according to 19th century thinkers, evolution worked. The authors make the point that if the Aboriginal population was considered to have

45 disappeared, it was by legislative fiat and not a reality.

MS MCLEOD: Could you just explain those theories, the concepts of social Darwinism and thinking around extermination or assimilation at the time?

PROFESSOR LANGTON: So –

5 **MS MCLEOD:** There's obviously reference here in 1837 to extermination or dying out of the race.

10 **PROFESSOR LANGTON:** Yes. So, this is what is meant by the title of this very important article, legislating Aboriginality, fractional identity and fractional citizenship. So, the Aborigines Protection Act of 1886, known generally as the Half-Caste Act described in the 1887 Protection Board report as a:

15 *"...measure for merging the half-castes among the general population of the colony. The new Act sought to accelerate the natural historical process of assimilation, absorption and, therefore, disappearance of Aboriginal Victoria from the human story by simply declaring, in the name of economy and of the people's own best interests, that persons of mixed descent were not Aborigines and were not entitled to live on stations, nor to receive aid as a right."*

20 So, in Victoria, there was that very specific purpose, and you can see the background of racial scientism or social Darwinism and the very firm belief that there was a natural historical process or evolutionary process.

25 So, 19th century scientists, philosophers, thinkers, adopted Charles Darwin's theory of evolution, which, in the main, he had confined to particular forms of biodiversity that he had encountered in his travels. But the racial scientists extended this theory of evolution to the human species and, of course, fitted it into the long history of theories of racial supremacy and purity that had begun much earlier, you know, and it was particularly heightened by certain German philosophers. And so, it was a given for Europeans and the British that white
30 northern races, the so-called Aryan races, were the superior races and all others fell into a chain of inferiority.

35 And there was a pyramid, and it was actually taught in Australian schools right up until the 1860s. A pyramid of the races. Right at the bottom of that pyramid, by the way, were Aborigines and Patagonians. And so, this theory developed that Aborigines and Patagonians were the most backward of all races and would necessarily die out.

40 But, of course, there was no evidence for any of this. In fact, I often wonder if it isn't indeed like the denial of Aboriginal property rights, you know, of system of property, even though in the Marshall case, you know, it was made very clear that people in possession of a place – quote quote – are the owners of the land.

45 But that law of a British court was not applied in Australia. So where was there evidence for all of this racial scientism? They really didn't have any evidence. It was all assumption. And, of course, we find out much later with the human genome mapping that, in fact, races don't exist.

MS MCLEOD: Can I just come back to the chronology for a moment, but before I do that, the language you read out there included some benign terms like “depopulation” and “the interests of Aborigines”. Uncle Robbie Thorpe will give
 5 evidence this afternoon about the fact that Australia is a crime scene, effectively, was his language, and we’re talking about crimes against First Peoples of a horrific nature, are we not?

PROFESSOR LANGTON: Yes. Well, in fact, see, at a certain point in
 10 Australian history – and perhaps Professor Henry Reynolds knows the date and the case – I can’t remember the case – the courts in Australia found that it was actually a crime to murder an Aborigine. I forget the case. I think it was in the 1840s. So, you know, under British law, was it a crime? I mean, I think they all
 15 knew that it was. And so therefore racial scientism was a pretty handy theory to have about where all those Aborigines went, if most of them had been shot and, you know, pushed off cliffs and starved to death.

So, I mean, I’m not an historian, so I don’t have any evidence for what I’m saying, but I think there is a lot of evidence, you know, if you look at the records. Because
 20 there were settlers and, as Henry said, you know, the Quaker reform movement, and there were settlers writing diaries and writing letters to newspapers pointing out that crimes were being committed.

MS MCLEOD: And there’s certainly, in the comments of the Aboriginal
 25 Protection Society on this report, instances of that sort of violence, including, in the passage we just went to, an instance in 1834 of Sir James Stirling, the governor:

30 *“...proceeding with a party on horse to the Murray River in search of a tribe who were thought responsible for a murder. Upon coming upon them, the appears the British horse charged this tribe without any parlay, killed 15 of them, not, as is seems, confining their vengeance to the actual murderers, and then threatened the women and children with similar unless they behaved in a particular way.”*

35 So certainly records, would you agree, Professor Reynolds, of this sort of crime being committed?

PROFESSOR REYNOLDS: Well, yes. Yes, that’s absolutely the case. I mean, you can go right back to Governor Phillip. But the point about that example is that
 40 it was still in a way contained within – it was the government doing this. What was happening by 1834 was that this, as I say, became privatised because anyone, if you have – if you set up 700 pastoral stations, they can all, if they want to, send out punitive expeditions. I mean, this is so pertinent to Victoria because the
 45 situation changed. It became a personal thing.

And there was indeed – I mean, if I just very, very briefly, the memos that were passed around the colonial office that weren’t sent to Australia, and the leading

figure in this period was a man called James Stephen and he wrote these notes on the dispatches coming from Australia on the back or on the corner but these were never published.

- 5 But for instance, given that the protectors came to Port Phillip in 1839, in April '38, there was indeed a dispatch from New South Wales, and on this Stephen wrote:

10 *"The causes and consequences of this state of things are clear and irremediable, nor do I suppose it is possible to discover any method by which the impending catastrophe, namely, the extermination of the black race can be averted."*

15 So, they were keenly aware that there was a very profound problem. Now, it's also important, I think, to get the chronology right. Darwin - *The Origin of the Species* isn't published until 1859. So up until this time, there certainly was the idea of a hierarchy of races. This is absolutely true. They decided they wanted to classify the different races of people. They had all sorts of ways to try and do it, and some there were three races and some there were many, many more.

20 They had all sorts of ways of measuring and trying to define the races and put them in this hierarchy. But before Darwin, it was a fixed hierarchy. It had been fixed by God. Whereas after Darwin, it's a moving thing, and the various races on this staircase, or in this chain of being, actually changed because Darwin made human history dynamic. And it was moving, and it was changing, and that's why, 25 in a sense, all of the thinking about eugenics and racial superiority and the competition of races - I mean, the very idea of a struggle for existence and a competition of races, this changes everything, but it only begins after 1859.

30 The realisation that, indeed, particularly in the 1830s - it was very, very tragic, and the British, indeed, tried - Governor Gibbs in New South Wales tried with the Myall Creek killers, and seven of them were tried and hung for murder. But such was the opposition, the opposition from inside the colony from every level of society, that it didn't happen again. And there's no doubt - I mean, particularly in the history of Queensland, the killing went on, and there was no attempt to ever 35 bring anyone to trial until well into the late 19th century. And the problem then was that juries wouldn't convict white men for killing blacks.

40 **MS MCLEOD:** That may have been one problem, that juries wouldn't convict. Were prosecutors willing to prosecute?

PROFESSOR REYNOLDS: Yes, by the late 19th century, people had come to the conclusion that killing was all right out in the frontiers, but in their small colonial towns that it had to stop. And so there were cases, indeed, where 45 a Aboriginal woman had been killed by a white bloke in the town and there were several cases by the 1880s, 1890s, where a trial was held but that didn't mean that a white jury would ever convict.

MS MCLEOD: Can I just come back to this alignment of discussions around violence on the frontier and land. Can we bring up slide 4, please, which was shown to the panel yesterday. This is a map of leasehold holdings in 1851, and on this version there's a red circle. Just ignore that for the moment. We've noted in
5 your evidence, Professor Reynolds, that the Hentys had been refused permission to claim land and took possession illegally, as did others. They did so in 1834.

And around that time, we've heard evidence on Monday of a massacre of 20
10 Kilcarer Gunditj at Convincing Ground. We have heard about the operations of whalers and sealers along the coast. And we heard evidence yesterday from Dr Bill Pascoe that these massacres peaked in the 1840s, and he said these were some of the worst things he had ever heard of anyone ever doing to anyone in history.

15 So, by 1851, the land was divided up like this. If we could zoom in on the left corner, to the left of the word "Portland" and just show Portland down the bottom of the map there. So, at the time of Victorian statehood, the land was divided up like this into various multiple leasehold interests, and that red circle marks the
20 station Merino Downs where the Hentys moved - or one of the stations where the Hentys moved their flocks.

So you mentioned, Professor Reynolds, the 15 years since that first white settlement, by the time we get to 1851, 15 years or something after the advice of Major Mitchell on his way through, "Go and look inland, that's where the valuable
25 lands are", the Hentys and many others in that 15-year period had taken and claimed all of this prime sheep pastoral territory; correct?

PROFESSOR REYNOLDS: Yeah.

30 **MS MCLEOD:** In other words, their claims, although noted as illegal, were successful because they resulted in these leases. Is that a fair comment?

PROFESSOR REYNOLDS: Yes. I mean, it's important, I think, to get this clearer. Now, what the - as I say, what the British realised they had to have some
35 control at least to stop the squatters eventually becoming outright owners. So, they introduced the systems of licences which went from 1836 right up until the late 1840s.

Now, it's important to - I mean, I think in one of your notes, two-thirds had
40 been - by 1840, two-thirds of Victoria had been sold as free title and that's quite wrong. What had happened was the squatters had squatting rights as a result of an annual licence. Now, the question arose: Did a person who held a squatting licence have the right to expel trespassers, i.e., the local people? And there was an important court case in Melbourne in 1842, as I think, and Mr Justice Willis
45 indeed said, "Yes, if I hold a licence to depasture my sheep, I can drive off a trespasser by any means available to me."

And it was a case about a squatter who was being on trial for shooting an Aborigine. And it was the case of 'was this murder or was it legitimate defence of your property?'. And the judge said, no, it was legitimate to shoot a trespasser on your land over which you held a licence, but they didn't own the land. They simply
 5 had a licence, an annual licence, to use it.

Now, it was that decision which led Protector Robinson to start writing letters and dispatches about this question. And, indeed, in one of them, which went to London, saying that, "The Aboriginal people of Port Phillip can find no place
 10 legally to put the soles of their feet" because this appeared to be what local courts had decided.

Now, it was as a result of this, once this became apparent in Britain, in the colonial office, they said, "Hey, wait a moment, we had no intention -" and by this time
 15 you had gone from licences to leases after 1847. But they said, "Although we've given leases to these people, this doesn't mean they can exclude the local people. They equally have a right to use the same land. And that is why we will put into the pastoral leases all over Australia provisions which make it illegal to drive
 20 people off their country."

A pastoral lease only gives you the right to use the grass, not to do any more than that, and you can't exclude the native people from using the land in their way. And that was the biggest reform that the British brought about, the pastoral lease. Now, I don't know what happened to pastoral leases in Victoria after self-government,
 25 but pastoral leases remained in Queensland, Northern Territory, all of Western Australia, and continue to do so.

It's just that people forgot there was a clause in the lease which said it was illegal to not allow Aborigines to use the same land. And that law was never enforced in
 30 the colonies, but it existed right up to the present and in the Wick case, to everyone's amazement, they found that this was still the case; that pastoral leases did not allow you to stop the local people from using the land in their own way, because they had rights as the leaseholder did.

Now, if that had been enforced in - after 1856, if that had been enforced, there would have been a totally different story of the settlement, in particular, the move
 35 into north Australia.

MS MCLEOD: So just to pick up a point you've raised there from John Quick's book that you sent through last night, Professor Langton. He notes - this is his
 40 book, *The History of Land Tenure in the Colony of Victoria*, John Quick being a barrister and member of Parliament says - he describes the run, or the rush for runs with a first-comer takes the best bit sort of attitude, and then he notes:

*"It was the spontaneous growth of private adventure and became recognised as part of the pastoral system. In 1835, the expediency of this unauthorised
 45 occupation of wastelands was first questioned. It then began to be feared if the*

5 *squatters were allowed to remain in possession, they would hereafter contend, as they really did, that this permissive occupancy was a recognition of their rights to demand titles of absolute proprietorship. The local executive imposed a nominal rent upon occupation, which was subsequently commuted into a nominal fee payable annually for an occupation licence."*

So, there is this commutation of the possession claims into occupation licences, which he notes:

10 *"...was not intended to be a payment of rent for the use of the land, merely a certificate of the character and a recognition of the precarious nature of the title of the occupant. Such was the origin and principal features of the early history of the squatting system in New South Wales, Port Phillip being then a province of that colony."*

15

He refers to the report of the Crown Lands Commission of Victoria 1954 to '55 and quotes:

20 *"Founded rather in default of laws applicable to the subject than in contravention of any subsequently recognised by local statutes and regulations, it constituted a general tenure of Crown lands, strictly provincial, while the title conferred upon the individual occupants was entirely at the sufferance and discretion of the representative of the Crown."*

25 So, thank you, Professor Langton, for sending that through. Just before we have a short break, I wanted to come back to this alignment of violence and land, the taking of land. Could we show slide 5, please. This is the massacre map, the work of Dr Pascoe and Dr Ryan. And we see on the left the massacre map for south-west Victoria or part of the map that they've reproduced from their research
30 that was described yesterday by Dr Pascoe.

And if we could - you see there the larger Portland Bay district area, and, Professor Langton, did you want to make a comment about the density of the massacre sites recorded there and the density of the pastoral leases in 1851?

35

PROFESSOR LANGTON: Well, you know, I mean I have to sit very close to the map, but I think there is a correlation between the squatters taking up their runs and the - you know, the killings that this database refers to. But it needs to be said that these records are the tip of the iceberg, and that most of -

40

MS MCLEOD: That is the massacre records?

45 **PROFESSOR LANGTON:** The massacre records are the tip of the iceberg. It is unlikely that most of the killing was recorded, because if the killings were executed by, say, shepherds and the workers for the squatters, then they likely couldn't read and write. So, we don't know what they did because they wouldn't have been able to write it down.

So, this map is - it must be an underestimate of the killings but there is clearly a correlation between the squatters' runs and the known killings.

5 **MS MCLEOD:** And it was Dr Pascoe's evidence yesterday that those massacres that they're aware of peaked in Victoria in the 1840s, which is similar to the period of between 1834 and 1851, by the time we see this map with the leasehold -

10 **PROFESSOR LANGTON:** Yeah, that's what I mean by the correlation. It's a very clear correlation.

MS MCLEOD: Professor Reynolds, can I invite your comment on that correlation?

15 **PROFESSOR REYNOLDS:** Well, it doesn't surprise me. But, I mean, the definition of a massacre, I'm not completely happy with. But, yes, I'm sure the killing was general. The other point that needs to be emphasised is that there was a code of silence on the frontier. Now, you didn't have to - you didn't have to necessarily take part in any of these - you know, these expeditions to kill people, but you couldn't talk about it.

20 You didn't have to hold a gun but you had to hold your tongue, and everyone knew what had happened locally, but no one talked about it. And so that so much of what happened got covered by a very, very powerful code of silence. And if you didn't keep to the code of silence, you probably would have got driven out of the district.

25 **MS MCLEOD:** Chair, we have been going for a while. I'm just conscious that Professor Reynolds has to go, but would it be convenient to take a short break now?

CHAIR: What would you suggest?

35 **MS MCLEOD:** For the comfort of all the of us, so would five or 10 minutes be enough?

CHAIR: Thank you. We will adjourn for 10 minutes.

40 **MS MCLEOD:** Professor Reynolds, we're just going to take a 10-minute break.

PROFESSOR REYNOLDS: Yes, that's fine.

<THE HEARING ADJOURNED AT 11.24 AM

45 **<THE HEARING RESUMED AT 11.38 AM**

MS MCLEOD: Are you back?

PROFESSOR REYNOLDS: Yes, as we have got limited time, I would like to go move on to the question of the dying race, eugenics and the ideas which so influence policies right up until, in living memory. Now, if I could, I just came
 5 across this, really, last night, I was looking at the Ernest Scott's *Short History of Australia*. Now, this is an extraordinary book because it was published in 1916 and it went on until the seventh edition, third reprint in 1958. And that is for two generations, it was probably the single most important history of Australia. And I actually was presented this in the late 1950s, when I was teaching a course of
 10 young public servants, Commonwealth public servants, doing, you know, a course that led to promotion.

Now, in this book - I mean, in so many ways, it's a good history book. And, remember, he indeed was the Professor of History at Melbourne from 1913 to
 15 1936. It's called the Ernest Scott Chair and there's an Ernest Scott Prize, so he really is the founder of the great Melbourne History School. This is the book, as I say, that I was given to teach from in 1960, perhaps it was, and he talks about the fading out of the native races.

20 In particular, he talks about that, yes, there are - you know, there are still people up there in the north, 1939, maybe 52,000, and he goes on and says in these two states, that is, where the decline can be accurately measured, the black population is fading out of existence very rapidly, and within the present generation will probably cease to exist. That's New South Wales and Victoria.

25 Elsewhere, though the decline may be less rapid, it is only where Aborigines are preserved by special missionary exertions that their numbers may be maintained. And he says there were fewer than 1000 in New South Wales, only about 100 in Victoria. So, as I say, this is an extremely important man with a very, very
 30 important and long-lived history book saying that they're fading away and that will continue, and in New South Wales and Victoria that will be - that will have happened quite soon, because there were only 100 left in Victoria.

MS MCLEOD: Sorry, Professor, when was that writing?
 35

PROFESSOR REYNOLDS: Well, he wrote it in 1916 but the seventh edition was 1958. It was in print and being used between 1916 and 1958 without change.

MS MCLEOD: So, the low point of the census of the Aboriginal population he is referring to was around 100, was it?
 40

PROFESSOR REYNOLDS: Well, that's what he says. I haven't checked the figures.

MS MCLEOD: Yes. No, just checking.
 45

PROFESSOR REYNOLDS: Yes.

MS MCLEOD: And Commissioner Hunter just asked for the title of the publication.

5 **PROFESSOR REYNOLDS:** *A Short History of Australia*. As I say, it was the most important general history ever in Australia for two generations.

MS MCLEOD: We have touched on the Aborigines Protection Act and the introduction of the notions or legislated notions of, to use the language of the day,
10 "half-castes" and there was also language that was used to describe those with quarter Aboriginal heritage or an eighth, and this sort of language was used in the 19th and early 20th century in these sort of writings, wasn't it?

PROFESSOR REYNOLDS: Yes. Yes, definitely. I mean, there was a complete
15 list, you know, octoroon, quadroon, half-caste and this was still being used right up - I think the important thing to emphasise is that all of these ideas and the racial science were quite predominant up until the Second World War. During the
20 Second World War, there was a profound change as a result, particularly, of the Holocaust but above all of Nazi Germany. And after the Second World War, human rights, United Nations, and above all UNESCO - the first thing UNESCO did was to endeavour to destroy racial sociology and racial science, so that the period of the Second World War was a real watershed. But up until 1939 these racial ideas were still very, very common and they were supported not just in
25 popular thinking but by many of the scientists.

MS MCLEOD: What were the consequences of this thinking in terms of the control and movement or management of Aboriginal people?

PROFESSOR REYNOLDS: Well, it was obviously extremely important, and
30 that's why the first Commonwealth Conference of Protectors in 1937 adopted the - you know, put great emphasis on the policy of breeding out the colour. And Albury Neville, AO Neville, the very powerful protector in Western Australia, made the famous speech which is there in the records, that if we're not careful - if we don't control this - because by then they realised what they said, there was
35 a real half-caste problem. If we don't control the half-caste problem - that is, in places like south-west Western Australia - and we don't control the - soon, if we are not careful, there will be a million Aborigines in Australia. So, we really have to introduce these policies, virtually, of selective breeding and to breed out the colour. Otherwise, we will never get rid of them. I mean, that was obviously quite
40 acceptable talk up until 1939.

MS MCLEOD: So, from the late 1850s with the establishment of missions across Victoria, First Nations peoples were required or sent to these missions to live and to have their daily affairs managed or controlled; is that fair?

45

PROFESSOR REYNOLDS: Yeah.

MS MCLEOD: Yes.

PROFESSOR REYNOLDS: Indeed.

5 **MS MCLEOD:** And I think you've written - correct me if I am wrong - was that one result of the creation of the missions and the passage of the Aborigines Protection Act was the expulsion or expelling of children of mixed descent from the reserves into the terrible economic conditions of the 1890s.

10 **PROFESSOR REYNOLDS:** Well, that was the Victorian experience. That wasn't done everywhere.

MS MCLEOD: Yes.

15 **PROFESSOR REYNOLDS:** I mean, I think Blakely, the Queensland comparable person in Queensland, was determined that, no, you wouldn't break up families. So, it did vary. But that's - that Queensland - that Victorian thing was particularly pertinent. But I think, once again, the context is that up until, really, 20 the 1920s, the expectation that these people were dying out was overwhelming. But it was by the 1920s they suddenly started to realise, as I say, that in Western Australia - and whether it was so obvious also in, say, New South Wales and Victoria - in the older settled places, indeed they weren't. In fact, there were large numbers of mixed descent families which had very large numbers of children.

25 So, all of a sudden they said, goodness me, they are not dying out. In fact, they are rapidly increasing. And that's why in the late 1920s and 1930s, there was this really very, very powerful movement about what do we do with the half-caste problem because they aren't going to die out.

30 **MS MCLEOD:** Just - and I'll come back to you, Professor Langton, to take you through this - but in terms of the policy of confining First Peoples to specific locations with the missions operated by church and church bodies, how did they operate, in effect, to control the daily lives of First Peoples? Professor Reynolds?

35 **PROFESSOR REYNOLDS:** Well, the problem is that there were many - a great variety of missions and, therefore, great variety of the churches that they came from. So, it's very difficult to put out a very single rule about what the missions were like. Some of them were, indeed, extremely punitive. They - you know, they controlled everything, including marriages. They also, you know, punished the use 40 of traditional languages. They frequently separated children from parents by setting up dormitories. All of these things are very common.

45 But there was a great variety of how punitive they were. I mean, particularly the German missionaries, from the very start, had insisted that you have to learn the languages and teach the Gospel in the languages so that the experience has to be dealt with mission by mission. But, overall, yes, there was a great deal of control

which they, no doubt, felt was in the interests of the First Nations, that they had to be treated like children, for their own good.

5 **MS MCLEOD:** The writings of Len Smith and others suggest that this approach was akin to - these are his words or the author's words - animal husbandry with the aim of disappearance of a dying race and dilution of blood. Can I invite your comment on that?

10 **PROFESSOR REYNOLDS:** Well, I think that's a gross exaggeration, and overlooks the great variety. I mean, if you look at - I mean, you know, talk to the mob up in Hope Vale where the German missionaries did indeed provide protection and the community survived when, if they had been left to the pastoralists in North Queensland, they wouldn't have. And, I mean, their main
15 desire was to spread the gospel, and this - if you leave out the religious dynamic, that they are trying to convert these people to Christianity so they will be saved, you distort the whole idea of the missionary endeavour.

20 But certainly, they are indeed treating them like children. But, you know, this totally underestimates the capacity of First Nations communities to manage the missionaries in one way or another and to find ways to defy them and ignore what they say. There's a struggle going on all the time. It isn't poor little blacks are being pushed around by the missionaries; they often found ways to control the missionaries themselves.

25 **MS MCLEOD:** Professor Langton, quoting from the writings of Len Smith and others, do you have - do you agree with Professor Reynolds in relation to -

30 **PROFESSOR LANGTON:** Well, Professor Reynolds is certainly right about the great diversity of, you know, the types of administered settlements and missions and the agency of Aboriginal people incarcerated in them, but at the same time it has to be said that the term "animal husbandry" is in inverted commas in that article and it's used to, I think, capture the classifications in the Aborigines Protection Act. So, the Aborigines Protection Act of Victoria, I've forgotten the
35 year.

MS MCLEOD: 1886?

40 **PROFESSOR LANGTON:** Yeah, I think there was an earlier one. Anyway. 1865. Yep. So, it's referred to as the Half-Caste Act, so this is where you have the first use of the language of full bloods, three-quarter caste, half-caste, quarter-caste, octoroon, et cetera. Now, I don't know which terms are used in the Act but certainly half-caste is used. But, you know, it's the beginning of using that language. And so much later, when Tindale was giving advice and with Professor Elkin so - this is in Sydney in the 1930s and 40s - they develop a - you know,
45 a whole elaborate animal husbandry chart, if you like, of how you categorise Aborigines racially.

And, you know, so this is how they - of course, they confined everybody who they identified as, you know, of any Aboriginal descent, but they classified them. And I think it was started out as a kind of measuring device to figure out with these head counts, you know, on the settlements, on the reserves, to figure out, you know,
 5 whether or not the Aborigines were, in fact, dying out and, you know, if so, how quickly.

So, they did have a view about, you know, the fading away of the race and so, you know, they associated race with colour and, you know, ideas of miscegenation.
 10 I won't go on, but I think you get the picture.

MS MCLEOD: Yes. Can I just change tack a little bit before we lose you, Professor Reynolds, I wanted to ask you about the case law, and notions of terra nullius. And could we bring up on the screen, please, slide 7. What's coming up,
 15 Professor Reynolds, is an extract from the decision of *Cooper v Stuart (1889)* in the Privy Council, and alongside that an extract from *Mabo*, the famous *Mabo* decision, from the decision of Brennan J, as his Honour then was, and the discussion there in 1889 in relation to:

20 "*...lands that were practically unoccupied without settled inhabitants or settled law*" -

PROFESSOR REYNOLDS: Indeed.

25 **MS MCLEOD:** - "*at the time when it was peacefully annexed to the British dominions.*"

About the colony of New South Wales and then, of course, the unequivocal rejection of the notion of terra nullius in *Mabo* -
 30

PROFESSOR REYNOLDS: Yes.

MS MCLEOD: - in 1992. So can I invite your comment about, first, the notions of terra nullius - and I'm not asking for a legal analysis, of course, but the rejection
 35 of those notions of land as being unoccupied and peacefully annexed.

PROFESSOR REYNOLDS: Yes, sure. I mean, I forget the Latin tag you give to things just said in passing that aren't essential to the particular judgment.

40 **MS MCLEOD:** Obiter dicta.

PROFESSOR REYNOLDS: It was one of those. And Lord Watson probably knew nothing about Australia, but that was the legal doctrine he assumed. The great tragedy was that that, in a way, had an effect on Australian law, because we
 45 have been too silly in 1901 and not - and waited until 1986 that we freed ourselves from British legal precedent.

And the fact that 1992 was after the Australia Act, Brennan was able to do this. But also to point out the - it was unconscionable that this idea had gone on. I mean, anyone who knew anything about Australia knew by the time that judgment was given that it was clearly, clearly wrong. But, you know, if the Privy Council says that was it, that became the law.

MS MCLEOD: So just reflecting on those judgments and the obiter dicta of -

PROFESSOR REYNOLDS: That's it, obiter dicta. Yes.

MS MCLEOD: I've earned my keep. The judgment, the obiter dicta of Lord Watson in *Cooper v Stuart* and the impact on the thinking in Australia around the basis of occupation, can I invite your comment on, or your reflection on notions of sovereignty and claims of First Peoples to lands up to the time of the *Mabo* decision?

PROFESSOR REYNOLDS: Yes. Well, the two, in a way, worked in tandem. As I call the double-barrel terra nullius, they neither had property rights nor had sovereignty. And, clearly, you know, my - I'm fully and very well aware that, for *Mabo*, initially, he was mainly concerned about the question of sovereignty, because he didn't think he had a problem with land.

It was only when he realised that he also had a problem with land that he - and he was clearly advised, undoubtedly correctly by his legal team, that - to leave the question of sovereignty. Don't challenge the sovereignty, because, as the Australian courts, particularly the High Court, have said, it was a decision made by the Crown and is not - we cannot deal with that in this court.

Now, that leaves us in an incredible situation that, my view is, that the only way is to take a case to the International Court of Justice. After the *Western Sahara* case, which is - you know, I won't go into the detail, it does raise that question of who is going to decide the legitimacy of the British claim to an original sovereignty? Where can it be done if our High Court says we can't talk about it? But I really can't see why - after 1986 why the High Court in Australia can't do what it wants to do.

MS MCLEOD: You've written these words:

"There is no clear explanation in Australian legal theory how sovereignty passed from the First Nations to the British Crown."

So, if First Peoples were recognised as sovereign nations, how then are we to view the actions of early settlers and the frontier violence perpetuated during settlement?

PROFESSOR REYNOLDS: Well, that raises that whole question of, is it conquest, is it warfare? And they're questions that still remain very, very difficult

in Australia. When people say the land was never ceded, well, that's absolutely - it was never ceded, but the argument could be, no, it was simply taken as a fruit of conquest, which up until, after the Second World War, was an accepted way to gain sovereignty.

5

So that whole question of warfare, of conflict, of sovereignty still is totally - you know, is simply not really open for discussion. Even the simplest one like recognising the conflict as warfare, and, therefore, should be dealt with significantly by the Australian War Memorial, let alone the question of

10 sovereignty and how sovereignty - I mean, *Mabo* implicitly says of course the Aboriginal people had sovereignty because they exercised laws which can now be recognised. But they can't take that final step and try and deal with the question of pre-existing sovereignty. And the complication is that pre-existing sovereignty belonged to a mosaic of small, independent nations.

15

MS MCLEOD: Pardon me, Professor. I've just noticed the time. The Commissioners may have some questions for you, Professor, before we let you go. It is 12 o'clock so just -

20

PROFESSOR REYNOLDS: Yes, sure.

MS MCLEOD: Are there any reflections from the Commissioners?

25

COMMISSIONER WALTER: Just one, Professor. Sorry, you talked about the German missionaries. Were there any German missionaries in Victoria? Were any of the settlements -

30

PROFESSOR REYNOLDS: I don't think so. They were in South Australia, really, and obviously then in Queensland and in the centre. But I don't think there were any in Victoria.

35

CHAIR: Could I just say that there were there were Moravians in Victoria. They came across the south of the land. They were in Western Australia. They were in parts of South Australia and they came to Victoria, and they were at Lake Boga briefly and went to Ebenezer for some years.

40

MS MCLEOD: I do want to give Professor Langton time to respond, but it may be we have to do that without Professor Reynolds in the room. So, Professor, if you need to go, it remains to thank you for your evidence. If you are happy to stay while I invite Professor Langton to respond, please just let us know.

45

PROFESSOR REYNOLDS: Let me - I will hang on as long as I can, but I will give my formal farewell to wish you very, very well. And, as I say, I think this is extremely important in the current environment, that this is being pushed ahead with such sophistication and professionalism, and I think that is most important for the rest of the country. So, I wish you all the best.

MS MCLEOD: Thank you very much.

CHAIR: Thank you very much, Professor.

5 **MS MCLEOD:** So, acknowledging that Professor may drop off when he needs to, Professor Langton, can I ask you to respond to that question of sovereignty and the notion that sovereignty can be lost or acquired through conquest or cessation - the English notions of how sovereignty is acquired - cessation through treaties, obviously, with First Peoples? So, do you have a reflection in response to
10 Professor Reynolds' statements around sovereignty and the uncertainty of that issue?

PROFESSOR LANGTON: Well, I agree with Professor Reynolds in what he says, and look, the International Court in the *Western Sahara* case is fascinating in
15 this regard. So, I've often quoted from one of the judges - and I don't have it in front of me but, basically, he says that sovereignty is, you know, the tie of - I think he uses "man" - to the place where his ancestors left him with a legacy. I'll see if I can find the quote. So that, you know, it's a spiritual tie to the land.

20 And the problem with Blackstone's commentaries and Watson's views on how the British acquired sovereignty is that it's just British international law all written in the middle of the imperial conquest of most of the world, and, again, a pretty handy theory to have. So, they take over vast swathes of Africa and Australia and other parts of the world, and, bingo, suddenly there's Blackstone's commentaries
25 explaining, you know, again an ex-post facto theory about sovereignty is taken by the British.

And, of course, this is the origin of the terra nullius doctrine, and, really, I think, except for the problem that our highest court cannot question sovereignty, as I
30 think Anthony Mason pointed out, an ordinary judge in a court would say, "Well, Blackstone's commentaries are ridiculous" if they know their history. And, you know, so too the part that you read out from Watson.

35 So, I mean it's plainly ridiculous. How can one country come along and kill off the sovereignty of another people? It can be asserted that this is what's happened but did it, in fact, happen? There can be military conquests, but does that take away the sovereignty of another people?

40 Well, the people who have been conquered or who are regarded as having ceded their colony peacefully - that's a big lie right there - well, they have a very different view. And this is why Aboriginal people today say sovereignty was never ceded. So - and it is, of course, I think, necessary to develop a view of our own sovereignty that is based on the facts of our existence here as the First Peoples.

45 So, you know, this is why the *Western Sahara* case is important because it's about the spiritual affiliation of people to places in the country, and that's what I think is the essential element of our view of sovereignty. And it's, I think, entirely

compatible with a British view of their sovereignty here. I don't think it's - but the problem is it's not recognised.

5 And, you know, again, Professor Reynolds is right, why hasn't been there a case in the International Court of Justice on this matter? Because if the truth were told about Australian history, it ought to be evident to the International Court that the notion that the British killed off our sovereignty magically with their theory of conquered and ceded colonies are - the court would say, well, that's ridiculous; it's a nonsense.

10 So, what would be the point of even legislatively recognising a form of First Nations' sovereignty here in Australia? It's not a real sovereignty. It could happen. It might be, you know, a measure that could be taken. But it could look more like the recognition of Native Title. There could be legislation - it would have to be Commonwealth legislation, could be Victorian legislation - that says the State recognises the inherent sovereignty of the First Peoples based on their spiritual affiliation to their countries, a link that cannot be broken. And, of course, this idea of spiritual affiliation is recognised by the High Court of Australia, just one example in the Thoms and Love case.

20 **MS MCLEOD:** Professor, I want to come to - there's a couple of other topics I want to ask you about. One is around measures of protection on the missions, and control in terms of loss of language, education, expulsion of mixed race children and things of that nature, and then the second is the question of eugenics and invite you to respond to the things that Professor Reynolds raised about eugenics. Is the Commission happy to have a short break while we do that? Because there's some sensitive material to discuss, or would you like to press on, given the time?

30 **CHAIR:** Keep going and break probably for lunch, I think. How much time do you think you need?

MS MCLEOD: If Commissioners are happy to manage the sensitive material the way we discussed before the hearing, unless there's a change of view about that, I will keep going. I just wanted to check in.

CHAIR: Yes. As we discussed, yes.

40 **MS MCLEOD:** So, Professor Langton, the first thing I wanted to come back to was the establishment of reserves and various controls placed upon the residents of those reserves and to invite your reflection on those control measures - movement, marriage, language, culture - to explain to those listening what the controls were. And we might bring up, just for this discussion, slide 8, which is the section 2, the Aborigines Protection Act 1869.

45 So just by way of context for this, when introducing this Bill to Parliament, the Minister for Justice said:

"The board was empowered to act in loco parentis to Aborigines..."

A phrase that means in the position or the standing of a parent:

5

"...to watch over adult Aborigines throughout the colony to prevent them wandering about among grog shops and, in fact, becoming waifs and strays."

10 And then section 2 is set out there giving the Governor power to make regulations for various purposes: Residence, contracts, apportioning earnings, care and custody and education of children. So, can I invite your reflection on the system of reserves and control of Victoria's First Peoples?

15 **PROFESSOR LANGTON:** Well, in this Act in particular, it's very much like the Queensland legislation. The prevention - the first one was the Prevention of the Sale of Opium and Protection of Aborigines Act 1896 and then that, you know, changed until - you know, through a good part of the 20th century until the 1980s, it was for a period known as the Native Affairs Act.

20 And the - what this Act and the Queensland legislation does and these two pieces of legislation in particular do is make Aboriginal reserves total institutions. Not only are Aboriginal people made wards of the State, they are, you know, made the children of the State. The State becomes their parent. And so, in all respects, their lives are controlled by the State and its agents such as protectors.

25

So, they're total institutions. Now, the missionaries - you know, the Moravian missionaries - and I don't know how to say; I've never heard it said - Ramahyuck. But the Moravian missionaries there - and there's very good work on this by Bain Attwood - ran a total institution. And I think it's very likely to be a model for this kind of legislation because they - you know, Bain Attwood describes the forms of discipline that the Moravians imposed on the Aboriginal residents of Ramahyuck and it was an extreme and kind of military - it was military in its implementation. People were lined up. The houses were in a row. All of this was alien to Aboriginal people.

35

In Queensland, it was very similar. You know, you can see photographs of it and see it referenced in the literature on Palm Island. There were bells. Bells five times a day. So, people had to respond to the bells. And, of course, these are ration depots. This is where people received their food. They are not allowed off the reserve to hunt or gather. They are given substandard rations in the main, and this is one of the big killers of Aboriginal people, the inadequate nutrition on these reserves.

40

45 By the time that they get around to classifying Aboriginal people by the colour of their skin, by racial classifications such as half-caste, and cut off the right of so-called half-castes to the benefits that the State is distributing to Aborigines. They expel them completely from the reserves in Victoria. They're not entitled to

any assistance, and they have to, you know, fend for themselves in the general population. And, again, it is very obvious that that is another pathway to destruction of Aboriginal people.

5 So while it is true that these reserves and settlements established under the
Aborigines Protection Act did protect a portion of the Aboriginal population from
the violence of the frontier, from the violence of the squatters and their staff,
nevertheless, there are terrible consequences of this legislation, and that is the
exclusion of so-called half-caste people, which I think has had lasting
10 consequences for the people of Victoria. Because so many, you know, Aboriginal
people in this State are not sure where they're from.

So, their ancestors might be the half-castes excluded by the protectors under this
Act, or they might be the people who were never rounded up and put in the
15 reserves in the first place. And so, without population records such as the
protectors kept, people have great difficulty in identifying their lines of descent,
although there are some great population records kept by individuals, and it's
referred to in the Len Smith et al article, the Koori population database.

20 **MS MCLEOD:** The historian Michael Christie observed of the reserves that:

"They aim to eradicate Aboriginal culture and replace it with British forms."

25 So, what impact did the missions have on First Peoples' culture and maintenance
of language and culture and both the negatives and positives in terms of acts of
rebellion and resistance?

30 **PROFESSOR LANGTON:** Well, I think here in the south-east, it's pretty evident
that the decline of Aboriginal languages is due in large part not only to the frontier
violence, but also to the way that the reserves were managed by the protectors. So,
you know, many Aboriginal people have spoken about how they were, right into
the 20th century, forbidden to speak their own languages.

35 In other parts of the country, however - and Professor Reynolds referred to Hope
Vale - the Lutherans - and they did this in Hermannsburg in Central Australia as
well - learnt the local languages and they were actually - they actually created an
orthography and translated Christian texts into both Ngaanyatjarra and Arrernte.
So, there were quite a few missions where the missionaries did learn the local
languages. That was the case at the Methodist mission at Yirrkala where even the
40 lay teachers taught in Yolngu Matha.

45 So, it does not appear to be the case here in Victoria and New South Wales where
you see the greatest decline in languages. In fact, Australia still to this day, has the
highest language extinction rate in the world, because every year we see languages
becoming extinct in Australia. So, if we started off originally - and I'm going on,
sort of, on the work of Professor Rachel Nordlinger at the University of
Melbourne don't quote me on the figures, please. But, you know, roughly -

MS MCLEOD: She is a linguist.

PROFESSOR LANGTON: Yes, roughly 600 language types, if you like. I forget
 5 her technical word. How many of these languages now are actually transmitted
 from mother to child? Well, you know, there's a tiny number. We have language
 revival programs. So, there's such an extraordinary rate of extinction of Australian
 languages and, as I say, Australia has the worst language extinction rate in the
 10 world, precisely because of these policies of destroying Aboriginal culture. And
 you destroy a culture by stopping people from speaking their own language, by
 removing their children, by stopping them from having ceremonies, for instance,
 by banning their religion and all of the rituals in life that traditionally were used to
 mark phases of life such as from birth right through to funerals.

15 So, with all of that content of the culture effectively banned, perhaps not by
 dictate, necessarily, but by the belief of the protectors that it was their duty to do
 so. And some were more enthusiastic in stopping Aboriginal cultural practices
 than others. And I don't know the details but I do know that, for instance, even
 Bain Attwood talks about some of the male elders going off and having
 20 ceremonies, and for a certain time in the early part of the colony here, some
 ceremonies that, you know, Barak was involved in were tolerated.

In some parts of Victoria, the ceremonies were tolerated by the local protectors,
 because you can see in Barak's paintings and Johnny Dawson's and Tommy
 25 McRae's paintings that they are painting life on the frontier. Barak's painting of a
 ceremony - more than one painting is I think - they tell us that, during his life,
 ceremonies were being held. So that's in the late 19th century.

30 So, look, the protectors weren't entirely successful in killing off Aboriginal
 culture, and people were secretive about their culture. And we see some references
 to that, to people having ceremonies. Bain Attwood writes about it. You see it with
 Barak's paintings. And there are other references to ceremonies being held around
 the country.

35 And where there were no reserves and there were Aboriginal people still living on
 country, you see illustrations, paintings, drawings of Aboriginal life such as
 Blandowski's lithographs in northern Victoria. And there are other illustrations of
 people going about, in many respects, a traditional Aboriginal way of life. I think
 40 many of the declarations of the death of Aboriginal culture were wishful thinking
 in many regards.

So, today, why Aboriginal ranger groups are so successful? And why are they able
 to speak about aspects of Indigenous knowledge that only they have about their
 particular ecological, you know, system in their country? So, it is because they've
 45 inherited knowledge and they've kept it secret and only recently revealed it.

MS MCLEOD: I want to bounce off that conversation to come back to the topic of eugenics and the sensitive discussion around preservation of human remains. And, Commissioners, I note this is a sensitive topic for those who are following and I repeat the caution that the information that Professor Langton may share is sensitive and may be distressing.

PROFESSOR LANGTON: So -

MS MCLEOD: Professor, you should have - that we are not going to show on the screen at the moment all of these, necessarily, but you should have a bundle of materials that I wanted to ask you about in relation to one collection of human remains known as the Murray Black Collection. And can I just ask you to give us some context around - this was a - we have got some correspondence written in 1940 around the collection of human remains. Can I ask you to frame this for us in the context of what was happening in Victoria and elsewhere in terms of the collection of memorabilia, including human remains, in this State.

PROFESSOR LANGTON: Well, look, first of all, it has to be said that there was a - you know, that people were - the white settlers were grave robbing and, you know, by various other means taking Aboriginal human remains from very early times. And there was a global trade in Aboriginal human remains. And this is why you find museums around the world have Aboriginal body parts.

So, our Department of Foreign Affairs has a unit, and they've been working for some years to have museums and collecting institutions return those to Australia. There is, in fact, a collection of unprovenanced human remains in Canberra. I believe about 3,000 of them. It's very difficult to repatriate them because there's no documentation. So, settlers simply took body parts, kept no notes, and sold them into the market.

Even in the 20th century, collecting institutions wrote to each other trading both parts. So that existed in any case. From the early 19th century, with the development of racial scientism, the idea of eugenics was developed, and the University of Melbourne had a number of eugenicists on its staff. Professor Sunderland was one of them, Professor Agar - there were quite a number.

MS MCLEOD: Just explain what eugenics is.

PROFESSOR LANGTON: Okay. So, there was a belief that there were superior forms of human, you know, types, and inferior forms, and it wasn't necessarily based on race. So, body parts were collected from disabled children, for instance, by eugenicists, because they were trying to prove - for some of them, in any case, you could create a super strain of human beings. And many of them actually advocated eradicating, you know, the people with inferior features, and so disabled people, blind and deaf people, Aboriginal people, the poor, and - you know, sorry, I should have this definition of eugenics ready for you, you know,

but that's the kind of - I can send you a good definition later, but that sort of, I think, sums it up.

5 And they used bodies in their anatomy schools to classify people by, you know, what they called phrenological characteristics, you know, the shape of their brain, the size of their brain, the distance between their eyes and so on. And there was - even in the 19th century in England, there was a view that people whose - I can't remember if their eyes were too close together or too far apart were inferior. You know, all sorts of crazy theories like that. So, I brought along, for
10 instance - and we probably won't have time to look at it, but the photographs taken by Donald Thompson at Lake Tyers where the eugenicist Frederick Wood Jones took a lot of photographs, including photographs of men's backs who - because he had a theory about the hair on the back of Aboriginal people.

15 **MS MCLEOD:** The material that the Commissioners have in front of them concerning the Murray Black collection includes a letter from March 1940 from George Murray Black to the university and he notes:

20 *"During my visits to the Murray Valley collecting Aboriginal species for the Institute of Anatomy..."*

He said:

25 *"...I obtained a large number of fractured skulls and incomplete skeletons. Directors informed me the institute does not require broken skulls or incomplete skeletons."*

And then he is making an offer in terms of what to do with that material and the Professor of Anatomy responds saying:

30 *"I'm particularly interested in these remains, would gladly welcome such a gift. Would like to meet with you and discuss disposal of material which you may collect in the future."*

35 And noting that he was working out at Tarwin Meadows in South Gippsland. So, can you tell the Commissioners what the Murray Black collection was and how it came to be in the custody of the university?

40 **PROFESSOR LANGTON:** So, George Murray Black was a farmer from the Gippsland. He graduated in engineering from the University of Melbourne. And he had an obsession with Aboriginal human remains, and he created his own hobby, if you like, of digging up graves around the State and collecting the body parts, and he must have had quite a collection on his farm.

45 So, this letter represents his approach to the university and, of course, Sunderland and others supported him to bring these bodies and body parts into the university.

And I've also sent you other material about that. So eventually – and Jim Berg is actually the expert on this, and I believe you are hearing from him later.

MS MCLEOD: Yes.

5

PROFESSOR LANGTON: I think it was something like 15,000 bodies and body parts were collected and were held at the University of Melbourne. Because of Jim Berg's litigation against the university when he was an inspector in the Victorian Government in relation to Aboriginal cultural heritage, he convinced a lawyer to litigate against the university. And the university resisted all, you know, attempts to make the practice transparent, particularly the lawyers at that time. This is back in the early 80s.

10

Eventually Berg won the case and the court ordered the University of Melbourne to repatriate this entire collection, and it was as a result of that litigation, that the original legislation, which really, you know, didn't protect Aboriginal cultural heritage at all or even, you know, prevent these kinds of practices, was amended, and by 2016, the legislation made it clear that automatically under the law, the Victorian Aboriginal Cultural Heritage Council established under the Act was the owner of all human remains.

15

20

There have been a couple of prosecutions that I'm aware of, university staff keeping remains in contravention of the legislation. One was at La Trobe involving Neville White, Professor Neville White, who is a geneticist. At the University of Melbourne, as far as I know, no one was ever prosecuted for retaining human remains in contravention of the Act. The practice now is that there are annual audits. And with some of the audits, you know, somebody opens a cupboard that was missed in the last audit, and human remains are found. Often, we don't know if they're Aboriginal or not.

25

30

There are human remains from other peoples. So, for instance, for a very long time, all of the skeletons that medical students brought to study medicine and anatomy were imported from India. There's a Pacific Island collection of human remains. We're trying desperately to repatriate it, but it's tangled up in the Fijian court in some litigation there.

35

MS MCLEOD: Just coming back to the current holdings at the museum, there's obviously great concern out amongst about the repatriation of those remains. Can you just summarise for us what are the provenance issues and cultural issues that make that difficult?

40

PROFESSOR LANGTON: So not all of the human remains that the Victorian Aboriginal Cultural Heritage Council has in its possession are from Victoria. They are from other parts of the country as well, especially the Northern Territory and probably Queensland. And they're stored in the museum where the Victorian Aboriginal Cultural Heritage Council rents appropriate spaces for the safekeeping of the ancestral remains.

45

But like the Murray Black collection – and I wanted to show you this so you could see how poorly provenanced the material is. So, you know, they just dug them up. Murray Black and his party just dug up, you know, the graves willy-nilly. There are often no place names. You know, you get a list like this one on one of your pages here, next page over. From the letter, I think it's from Sunderland to Black.

MS MCLEOD: So, note, for example -

10 **PROFESSOR LANGTON:** Anthropology, Australian Aborigine, catalogue number, box number, sex when known, field number where known, bones in each set. And then there's categories of bones, total number of the above listed bones. That was it. Right. That was their scientific record.

15 **MS MCLEOD:** On the record, you might have "female" or "human remains".

PROFESSOR LANGTON: Yeah, you have "one female". And, you know, no place. What's the place of origin? Where did they dig this up from? You don't have that information. So, the provenance is the issue. Just by the by, this is why the Ngurra Precinct in Canberra was designed by the Australian Institute of Aboriginal and Torres Strait Islander Studies as a dignified national keeping place for all the unprovenanced human remains.

Because you can imagine, first of all, you have the problems with DNA. It's not possible to get DNA from a lot of human remains. And, secondly, the cost is exorbitant. You've got 3000 in Canberra and every year more come back from other institutions. There's all the stuff that the Victorian Cultural Heritage Council owns here in Victoria and stores in the museum. If it's not provenanced, then you need a dignified safekeeping place just to honour them as ancestors and give them a dignified internment. I mean, I think a lot of people are very upset about ancestral remains being stored in cardboard boxes on shelves.

MS MCLEOD: So, the injunction obtained by Jim Berg was 1984. The Commission has heard evidence on Wemba Wemba Country about the renovation of the Murray Downs Golf Club and the car park there unearthing remains and the, can I use the neutral term, disrespectful way that Traditional Owners were invited to collect remains as that work was happening. Is this now fixed or are the practices of the 1980s continuing in some way?

40 **PROFESSOR LANGTON:** Sorry?

MS MCLEOD: That was 1980s when the car park at the golf course was being renovated, and I think the evidence was that Traditional Owners were invited to follow along behind the earthmoving equipment.

45

PROFESSOR LANGTON: So, does that still happen, is your question?

MS MCLEOD: Yes, does that persist in some way?

PROFESSOR LANGTON: I don't think anybody who turns up human remains would be doing that now. I mean, they might be stupid enough to do it, but it
5 would be illegal under the Act. So, I guess, you know, in the first instance, a bulldozer driver is going to report human remains to the police. If the police understand the laws of the State, they would contact the Victorian Aboriginal Cultural Heritage Council if they believe them to be Aboriginal remains.

10 And, in any case, whatever the circumstances, they are automatically the property of the Cultural Heritage Council. I don't actually know what the practices are. I think once there's a - you know, all the State permits for excavating a site for houses, infrastructure, car parks, perhaps these, you know, regional Aboriginal bodies that deal with culture are notified. I don't know.

15 I don't know if that system works. But, you know, without an injunction, there's no way of stopping an authorised excavation. So, unless the Victorian Aboriginal Cultural Heritage Council has a system for retrieving human remains from construction sites, I don't know what happens. Maybe they're sitting in police
20 evidence boxes somewhere.

MS MCLEOD: Do the Commissioners have any questions for Professor Langton or other reflections?

25 **COMMISSIONER LOVETT:** Probably just reiterating the point, Professor, here that the dates are not too long ago, 1940s and 50s. I think there's a lot of misconception that this happened hundreds and hundreds of years ago. But this is recent. 1940s and 50s.

30 **PROFESSOR LANGTON:** Correct. And Jim Berg's notice impounded and detaining certain relics - so this is under the Archaeological and Aboriginal Relics Preservation Act 1972 from Jim to Professor Graham Ryan, Chairman of the Department of Anatomy and Histology, University of Melbourne, that is dated 18
35 May 1984. So, this is, you know, where the case - you know, this is the case that I spoke about which resulted in the legislative change and, you know, the court order to make the University of Melbourne turn over.

COMMISSIONER LOVETT: 40 years ago. I want to reiterate that point. 40
40 years ago.

CHAIR: If I can add, the White one at La Trobe, that was in - during my time on the Heritage Council and he was not found to be at fault. And I can't remember the year now, but it's in the last 15 years or so.

45 **PROFESSOR LANGTON:** It was in the 2000s, yeah.

MS MCLEOD: Questions or reflections from the Commissioners? Thank you, Professor Langton.

PROFESSOR LANGTON: I just want to say, if I may.

5

MS MCLEOD: Yes, please.

PROFESSOR LANGTON: We've tried very hard to have photographs, our photographic collections from - taken at Lake Tyers and surrounds returned to the community, and we just can't get them to meet with us. So I just want it on the record. We still have them. This is the box we were going to give them - one of the boxes.

10

MS MCLEOD: Thank you.

15

COMMISSIONER HUNTER: Can I just ask the question of, when did the law come in that it was illegal just to take - I mean, I'm sure it was already in, but when did - because you said before they wouldn't do it now because it's illegal. I'm sure it's been illegal. But when would those practices have stopped, of, you know, ceremonial burial grounds being robbed of bones?

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PROFESSOR LANGTON: Well, you can't know how an Act is implemented. So, the Act changes after this litigation.

COMMISSIONER HUNTER: By Jim Berg.

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PROFESSOR LANGTON: Yeah, that Jim Berg took against the university, right. And then it was amended in 2016, when it, you know, was clarified that all Aboriginal human remains were the property of the Victorian Aboriginal Cultural Heritage Council on behalf of, you know, the relevant people. It's a pretty interesting Act and I can't cite it to you word for word, but I think probably you get clarity in the law in 2016.

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COMMISSIONER HUNTER: It's not a long time.

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MS MCLEOD: We can trace through the legislative history for you.

COMMISSIONER WALTER: We are talking eight years ago.

COMMISSIONER LOVETT: It's important to point out as well that the offer made there by Professor Langton around the return of those photos but, as we have heard today and other days, that not only are they our ancestors but our artefacts as well, spread right across the world but also in institutions. We have opened up our submission process to non-Aboriginal Victorians. And I think it's an opportunity just to remind people that if people do have objects - whether they be an institution or individuals - to also follow the processes around being able to return those to our people, because they are our product of our ancestors' contributions. And I'm

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not just talking about remains but also all the other artefacts around our identity and our culture as well. So, I just want to also further make that point.

5 **PROFESSOR LANGTON:** Just on that, the 2016 Act refers not only to human remains as the property of the council but also sacred objects. So, you know -

COMMISSIONER LOVETT: Secret and sacred objects.

10 **PROFESSOR LANGTON:** Secret and sacred objects, yeah. So, there's a lot of material that the Council or even a Court might not classify as secret and sacred but which is nevertheless the cultural heritage of Victorian peoples and all peoples whose countries are in Victoria. And a voluntary process is a great idea because a lot of people wants to return stuff. There are farming families that have got huge collections of stone tools in their sheds. I'm sure they don't want them.

15 **COMMISSIONER LOVETT:** But also as well, I think Traditional Owners are - we saw yesterday, the other day, actually, when we were on Gunditjmarra country, Gundit Mirring, and the work that they've done around not only world heritage listing as well but also having the correct and appropriate facilities for their artefacts to also be able to be returned and housed in a really effective way
20 that will also protect them as well in the right circumstances that not only fit with the legislation but also the tempered environment and so forth that these -

25 **PROFESSOR LANGTON:** I've seen the Gunditjmarra Museum or keeping place and I think they might have run out of room. But you don't need museum standard storage facilities for stone tools. And, you know, they've been kept in farmers' sheds for decades so what's the problem? I think there's a great case for keeping places in Victoria to have really precious cultural material that's not of a secret, sacred nature, on loan to the keeping places, even permanent loan, from the
30 collecting institutions.

COMMISSIONER LOVETT: There might be a difficulty with the mob around the term "permanent loan", because, ultimately, the mobs are the Traditional
35 Owners.

PROFESSOR LANGTON: Yeah, I understand that point but if institutions won't repatriate it, how are people ever going to see it?

40 **COMMISSIONER LOVETT:** A good point as well. I'm just saying it is important.

PROFESSOR LANGTON: The point has been made to me many times, and it's heartbreaking that the patrimony of First Peoples is owned by institutions who will not repatriate it. So, yeah. But, you know, this has been a practice for some time
45 with many institutions to lend material on a, you know, period term or a permanent loan.

Families do it all the time. You know, non-Indigenous families lend family paintings to galleries on permanent loan. They want a safe place to keep it and they don't want to sell it. It's an important Australian work or something, you know. So, there are lots of other solutions to get around the refusal of collecting institutions to repatriate material to First Nations people so that the young can see their cultural heritage.

COMMISSIONER LOVETT: See, touch, feel, experience.

10 **PROFESSOR LANGTON:** Yeah.

COMMISSIONER LOVETT: All part of identity which is what we have deeply talked about today and heard evidence about identity, connection, importance of language.

15

CHAIR: Thank you. Thank you very much and thank you, so much, Marcia, thank you. I think we should break for lunch and could I suggest 45 minutes, given the morning we have had. Will that work or not?

20 **MS MCLEOD:** Yes, I think so. We have Jim Berg's evidence. The video is approximately 20 minutes and then the second evidence of Uncle Robbie Thorpe is approximately two hours. So -

25 **COMMISSIONER LOVETT:** Can I just say one more thing; is that all right? I think given and building on yesterday's evidence, just recognising the deep trauma that this does bring up for our people but also for non-Aboriginal people as well, just encouraging that we do have a social and emotional wellbeing team with counsellors to be able to work with people who want to reach out. The number is 13 YARN, so 13 9276, or you can visit www.13yarn.org.au. Also, there's Beyond Blue, 1300 224 636, and also their website www.beyondblue.org.au as well. Really important.

30

So hopefully also people who are listening in or watch this in the future as well, do take the time to look after yourself. This is deeply traumatic things that we are discussing. It is our people's lived experience in the State of Victoria's history as well. So, I just want to remind people that this is the true history of Victoria that is being - evidence has been before this Commission as well. Thank you.

35

CHAIR: 1.30, thank you.

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<THE WITNESSES WITHDREW

<THE HEARING ADJOURNED AT 12.53 PM

45

<THE HEARING RESUMED

MS MCLEOD: Thank you, Chair. Chair, we will now have the evidence of Uncle Jim Berg, and that will be on video, and this is, of course, of the evidence that he part-shared with Yoorrook. So, we are playing this part today and there - we may supplement his evidence in due course.

5

CHAIR: Thank you.

(Video of Jim Berg's evidence played)

10 **JIM BERG:** My name is Jim Berg, Gunditjmara Elder. I'm 86 years old, turned 86 on the 17th of February. Born '38. And I'm here to make a statement on who I am and what I am. I'm going to start off with a statement that when we was on the mission, everybody knew each other and it was all part of the same mob, and everybody always shared what they had. But when you are not on a mission and you
15 hear racist comments often enough, you start to wonder who you really are. You start to ask yourself - Who am I? What am I? What does it mean to be me and who and what I am? What does it mean to be me?

20 When I was young and outside the boundaries of the mission. It was a time in my life that I never looked anybody in the eye. Off the mish, we were told the blacks are a blight on Australian society. And they wouldn't work in an iron lung. And there are no true Aborigines in Victoria. So I walked around looking at the ground in front of me. Often it wasn't the comments that hurt as much as the body language. The looks they gave me said it all. It made me feel dirty and ashamed of myself. It was easy to
25 become a shadow person and to be lost within yourself. We were not even considered citizens of this land that our people were the custodians of for more than 60,000 years.

30 I left school as soon as I could, which was at the age of 14. We moved from Fram to Gippsland. And I worked in many jobs. As a young man, I started going back to my Country to the mish for short visits. I only went down to Cemetery Road to visit our cemetery. I walked through the cemetery, and I talked to my ancestors. I talked to them about my shame and about my pain, and about the heartache that I was carrying deep inside me as a lost Koori person. And my ancestors heard me. And they
35 cleansed my body of this pain. And the strength and the spirituality and identity that my ancestors gave to me has made me the man I am today. A very proud, strong, Gunditjmara Elder. And at the age of 86, I'm still a worker.

40 Hello, my name's Jim Berg, and I have a tape here to demonstrate how long our people been in this Country called Victoria. See that little piece there? That represents invasion, occupation and Torres Strait Islanders. Each foot of this tape represents 1,000 years. And we move along here we have two feet. Christianity. This is how long we have been living in this Country now called Victoria, Australia. And we keep going and we just keep going and going. That there is 60ft, which represents
45 the 60,000 years. The story of the most resilient culture in this country will be and should be told. Thank you.

Tell the truth.

5 What happened to the Kooris? They were the custodians of this old, old, ancient land for thousands and thousands of years. What happened to them?

10 After invasion the colonisation took place. What happened on the Frontier Wars when the Kooris of the state were raped, murdered by the sword? Bayonets, bullets, poison and genocide. They wiped out whole Koori nations.

15 Were the bodies thrown on the fires? Into creeks, swamps, lakes, rivers? Buried in shallow graves or thrown over cliffs? Hoping that they'd never be found. Or were they left on the ground where they were slaughtered and used as blood and bone to fertilise your stolen land?

20 And you took the children away.

25 Was anybody ever punished for what they did to the Kooris of the state? Or was British justice and punishment only handed out according to the colour of your skin?

30 Without the truth being told of what happened here in this place now called Victoria. There can be no reconciliation, only a divided state as it is today.

35 Tell the truth.

40 Jim Berg, Gunditjmara man.

Silent witness.

30 A window to the past. This display of scar trees is dedicated to the Traditional Owners of Wotjobaluk Country, and in particular, to the memory of Patrick Kennedy. Rest in peace, old friend.

35 Come with me on a journey to Wotjobaluk Country. I would like to share with you some glimpses of the trees of this Country.

40 As far as I know, there is no other area in the whole of Australia that you'll be able to find so many scarred trees, so close together.

45 You'll hear the people of the land speak through the trees. They tell of what they had seen through the eyes of the trees.

50 Trees were the supermarkets of the land. They provided food, shelter, transport, medicine, tools and weapons.

55 These scar trees are a testimonial to the skills of the people who invented the canoe, coolamons and shields without taking the life of the tree.

The scar trees are witness to a way of life and freedom for the people to roam at will throughout their own Country.

- 5 I feel deeply emotional, stirred and saddened that what we can see of this way of life and identity with the traditions of language, customs, beliefs and Culture were not able to be passed down through the generations.

The government policies and mission life all played a part.

10

And yet, some of the government policies and missions may have saved us from total extinction.

- 15 These scar trees are a reminder of the past and they are linked to all trees. Take the memory of the scar trees with you forever. Share the stories with your family. Take too this gift.

- 20 Close your eyes and hug a tree. The heartbeat you hear is your heartbeat and the heartbeat of the tree. For a brief, short moment, you and the tree are one. In time, you, the tree, and I will become as one, as we return to a spiritual mother of the land.

Close your eyes and hug a tree.

Coastal dreaming.

25

At the mouth of the Hopkins River, as it flows into the sea. You'll feel your feet sink into the wet sand and seashells under foot. Seaweed and sand between your toes. Kelp from the depths of the ocean being swept up and on to the beach. Smell the sea as you walk along the rocky shore and sandy dunes, covered with sharp-edge native grasses and pigface, under your feet. And sitting on these sandy dunes is Killarney Beach, where you'll find middens covered with sand and shells all around. Black and fire stones lying on the sand.

30

- 35 Take a deep breath. Inhale the smell of the sea. Fire and smoke. The aroma of abalone. Lobsters, scallops and other shellfish cooking in their own juices, on hot coals over the fire. Hear the laughter of the Elders, mothers and dads and their children enjoying their tucker that they've harvest from the sea. They are practicing the culture that they've had for thousands and thousands of years. Can you imagine being there? Keep standing on the sandy dunes with your eyes closed and looked
- 40 towards the sea. Can you also imagine seeing white sails on the horizon where the sea meets the sky?

45

The sailing ships are carrying invaders that will destroy this peaceful scene of happy, smiling faces. These invaders bring with them diseases. The common cold, smallpox and blankets. Rifle, bullets, bayonets. The sword, the Bible and genocide. We were forced off our land. Destruction of our culture, language, identity, spirituality, dignity and pride. And Stolen Generations. They destroyed and wiped out all three nations.

Open your eyes. Can you imagine that this took place in this country they called Australia?

5 **UNIDENTIFIED SPEAKER:** What's inspiring you to write these poems right now? When did you write those poems?

10 **JIM BERG:** I wrote these poems, some of them are - I've got a whole lot of poems. But what affects me is what I've been involved in. I've been involved for 50 whole years of my 86 years, full time in Aboriginal affairs. And I sat on many, many committees. And I helped organise setting up lots of co-ops in Victoria. And occasionally I think about the past. Then I put it down on paper. And these were just a couple of my selections. Yeah.

15 I would like to move on to some of the Acts. Because back in 1901, we were dehumanised. And I use that word dehumanised. We lost our humanity. We became a nothing under the White Australia policy. And we talk about missions and we talk about Stolen Generations. But what we don't talk about is the missions themselves. What were they? Missions and reserves. What were they? To me, they were nothing but prisons. Refugees in our own Country. And we was moved around all over the rest of Victoria. It was about 19+ reserves in Victoria. And most of them closed down, Fram closed down 2 or 3 times and opened again. Ebenezer was the same.

25 And most of the people that was left after all the massacres was moved from one mission to another. Fram down to Coranderrk. Coranderrk. Ramahyuck. Ramahyuck down to Lake Tyers. And one of the big issues, and that applied to every other mission and reserve in Victoria. People were removed like cattle. Had no choice. I saw a photograph of a stagecoach full of Kooris. I said, wow, look at that. But they was going from Coranderrk down to Ramahyuck. And Ramahyuck was one of those missions where the manager, Angus McMillan, had a private army mercenaries that went out and slaughtered and murdered the Gunaikurnai people. And they wrote a book about it. Yeah.

35 I had a friend who went into a bookshop in the city, picked up a book and was all about the Hentys from Portland. Took it up to the cash register and the lady says "Oh - what's this all about?" We were going to do a documentary on the Hentys' involvement in the massacres down in the Western District. And the young lass says "That's my family". How you like that? "That's my family. And I want to get involved in the telling of that story. Of what they did to the local Aboriginal people." 40 McMillan just went out and slaughtered our mob. Yeah. And there's other stories about other - David Marr wrote a book about his family. Pioneers. About the massacres they were involved in. Yeah. And the Frontier Wars. Yeah. And by that time there wasn't too many of us left.

45 They just shuffled them off to other missions via Coranderrk down to Lake Tyers. Coranderrk was one of the most successful missions because they grew hops and they wanted more land, and the government says that's it. No more land. Missions

closed. So you will find that at Tyers people from all over Victoria - lost generation. And we talk about the Stolen Generation. We don't talk about the 'Lost Generation'. The missions and the reserves are nothing but prisons. And I have the proof here. Order under the Act for the Protection of Aboriginals. And pursuant of the power
5 given by Subsection 1 of Section 2 of the Act of Parliament, number 349.

10 *"The Governor in Council has made an order prescribing at the Aboriginal station at Framlingham as a place to which the Aboriginal known as [gestures] shall reside."*

And then soon thereafter, the Governor in Council rescinded that motion and barred him from going to Fram. Then we have the notice of inspecting the clothing issued for the use of the Aboriginal, and they go into great detail on what should be given to the blacks. I won't go into under the order of the pursuant Acts again.

15 *"In order for them to act for the protection of Aborigines, and the pursuant given by subsection. The three named individuals shall reside at Framlingham."*

20 They had to get permission to move to Fram. "In pursuant of the powers conferred by section 11 A of the Aboriginal Act 1934 to 1939, the Aboriginal Protection Board being of the opinion that dot, dot, dot, dot of dot, dot, dot, by reason of his character and standard of intelligence and development, should be exempt from the provisions of the Aboriginal Act 1934-1939, does hereby unconditionally declare that the said dot, dot, dot shall cease to be an Aboriginal for the purpose of the act. Signature of
25 bearer. The seal of the Aboriginal Protection Act were hereunto fixed on the day of by the Chairman, Member and Secretary. Application to permit to reside on Aboriginal reserves."

30 So, they had to fill out an application to move to Fram or to Coranderrk or to up at Horsham. And this is what people don't know. People don't want to know. And this is all under government policy. I'm not too sure if the state government is going to endorse or reject this report. And we have the backgrounds. Of some of the comments made by some of the early pioneers.

35 *"I think it's good fun to shoot a nigga. Or shoot or ravish a gin."*

"A well-known fact, that the only control possible to be obtained at the outset was to maintain complete abolition of the blacks."

40 That was the common language back in those days. When we look at all the massacres, it only spreads over a 15-year period. What happened before they started recording? And what happened after they recorded? It's only a 15-year period, and over 60 to 70 massacres took place throughout Victoria.

45 **UNIDENTIFIED SPEAKER:** So, what do people think the missions were, and what do those documents prove that it really was? You said it was like a prison. And I just want to get a sense of why those documents are so important for truth telling?

JIM BERG: The missions were established to protect us from the massacres and the racial discrimination and yeah - for protection. But we weren't allowed to hunt native foods, speak the language, or do any of our traditions. I spoke to my mum one day. I
 5 said, "where's the language, Mum?" She said, "we were taught not to speak the language, otherwise we would have been punished".

We have individuals - won't mention her name - from Condah. She was told by her mum never to practise their culture because you'd be punished. And she used to
 10 come to Fram and look through the windows and watch the old people behind closed door making baskets. And she became one of the best basket makers in the state. She used to give demonstrations and teach people at Hamilton, in the keeping place there. And we have one of her baskets at home. It's a beautiful yellow, yellow - yeah.

15 So, it was there to protect us and yet keep us under control. You can't go anywhere unless you get permission. There's some issues when people apply to go to funerals, say down at Lake Tyers, they didn't get permission. There was one case where a mum with her own, her own money, wanted to buy a birthday bike for her son. And the welfare board said no, and I'd check out what individual
 20 Kooris were on the Welfare Board. And that's important too. And there were –

(Video of Jim Berg's evidence stopped)

MS MCLEOD: Commissioners, we have cut that off, obviously, but there is more
 25 on the video. That's all we intend to play this afternoon, and that comprises part of the evidence of Jim Berg.

CHAIR: Thank you very much, Counsel.

30 **MS FITZGERALD:** If the Commission pleases, we will now a play a video of Uncle Robbie Thorpe's evidence. He is also known by the name of Djuran Bunjilinee.

COMMISSIONER LOVETT: Can I just jump in? Uncle Robbie is actually here.
 35 He might just be outside those doors, probably awaiting to be brought into -

MS FITZGERALD: Brought in? I was not aware of that. Thank you, Commissioner. Yes. Perhaps we can pause for a moment.

40 **COMMISSIONER LOVETT:** Yes, a couple of minutes. We will give five minutes? I was just going to go and say hello to him before he comes. I can do that. Government policy, I'm allowed to go and say hello.

<THE HEARING ADJOURNED

45

<THE HEARING RESUMED

MS FITZGERALD: We are now live, Commissioner, Chair. We have Uncle Robbie here with us today to hopefully answer any questions the Commissioners have at the end, but first, I propose we play a video of Uncle Robbie Thorpe's evidence.

5

(Video of Uncle Robbie Thorpe's evidence played)

UNCLE ROBBIE THORPE: We began on 20 January this year. You know, we want to make a statement in this era when they're talking about truth-telling and treaty business. And on the back of that, we thought it was just too much of a good opportunity to miss. It was just timely that we come here and resurrect our camp sovereignty. We were here back in 2006. So, we have been here - this will be our 45th or 46th day that we have held ceremony here. When we previously set up camp sovereignty here in 2006, we were set up by a committee called the Black GST Committee. And that GST means the genocide issues, the sovereignty issue and a lack of treaty or consent issue or the jurisdiction issue.

So still the issues today, 18 years down the track. And today is the 18th anniversary, 12 March. So that's what we're doing here today, having a bit of a concert later. We have got a couple of people from around the country. We sought a 120-day permit to light a fire. That gives us an opportunity to occupy the site. If you are going to light a fire, you need to look after it, right. So, it requires that. Basically, we're making a statement about our unceded sovereignty and we want things clarified. We'd like for the local government to come and have a yarn to us here. We can't afford to be waiting any longer. So, we're hoping we can force the issue a bit.

COMMISSIONER LOVETT: Yep. You're keeping it on the radar and on the agenda, you know. I think that's something that, you know, there's power in that too.

UNCLE ROBBIE THORPE: Victorian Aboriginal people suffered pretty severely, like the people in Tasmania, like, basically erased from our existence here. There wasn't very many people alive. So, what actually happened to our people? What we're asking is this - the local government give us a permit to build an interpretation centre here.

COMMISSIONER LOVETT: Yep.

UNCLE ROBBIE THORPE: So, people can know what happened on the Aboriginal people of Victoria. And it's also called the Kings Domain, which is a bit offensive in this time and age. So at least we are asking for a change of the name here. So - and the idea of an eternal flame here is the same reason they've got an eternal flame around the corner with the shrine. And what's the difference or what's the difference and why isn't it acceptable and why can't we have some sort of interpretation centre for this place? It's highly significant. It's a former

Aboriginal reserve. I think the first Aboriginal reserve in Victoria. And that's really important.

5 **COMMISSIONER LOVETT:** Not many people would know that. Not many people would know that at all.

10 **UNCLE ROBBIE THORPE:** Not many people know that. And what do we have? Where do you got to go to get some living Aboriginal culture in the centre of Melbourne? This could add value to the tourist destination of Melbourne, you know. But this is a little space doesn't really get used. I think it's a perfect little space for our – doing our ceremonies, healing. We could add value to this space here, for the –ider Melbourne community here, Melbourne town. A living Aboriginal space where you can get information, anywhere – any one of these tribes, you can get information about. You know, with our idea of a cultural interpretation centre just over there.

15

It would just be temporary until we actually sort it out properly. And people are interested. They want to hear. They want to know the knowledge. They want to know what this means. They want to know what our fire means. They want to know what the site means.

20

We're talking about a re-vegetation program for this whole area, you know. Removing a lot of these foreign trees, put our native stuff back in here. Like, it could be in any city in the world if it wasn't for the foreign fauna. So, we want to be a part of that plan to bring that all back. It's a couple of jobs for our mob, young people, to be doing that sort of work. Sort of like one - for me, it's like one last throw of the dice, in terms of is there ever going to be any justice for our people. That's what I'm feeling. And I think it's a critical time in terms of, you know, humanity on this planet, when you see what's going on around the globe and the environment.

25

30

You know, our people look after the land. You know, I feel that our lore is like the blueprint for survival on this planet. Our people know how to look after country, know how to look after people, obviously, because our land was in pretty good shape before colonials got here and so was our people.

35

So, this is a statement by our people. I assume that is vacant Crown land here. I don't really understand how the local - the Melbourne City Council claims ownership of this, but it's something we can talk about. We are inviting anyone to come up here to just - we don't block it off. We invite anyone who wants to come and talk to us, to share and we will tell them what we're doing here.

40

We have had a great response from people. We have been a constant trickle of people coming up and enjoying it. A lot of people want to stay. A lot of people get very excited about what we're doing. This is our land. We are entitled to a little bit more than what we have got here at the moment, you know.

45

COMMISSIONER LOVETT: Yeah.

UNCLE ROBBIE THORPE: Our sacred fire. Every night, the last 45 nights, we have had a ceremony here. That's a fire stick thing here. Make fire from these
5 ones.

COMMISSIONER LOVETT: So, you start it, hey, yes.

UNCLE ROBBIE THORPE: That's how we started that one there. So, it was
10 good to do that, like, we can light -

COMMISSIONER LOVETT: Deadly. Yeah, no. Well, it's a connection, right.

UNCLE ROBBIE THORPE: And we are trying to teach the followers who
15 come about our lore, and the importance of our lore. You will notice the humpies and mia-mias here. We had tents but they said we weren't allowed to have tents. We had to take the tents down then we put the mia-mias up. They didn't know what to do with that, which was interesting.

COMMISSIONER LOVETT: Innovation.
20

MS FITZGERALD: Before we begin the evidence today, I pay respect to Victoria's First Peoples and Traditional Owners who have never ceded their sovereignty over the lands that make up this state. Uncle, can you state your full name for the
25 Commission and explain who your mob are?

UNCLE ROBBIE THORPE: My name is Djuran Bunjileenee Borun
MunDunDarung. I come from the tribes of the Eagle and the pelican. Yeah, that's my
30 name. Djuran Bunjileenee, also known as Robert Alan Thorpe. My father's people are the Gunai Kurnai people of East Gippsland. My mother's people are the western Kulin Gundjitmara Wirangu people from Western Districts, Victoria.

MS FITZGERALD: Do you commit to telling the truth here in your evidence to the
35 Yoorrook Justice Commission?

UNCLE ROBBIE THORPE: I do.

MS FITZGERALD: What lands are you connected to?

UNCLE ROBBIE THORPE: All of the Gunaikurnai tribes, I suspect. And many of
40 the Western District tribes, the western Kulin people. They're my main tribal peoples, but I'm connected to lots of others as well. My ancestors come, in the main, come from the Gunai Kurnai people of what is known as East Gippsland. And my mother's side are the western Kulin, Djab Wurrung, Gundjitmara, mainly the eastern
45 tribes of the Kulin. So that's where my ancestors come from, in the main. But I'm connected, I've got blood connections to many of the other tribes around Victoria, in the main. Yeah. So all of those groups really like, one stage of the history of this

country, this state here, that was a very small group of Aboriginal people left alive, and many of them already had white blood in them. So it was hardly a full blooded Aboriginal person left alive in this state. And considering that this is what they described as the land of plenty, this is a very robust society that lived here, enjoyed
5 these lands for 100,000 years and it all disappeared very quickly. It was very traumatic for those people. Many of them ended up in reserves. I think there was something like 36 Aboriginal reserves across Victoria. They were whittled down to two, two or three; Lake Condah, Framlingham and Lake Tyers. Most of our people lived together. There's a lot of, we're connected through those reserves because we
10 lived together. And despite we may have even been related to each other, we- a lot of that knowledge was taken away after, we was taken away as children.

We were forced off our lands and put into places, we were un- you know, we weren't familiar with. Other groups of people were placed amongst us as well. So you can
15 just imagine the mix up of blood there and how that all got come together. So it's incredible that we have any link back to our, to our tribal culture at all. So that's been a journey. There's none of this information is forthcoming from the from the people who did these things to us, as you can obviously understand why they wouldn't do that. But incredibly, we've found our way back to our people, you know, and it's, and
20 I'm probably one of the more luckier people because we've always had our feet on our Country. Krauatungalung is also where Lake Tyers is. So despite the fact it was a concentration camp or gaol, it was still our land - that did help. The same as my mother's people. They were from that area down where Framlingham and Lake Condah are. So we're still connected to our Country even though we're under those
25 circumstances. So a lot of it was lost and it was deliberate attack on our people. Now, they tried to create a *terra nullius*. They didn't just claim it. They tried to create *terra nullius* here as well. And that meant a lot of destruction of our people and lives. The forced removal of our children over generations didn't help our cause. The sort of oppression that our people lived with in, throughout their lives, you know, it wasn't
30 conducive to learning and understanding who you were or your knowledge of who you were. That was that was a distant thought.

You know, it was the day-to-day survival that was more important. Well, just for example, my great great grandfather, his name was Glen Gunn Waterhen. He was
35 from the Gunai Kurnai people. He survived the massacre with his brother, but just his descendants alone is up in the 7 to 8000 people. That gives you an idea. And that goes all up the east coast of Australia. My mother's side of the family extends to the west and to the, into the north. So it's very extensive connection to just about all the Aboriginal people in that those areas in some way, we've got some sort of connection
40 to people. So, you know, after a period of time, even though we're under that duress and living in concentration camps and, you know, being repressed, it's still a massive connection to people right across the, our black Australia. You know, people say that they're along the East Coast. They always mention the black duck. They're the people from the black duck. Well, that's the black duck is part of my tribe. Very much
45 important part of my tribe. So we connected everyone along those lines. Everyone across the Borun, which is the pelican, Bunjil, the eagle and Waang, crow, they're all connections. And also involve the marriage system as well. You know, like, if you

were one of these things you couldn't marry back in. So it was an important part of our, our marriage system. And songlines, not songlines, oh yeah songlines as well, but who we could and couldn't marry into. We had an incredible system our people, which was been developed over thousands and thousands of years, and it stood the
5 test of time.

You know, we were in very good shape back in 1770. And if you look at the description of Cook, mentioning when he first started, said they were a very manly
10 people and he'd been around the world and seen many people, but he was very impressed by the condition of Aboriginal people at that time. So, you know, we have these connections right across the south-eastern part of this, this continent, very strong. And it's connected by those things like our, our, our totems and our, and our songlines. So we have these massive connections and before colonialism it just, just stretched even further and further. Every time you married a person, it, it broadened,
15 your family member married someone, it broadened your connection to the Country. It's very intricate and defined way of existing I suppose and something that needs to be looked at even more. I know there's been a lot of study around those things, but, you know, it's out there, all that, all that knowledge. And, you know, we've been cut off basically from who we are, our identity. But we're still big people, big families.
20 And, you know, we know that, you know, ask our people. They're very aware of who they are and where they stand, in the Country. And like I said before, we don't really ask a person's name. We ask them, what's your Country? And, and most things can be gleaned from that, the information that you need to know about that person. So it's an incredible way of operating I suppose.

25 **MS FITZGERALD:** These hearings in particular are focusing on land and land injustice. What role does the land play in the knowledge of yourself that you're talking about, people's knowledge of who they are?

30 **UNCLE ROBBIE THORPE:** It's totally important. You know, we say that we come from Country and there's laws and, and totem relationships to the land that connect us to that place. Important part of who we are as well. So it's fundamental to know who you are, from Country. We in fact, we identified people by saying we don't ask your name. We say, what's your Country? And then we can work out who
35 they are, right? Because we know who's who there. And so people got to, it's not about your name personally, it's about what Country you're from. So it's critically important in terms of Aboriginal people's identity and things like that. So, and that's what we premise our, a lot of our struggle on is that, you know, we're the remnants of these people, you know, it's amazing history and culture that comes with that. So
40 we don't want to let any of that go. And we're trying to get back to our land so we can rebuild that the way it was.

MS FITZGERALD: Growing up here in Fitzroy and Collingwood, a lot of mob lived around here. Tell us about that community.

45 **UNCLE ROBBIE THORPE:** I grew up in Fitzroy from about 1970, but my mother had been here. She was born here. Her mother was brought here as a domestic

servant from Western Districts, Victoria, with many other Aboriginal people. They found a place to exist here in Fitzroy, which was, I suppose, appropriate for Aboriginal people at the time, as they deemed it. But we had a very strong connection to this place. Even prior to 1970, before I was here. So it felt very much like home to me. So I'm connected to that. I actually married a Boonwurrung lady who was actually Lisa's sister. My daughter's sister. Mother. Sorry. So you know, I'm sort of connected to the place in a number of ways.

MS FITZGERALD: The name Thorpe is well known here in Victoria. It's fair to say there is a strong history of activism in your family. Can you tell us about that history?

UNCLE ROBBIE THORPE: Well, the name Thorpe was just given to us. And, you know, like plucked out of thin air somewhere. Actually my great great grandfather was given the name Thorpe, and his brother was given a different name, Thomas. So sort of, I don't know, add to the confusion or something, but those names, those English names didn't really, you know, didn't - was all about assimilating us into the, into the mainstream. But my great grandfather was a, my great great grandfather was a - he spent most of his life at Lake Tyers. And they were always active in terms of trying to get some sort of justice for their people. My great grandfather was a war veteran from First World War. Really the political stuff didn't come until that generation after him, where they started to fight for their rights on Lake Tyers and, and got removed from that place. I'm talking about my grandfather, Reg Thorpe, my dad's dad, and, you know, they were removed from the Lake Tyers, they were stopped from going there. So they started to become political around about that time. My mother's family, also very similar. I learnt the most from politics, from my grandmother, my mum's mum. She taught me what Aboriginal was to me. She explained it to me and showed me, she didn't just explain it. She showed us what Aboriginal was and she was very active in the community.

They created things like the Aboriginal Funeral Fund, which is talking about burying our people with dignity, you know we were buried as paupers, had no sort of acknowledgement of who we were. My, my grandmother actually helped create the Waroona Cemetery, which is pretty incredible. For someone like my grandmother to be able to do that. But she was always taking care of the people in Fitzroy. It was a, back in the day, it was like a ghetto. It was where Aboriginal people gravitated to because there was a couple of Aboriginal families who were, who did have rental places, which was rare at the time. So yeah, the politics has always been a part of my family. And then for my mum, she was involved with the Aboriginal health services, which was independent, community controlled, self-determining organisations. This is on the back of Gough Whitlam's change in the, the attitudes in this country, it seemed, going back to that time, which gave us an opportunity to actually own and control properties and organisations. So it was, you know, fairly unique time. And we took, well took advantage of that situation and created some amazing organisations come out of the 70s here in Fitzroy. And so it was very much a political family and we didn't know anything different. Actually.

MS FITZGERALD: Your mother, Aunty Alma Thorpe, was one of the Elders who gave evidence to Yoorrook in the first hearings. She was worried about this truth telling because the government is running it. What's your view on that?

5 **UNCLE ROBBIE THORPE:** Yeah, I think it's problematic. But everything we do, the government runs. Every law that's ever been made, they're imposing on us. This is no different. I wondered why there needed to be a domestic version of a, of a truth telling process, particularly around these issues like you know, our, our land rights and our sovereignty and our, the crimes that have been committed against us. You
10 know, there is international organisations set up specifically for that purpose. So why does why does the state government got to reinvent the wheel on that sort of process? You know, we'd much prefer to go to the international courts, impartial, unbiased. So that was you know, it made me wonder why Victoria did that.

15 **MS FITZGERALD:** Particularly as a Royal Commission. Aunty Alma saw it as an insult when she saw it was being done on behalf of the Crown. How do you feel about that?

20 **UNCLE ROBBIE THORPE:** It's the Crown who is the perpetrator of the crimes for our people. So how do they get to be the authority in terms of the inquiry? You know, it's like the, as we say, the police investigating the police. That's why we don't do very well in terms of that system. As you can imagine.

25 **MS FITZGERALD:** She wanted Yoorrook to write to the Queen or the next king and say, under your reign this happened. Is that something you think should happen?

30 **UNCLE ROBBIE THORPE:** I think we should look at every king and queen that's reigned since the time that British claimed this Country as their own. I think it's all relevant, and it's shaped this country, and it's shaped how our people, the conditions of our people today. So I think all of those, all of those kings and queens and the Crown, every time they ever made a law for our people, it needs to be examined. And what was the purpose? What was the intent behind this? What was the impact? What was the outcomes? And I think you'll see a very clear picture start to emerge about the intent behind it all. And that's what we're saying. It's intentional, what's
35 happened to our people. Premeditated. It was planned, plotted, schemed and scammed. What they were going to do to this place and what they're going to do to our people. It was all about stealing the resources of this rich continent here. And that's still the case today. And you can see, it's very clear to me, I was hoping to make it clear to the wider community. This is the whole premise of this, this place
40 you call Australia.

45 **MS FITZGERALD:** She said it was a big thing for her to come to Yoorrook and open up, but she saw it as her role to come and tell the truth. You also have reservations about being here. Can you explain what those reservations are?

UNCLE ROBBIE THORPE: I do have reservations because I, I thought it would have been an into internationally, um, process and looking at, you know, the true

history of this country, we don't really expect to get it coming from them. Like the people who were who were caused these problems for us. We don't expect to get the truth out of them. So it made me think, well, why isn't this an international process? You know, like places like the International Criminal Court of Justice has set up specifically for this purpose? Why isn't it going through that process? So it did make me, me think about, you know, why. But like my mum, I think it's important that when people actually talk about the truth, it's worth having a go because, you know, the truth is a very, it's a, I see it as a spirit actually. It's a living thing. It's hard to control. It's double-edged sword sort of thing. You know, we haven't got many options. And maybe, you know, you want to mess around with the truth. Well, we'll see what happens. And, you know, we'll throw our side of it in there.

You know, Australia needs to deal with the truth. Sooner or later. We all know it was premised on a monumental lie, namely *terra nullius*. The legal fiction. Everything that you see around you is created through that process. So sooner or later, I believe that the truth will come out, the truth will come out in the wash. And that's why I'm sort of hinging on, you know, my beliefs and my hopes on because just the nature of truth isn't it? Symbolised by a woman who's blindfolded, wielding a double-edged sword? Well, that's a dangerous, that's a dangerous thing, right? In anyone's language. So it cuts both ways. So maybe it's the truth that will bring this country down or up to where it needs to go. And the true history is exposed for the first time, maybe. You know, it needs to be seen in the context of everything here. Since Cook. And what I said before, how it's all premeditated and plotted and you know, we want that truth told about the true history from the beginning.

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MS FITZGERALD: Can you explain your involvement with Aboriginal community-controlled organisations and the Koori Information Centre here in Gertrude Street?

UNCLE ROBBIE THORPE: Such a so exciting thing when we seen Aboriginal people starting to run and control organisations for themselves. You know, I was very much a part of the beginning, of what seemed to me like the beginning of all that. And - I thought it was the greatest thing of all time. I could see something happening from, coming out of this. Where in the past there was nothing. Every time we did do something, the rug was pulled from underneath us and we went back to square one. But this seemed to be different this time. There seemed to be some real changes, there was talk about self-determination. And so that was exciting time for me. And I seen the growth of a lot of these organisations around, particularly around Fitzroy, and starting to emerge nationally. But I still wouldn't be, wouldn't partake because I, I don't believe in any part of this system. And I was still reluctant to get involved in. The Koori Information Centre was an independent organisation and it was fiercely independent. Because we didn't trust we, even the Aboriginal organisations, they become incorporated, which was problematic for me. We refused to become incorporated because of the nature of the State and what that represented. You know, these other organisations had issues with becoming incorporated because they lost control as far as I was concerned, and they were. Wasn't a community organisation anymore. Our Elders were cut out of the process. We had directors and

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CEOs, and that's what shifted it for me. I said, no, no, no, it can't be the way. And so we, we, we followed the line of total independence and self-determination. And that was going to be it. That's the sort of the, the trajectory that I've had. You know, I've been involved with places like the Aboriginal Tent Embassy, and you don't go there unless you're talking about sovereignty. Don't bring any other politics to this place. So, you know, I grew up with that sort of mindset. And, you know, we done it hard. There was no money in doing things like that. There was no-

MS FITZGERALD: You have always had an issue with taking government funding. Can you explain why? Can you explain why you have had that issue?

UNCLE ROBBIE THORPE: Because, we say, once you get government funding, well, they basically control your agenda and the whole purpose of the thing. And that's, defeats the whole purpose of why you're setting up. They're unlikely to address the issues that we're talking about, like genocide, sovereignty. Took them a while even to think about Treaty business in this country. So they're the issues that concern us. And we knew that they weren't they weren't serious about that. And it was like, it was entrapment to turn us around. And once you did put your energy into a corporate body well they could pull the pin on you any time so you could build something, then they could pull it from underneath you. And that's, I witnessed that a number of times. At the end of the day, they actually ended up controlling the organisations and they become ineffectual to me. And you know, perpetuating the problems at the end of the day. Well, you probably look at the first people who were employed, or deployed might be a better word, were the Mounted Native Police Force. The very first people who were part of the system. A very brutal, described as a very brutal force of people, who carry out some very heinous acts against the Aboriginal people, they were actually paid by the State to do these things.

And you know, that was a very divisive moment in our history where we had our people who were working now for the colonisers and the State to do damage on their own people. And so that that's sort of why there's been a thought, you know, if these people are paying, what are they expecting from us? So, you know, it does, it needs to be addressed because as far as I'm concerned, everybody who's getting paid by the colonial state is problematic for me. They don't represent me. And they got vested interests. And so, you know, we need to look at that. And anybody, it would be hard to find anyone out there who's not affected in this way. But there is some people, including myself, you know, I'll tell you, I get the dole. I've been on the dole all my life, and I'm entitled to it, like any refugee or anybody else, is how I looked at it as a token form of rent. I'm looking for the rest of it. And now that. Whatever, what we're entitled to, this is our land. So, you know, I've been reluctant to get involved with the system because what it brings with it, it confines you, controls you, and, you know, and then it hasn't worked out for our people. It's steering us in a different direction. If they funded our people the way that they wanted to be without any strings attached, there'd be a lot different world out there for our people, I'm sure.

But you know, looking at the native police, it was one of the most divisive periods of time in our, in our culture, you know, and the damage that they did, it needs to be

looked at. You know, I reckon a lot of the massacres in Victoria can be attributed to the Mounted Native Police Force who emanated out of this area here. And the history is there, but it's not well defined. All that information is there. You know, there's names for all the Mounted Native Police Force. They were paid. They were a corporation. Is it a corps? Native police corps? Is that a, is that a body, an army, you know, so all that information is there. So where is it? We want to see who's who in the zoo. You know it's probably a good chance that I've got Native Police in my family along the track somewhere. I think most of the Aboriginal families have. It's not, it's not having a go at anyone. And this is just the circumstances we've found ourselves in. We want to heal that because it was never the case for Aboriginal people. We lived in harmony, even though we have, we're very strong about where we stood in our land and our principles.

But we lived in harmony, basically with just about every other tribe across this continent. This is quite incredible in itself, and we had a proper law that worked and a way to resolve issues and, you know, but that all changed when the Mounted Native Police were, who were killing for pay, and at that changed our world fundamentally. And it needs to be addressed because it's the cause of a lot of intergenerational trauma that's going on now. And you'll probably see that the names of those native police whose descendants are actually the ones who survived here to a large degree and inherited. That's not a really nice thought, but you know, I'm not going to let it, let anyone get away with these types of crimes. It's the way we roll. And we'll be calling it in as the best way we can. This is why we got this, this problem, this malaise, if that's the right word. But going on in, in our world because these deep-seated problems haven't been addressed. You know, I see these people, what they do, I dream about what they do and what they done to our people. It's all premeditated, very clearly. What their purpose was. They were here to clear the land of its original people.

And they, you know, this is not the only time that the colonisers have divided our people and used each other, used them against each other, divide and rule us. And that's the, that's the, that's the British Empire. That's how they were created, and that's how they maintain their power by dividing and ruling everybody and perpetuating and maintaining that. And this is what's happened to us. You know, you've got to remember, Australia's been out of sight, out of mind for the rest of the so-called civilised world. 200 years in isolation, they've been able to get away with a lot. So it needs to go back and unravel all that, you know Native Police Force, that era. And what happened to them? What happened to the, what was the end result of the Native Police? Did they end up in the reserves? I think they did. After they were no use. That's where they ended up, on the Aboriginal reserves. You can just imagine all those problems that sort of created, you know, but that's why we need to go, you know, we want to attack the truth. We always attack the truth. We want to get to the truth. We don't want to step, move away, forward until we sort that truth business out. That way we can, we can sort of move along, move on.

You know, always telling us to move on, but we're not moving on until we know the truth of the matter. So, I think that the Native Police Force needs to be examined

very carefully. I know there's a lot of written material about them. It's not what you learn in the schools. And yet they've had such an impact on our society. And so I think it's very important that this is exposed for what it really is, because they help create what we got here today. And if it wasn't for them, where would the country
 5 be? May have been a different story, but they were very much used. Not, and I know that they did elsewhere, scouts, trackers, all these types of people, and they were used all over the world in terms of colonialism, all the front line of colonialism. So we need to go there and look at who they were, what they were doing, what was their purpose, who was paying for them, and what were their, what were the outcomes and
 10 what happened to them. So, I think that would cover it a bit and explain why we're in a condition we are today. And we got a lot of explaining why Australia is reluctant to talk about these issues as well. So, let's go. Let's do it.

15 **MS FITZGERALD:** Thanks, Uncle.

UNCLE ROBBIE THORPE: No worries. Yeah.

20 **MS FITZGERALD:** How could community organisations be funded in a way that gives them self-determination?

UNCLE ROBBIE THORPE: When I, when we first set up the Aboriginal Health Service, they, they set up a thing called the 'Pay the Rent' concept, which was an independent source of funding, which the government didn't like the idea of. And we were getting money from international places like Germany and I think South
 25 America somewhere or so that's what started our organisations initially. And we were very concerned about allowing the government to fund us. It required a lot of thinking about. And I remember at the time I said, well is this, what's this going to do to us, this funding, you know, because once they, you know, they'll give you the money to begin with. And then once you become reliant on that money, that's when
 30 they stop and start dictating what, what's going to happen with this organisation from here on in. Well, you know, I said Australia, well and we're setting the organisation up for our purposes. Once we got involved with, with the system, it opened it up to anybody to be able to work in, you know, and our people didn't have the qualifications and all that background to. So, we missed out on the jobs. You know,
 35 we weren't qualified in terms of their, their system and yet but we were the experts in, in the things that we're talking about.

So we got cut out of that process. That was a danger of being incorporated, it opened you up to the whole world, which we weren't ready for that. We needed to develop
 40 our, our, our organisations and our growth at our speed and the way that we wanted to do it. We lost control of that, I believe, when corporations took us over. So it was, it was not just equal opportunity did that. It was other things that were pushing which opened us up. And then I was infiltrated by everybody and anybody who came in and started working in our organisations. And, you know, that was the end of them as far
 45 as I was concerned. And but it's a huge industry now, people working in our affairs and misrepresenting and being unaccountable. And I think, I think that was the purpose of being funded in the first place, because I don't ever think they've ever got

any good, good intent for our people. This State, you know, the evidence is there that genocide has occurred. It's ample evidence to suggest that genocide has occurred in this country. So, trusting them is problematic. There's never been an end of hostilities. Officially. That's what we'd like to see. You know, before you step into things, talking about Treaties and truth telling, we should have an official end of hostilities first to show that, you know, what's the intent and any good faith in this process.

Maybe that should happen first so we can all get off on the same level. You know, I believe our law, if it's not superior to your laws, is at least equal to this law that you're claiming to be an authority here. So, where's the recognition? Is there equal weightage given to our law in this, in this whole process? And we have our own processes and ways of doing things. So, where's that acknowledgement of our law and this process to start with. And you know, that's usually held by our Elders who are from Country as a body there. It takes care of our law business. That's why it's always been. We have men's business, women's business, initiation of young people into that law. So, we have a serious law that needs to be acknowledged before we sit down and talk business. There's a few things that need to happen. There's, I look at the international law for my, to get my ideas from. I don't think this is appropriate, this colonial occupation. Don't really expect to get anything out of that. You need to force them to change. And that's you know, we've had to do that whatever way we can.

MS FITZGERALD: In 1990, you were one of the founding members of the Aboriginal Provisional Government. Can you tell us about that?

UNCLE ROBBIE THORPE: Yeah, we tried lots of things. APG was one of them. Aboriginal Provisional Government. We're looking at all sorts of ways. It was actually the way that we ended up with this our lawyer, sitting right there, because it was up to me to decide which lawyer should be employed. [*Uncle Robbie Thorpe gestures off camera.*] We have, we have to, I remember an advertisement we put out, APG was, "lawyer wanted, constitutional experience" and a few other things in there. But I said, "hours negotiable, salary nil". And this, this young man actually stepped up and took it on, and we've been fighting it sort of that battle ever since.

MS FITZGERALD: But the Aboriginal Provisional Government issued passports, which have at times been accepted by other countries. You were challenging the Australian Government's sovereignty. Can you tell us about that?

UNCLE ROBBIE THORPE: Some countries, not all of them. Rarely would some countries stamp your passport. But it was so good. To have a stamp from another country actually gives you acknowledgement and a recognition of your passport. So, something they didn't really like the idea of, the State. You know, we have, we still got our passports. One day they will be real. And so, you know, we issued, we issued passports to the West Papuan refugees and made them welcome in our country. That was one of the actions that we did take. It was very successful. People really took to that idea. A lot of people want to be acknowledged by the true sovereigns of this

country, not a colonial citizenship sort of thing. It's not much. And it's got to be more to it than that. And, you know, we hold a lot of the knowledge about this Country, the original people. It's not, it's not something that's come from, it's not a foreign thing. You know, that's where you want to be acknowledged by. So that's got, it's got potential, all those things. We've done many type of actions like that. It was
 5 incredible how we created those passports and, and but the stamping them is what's important about them.

10 **MS FITZGERALD:** The recognition.

UNCLE ROBBIE THORPE: The recognition.

MS FITZGERALD: By another State.

15 **UNCLE ROBBIE THORPE:** Yes. And but also amongst ourselves. You know, there's many black nations on this Country. Passport will thinking that. Well, here's your way to walk through our Country, through our continent and be recognised by the many and various tribal nations across here. That's still got a lot, it's still workable thing. And we're still looking at that, like it split our community in half
 20 when we become incorporated. Then there was the haves and the have nots. We've started to be defined as well. But it seems to me the corporate world, you know, they haven't got any sort of initiative or they can't be self-determination. They're subject to corporate laws and governance, corporate governance and government funding, which basically makes them ineffectual to what we're talking about and what we're
 25 trying to achieve with that Aboriginal people, like independence and self-determination, recognition of our sovereignty. You're not going to be talking about that in a corporate sense or a government body. That's not what they don't talk about. You've got to, you know, their agenda is set and it's not about those things it seems.

30 **MS FITZGERALD:** In one of the cases that you've run in the High Court, *Thorpe v the Commonwealth (No 3)*, you were seeking a declaration that the Commonwealth owed a fiduciary obligation to the original Peoples of the land because of illegal invasion, war crimes and genocide. What was the purpose of getting a declaration about those things?

35 **UNCLE ROBBIE THORPE:** Well, that was obviously going to be a test for them. I think it went straight to the heart of what we were talking about here. But also, part of that, that, that case was seeking an advisory declaration for the, from the International Court as well, which was, you know, going exhausting the domestic
 40 processes. What we knew you had to do, you know, the International Court would send you straight back to your own country and say, no, you need to exhausted domestic remedy first. So, the need to, to even approach these courts here was, you know, the reasons why we need to do that and give us credit, credibility in the international court, I suppose.

45 **MS FITZGERALD:** Justice Kirby observed in that judgement that the difficulty for you was that Australian Courts simply cannot uphold a notion of sovereignty that is

adverse to the Crown. That is the catch 22 that you are faced in a number of cases, isn't it?

UNCLE ROBBIE THORPE: Well, I think the, you know, the whole state of
 5 Australia needs to act honestly, morally, legally and ethically. If they did that in the
 first instance, even you have a look at what Cooks, in Lieutenant Cook's instructions,
 specific simple instructions was to get consent. And that's where it all goes back to.
 Did you get consent if you didn't? Well, that makes the whole process here a crime
 scene. As we all know, you haven't got consent, so I don't know how you feel about
 10 that yourself, because most women I know would think that's essential, if you don't
 get consent. It's a criminal act. So, we need to go back and address that issue. You
 know, these are the King's instructions to Cook, and the Crown's instructions say
 how is exactly do you have authority? And, you know, and will that stand up in an
 international court? You haven't got consent. You've committed these crimes against
 15 the people. It's very clear to me that what's going on here? We need to play this out
 in an international, unbiased, impartial court. Not here. I don't think we can really get
 justice here. So, but this is a step in the right direction. I think, you know, that your
 Truth Commission is a, is a step in the right direction. Ultimately, it needs to go to
 the international court unless Australia can step up to the mark and act, you know,
 20 act, act the way that we're asking them to be honourably, ethically, legally, morally.
 If you can do that, well, pretty sure we can resolve the issues here within. I'd rather
 see that happen rather than go through the international court. I think it'd be much - it
 would work a lot better if we had done it ourselves here and sorted it out.

25 **MS FITZGERALD:** Do you think most Victorians are aware that the colony was
 established against the instructions of the English Crown?

UNCLE ROBBIE THORPE: I think it's a lot more aware of it these days. But
 initially, no. And no one really knew the true history of this, this country. It was a
 30 secret country, a secret history. It wasn't really to be known by anyone, you know.
 That's why you can see the premeditation and the intent from the from the Crown,
 from the outset. And they've tried to cover that up, hide that. They tried to erase us
 from history and everything and they almost did that. I was just, you know, it's a
 credit to the Aboriginal people, their resistance and resilience. That's what these
 35 things delight. You know, I don't think it's come from anywhere else. It's come from
 the Aboriginal people and their toughness and their determination not to let go of this
 land which is sacred to us. We see the land as our mother. We're not going to let that
 go too easy. So, we continue to fight, and we're not going to stop fighting either. It'll
 always be that, we want some justice for our people, simple justice. And I think the
 40 onus is on the non-Aboriginal people in this country. How blind can you be? And,
 you know, they need to acknowledge that, you know, they've got all the wherewithal.
 What don't you know about your own history of the place you call your own home,
 and the place that you claim to be yours? Tell us about it. They can't do that. You
 know, it's very messy at this point, but we're determined to sort it all out and clear it
 45 all up.

You know, we're lawful people. Like I said before, we have a law. Colonisers didn't bring law here. They brought a terrorism. They brought a, they brought all every problem in the world with them here. They didn't bring law here. They brought piracy here. So you want to live that way? Well, so be it. But, you know, we need
 5 some clear answers. Where do you stand on these issues? Where does the rest of this country stand on issues of the black GST, for example, where does the rest of these countries who are trading with Australia, got trade treaties, stand on issues of the genocide, sovereignty, Treaty issues in this country? We want to know. Can you tell us so you know, they know exactly what they're doing. There's huge profits being
 10 made out of the occupation, of illegal occupation of our land, the tearing it apart and extracting all the resources. That's what it's really all about. We know it's pretty clear, and nothing's going to stand in the way of that, of that machine just snatching everything. But it's not sustainable. And I think it's come to that point. That's the other thing. It's going to make the change is you know, not just the humanity's at
 15 crisis point, it's the environment. And we know the true law of this land is about the land itself. You know, we draw all of our law from the land.

And at the end of the day, that'll be the, that'll determine the outcomes for everybody. The true law of this land, you know, if you don't look after it, it will punish you. And
 20 you can see that's going on today. And that's what we were afraid of would happen. And there's a, it's a connection. I see a connection between the genocide, the ecocide and the suicide. It's starting to be a real issue in this country today. What is, has been, for Aboriginal people, in fact the most likely cause of death for an Aboriginal person under 25 is suicide. That's not a good look for Australia. It's pretty disgraceful,
 25 actually. I want to talk, and this is today. And if you look at the Closing the Gap report, nothing's improving. There's a lot of money being spent in our name, but nothing improves ever. It's a huge industry to manage our affairs and manage our affairs very badly, which is you know, that's the intent there as well. They're not interested in really recognising our, our humanity, our rights, nothing. You know, so
 30 it's, I don't really believe in any help, but we need to do this, these sorts of things. And you know, Yoorrook gives us an opportunity and we're talking about the truth here. So, we'll see what happens there. And if that gets reflected in the outcomes, at the end of the day, though.

35 **MS FITZGERALD:** One of the other cases you ran in the Supreme Court of the ACT in front of Justice Crispin, was a case relating to genocide –

(Video of Uncle Robbie Thorpe's evidence paused).

40 **MS FITZGERALD:** I wonder, I know we had in the timetable a five-minute break scheduled. There's certainly another hour of Uncle's evidence and so I thought I might just interrupt before the response to the next question started and see if you would like a short break? Chair, five or 10 minutes?

45 **CHAIR:** 10 minutes.

MS FITZGERALD: 25 past. Thank you, Chair.

<THE HEARING ADJOURNED

5 **<THE HEARING RESUMED**

CHAIR: Counsel.

10 **MS FITZGERALD:** Thank you Chair. We will now resume the evidence of Uncle Robbie Thorpe, Djuran Bunjilinee.

(Video of Uncle Robbie Thorpe's evidence played)

15 **SARALA FITZGERALD:** One of the other cases you ran in the Supreme Court of the ACT in front of Justice Crispin, was a case relating to genocide called *Re Thompson; Ex Parte Nulyarimma*, in 1998. You were one of the applicants seeking to lay charges of genocide against John Howard, Tim Fisher, Brian Harradine and Pauline Hanson after the Native Title Amendment Bill was introduced in 1998. Why did you think that bill was genocidal?

20 **ROBERT THORPE:** Well, I thought the Native Title Act was genocidal, so we didn't have our act together to respond to that. But by the time the ten point plan came around. Well, you know, that was a furthering continuing act of genocide as far as we was concerned. And it was, just stripped away whatever the native title offered, which was, you know, a pretty hopeless sort of Act. It was very lowly sort of thing. Described as a, the Native Title Act was less than, had less strength than a pastoral lease. We said, well, that's for foreign wild animals, a pastoral lease. We end up with an entitlement to our own Country, that's less than that. It was hardly good enough. But by doing that, stripping away the rights of the so called native.
25 Totally. It was a continuing act of genocide, and it would create the conditions of life entrenching us into a, into an outcome that we know, we could see happening. And it has happened too. You can see what's happened with the Native Title Act. So it's been very divisive and it's undermined our sovereignty. If you're going to undermine our sovereignty, it's an act of genocide.

35 **MS FITZGERALD:** You were just referring to the conditions of life? That's, the Genocide Convention specifically refers to genocide as including deliberately inflicting conditions of life calculated to bring about its physical destruction. And is that what you say?

40 **UNCLE ROBBIE THORPE:** Yes. That's what I'm sort of saying about-

45 **MS FITZGERALD:** Land does. Some of the participants in that case had difficulty explaining their position in the courtroom, and Justice Crispin agreed to hear further submissions over at the Tent Embassy opposite the site of the old Parliament House. What did that gesture, by His Honour mean to you? And how important was it for people to be able to speak in that environment?

UNCLE ROBBIE THORPE: I thought it was groundbreaking, actually, that the Court, that institution, actually come down to the ground where our law sits, where our people sit, where we're comfortable. You know, it's very intimidating to go into their courts in their, you know, they've got all the power positions. Whereas good on Mr. Crispin for coming down there and doing that. And sitting down on our ground around our fire in our legal - the way that we do law business. So that was very significant. That and what he, what he did say there was very significant as well. He said that I think the quote was there's, he said, there's ample evidence to suggest that genocide has occurred in here. But the issue that it's going, you're going to be facing is proving the intent behind this genocide. Well, that's where we I thought had all left off. That was the end of it. And we want to say, well, we can prove intent, I think pretty simple to prove intent. And that's where we're at today. I think that's where that case left off. And that's where we're at. We, all we need to do is prove the intent. You know, if you look at *terra nullius*, you look at white only policy, constitution. There's many things that demonstrate the intent clearly in this country. So that needs to take the next step.

MS FITZGERALD: Even though the charges of genocide that you wanted were not laid, Justice Crispin made some groundbreaking findings on the basis of the evidence that he heard. One of them was at paragraph 32 where he noted that, "it is clear from the bloody pages of Australian history that the wholesale destruction of Aboriginal peoples was related to an equally wholesale usurpation of their lands. Yet in light of what we now know, it appears that this course was contrary even to English law." He made a number of other findings, including that there was ample evidence to satisfy him that acts of genocide were committed during the colonisation of Australia. He did all of this on the basis of the evidence that you produced in your hearing. To what extent do you think that Yoorrook itself could use his Honour's findings as the basis, for example, of a statement of agreed facts?

UNCLE ROBBIE THORPE: Absolutely. I think we need to really seriously look at a document of agreed facts. And we don't need to be going and reinventing the wheel, like I say, and bring us up to a point where, yeah, that's obviously happened. You know, let's start from a level where we can, you know, rather than go through that old history all the time, you know, surely we're at a point now where we can agree to some facts about the history of this country and then go from there. But we haven't got to that point yet. It's really just sort of staying at that level and not progressing this whole thing. So, yeah, I think the idea of a document or a statement of agreed facts would be very helpful in the whole process to get to where we want to go.

MS FITZGERALD: And a paragraph 78 of His Honour's judgment is exactly the one you just referred to, which is "there is ample evidence to satisfy me that acts of genocide were committed during the colonisation of Australia." And is that something you think the State should simply proceed with as an agreed fact?

UNCLE ROBBIE THORPE: Absolutely. And when did the colonial, colonisation stop? Is it still colonialism going on here? Could there be genocide going on today? So I think that's an important statement. Suggested that genocide may, has happened. And that brings us, if they're thinking that, has Australia actually prevented genocide or punished anyone for the crime of genocide in this country? And that's clearly an indicator of things that should be happening, but it's not. So, you know, we need to establish that right from the get go. Where do we stand on the issue of genocide in this country? What is its status? You know. How has it been addressed? So, you know, I think it's pretty fundamental. I don't know if I'm answering that question properly, but.

MS FITZGERALD: Definitely. And is that one of the things that could be achieved through a truth telling process that you get to a statement of agreed facts by the end of that process?

UNCLE ROBBIE THORPE: Yeah. Be good to start before, you know we should have started off with it. There's agreed facts that I think we could come straight to you know, was this land occupied before colonialism, that's a fact. There's some things you could build it up to, and then you need to get to a level of agreed facts, but then it continues to develop as you go along. But I think instantly we can have a set of agreed facts, the sort of fundamental things. Why are we having these same arguments all the time when this can be settled. It's, it's recognised as fact by the State. It's recognised as fact by the original people. Unless they're sort of platforms we can start building right now and putting in place. Otherwise we've just got to go over and over reinventing the wheel the whole, every time we sit down. It's tiring. And the strategy, I believe, to not get to the place we want, we want to go. I think there's reasons from the other side not really wanting to go to those places. So we're dragging them in a sense. A lot of this, this truth telling and Treaty business came about by Aboriginal peoples' initiative, wasn't, didn't come from the State. I think they're trying to defend their position the best they can. So we want to, you know, I would love to see the idea of agreed facts being put up front. And I think that that is a role for the Truth Commission to be doing and, and quickly too, you know, before we go any further, let's clarify a few things. So I think it's really important.

MS FITZGERALD: Turning now to Camp Sovereignty, which is established in King's Domain. It was first set up in 2006. What was it and why was it set up?

UNCLE ROBBIE THORPE: We had a committee called the Black GST - Genocide Sovereignty Treaty. Unresolved international legal issues, unresolved issues we seen as fundamental to our struggle. These issues needed to be addressed so that they become the focus of our campaign. And we spent an almost a year, some of us creating Camp Sovereignty and the Black GST. The other thing is that we, we targeted international spotlights on the country. At that time, it was the Commonwealth Games, as we call it, the Stolen-wealth Games. So we used the occasion of Melbourne Commonwealth Games to target and expose these fundamental legal issues, legal issues that had haven't been resolved in this country. And probably the reasons for a lot of the problems that we do have, you know, the

Gap, you know, the continuing jail rates, removal of our children, all these things were pretty much part of what we were talking about, our campaign. And we wanted to resolve, these things do affect our lives. And so we wanted to do something, and we knew that we couldn't get anything from the State here. So we need to expose it at the international level. That's what we were trying to do. And we did, successfully I think.

MS FITZGERALD: You've more recently set it up a second time, and on the 26th of January this year, you lit a ceremonial ceasefire peace fire in protest. What are you seeking to achieve?

UNCLE ROBBIE THORPE: Well because of the issues haven't gone away. It really become clear to us when we were sitting there in that camp for the last 45 days, that not only exactly the same issues that we're talking about 18 years ago are still the issues today, the unresolved issues surrounding genocide, the failure to really acknowledge our sovereignty, even though Yoorrook did back on the 23rd uh, 26th, 27th of April 2023, there was some sort of acknowledgement of sovereignty and the unceded sovereignty of our people. That's probably something that has changed, but hasn't really been fleshed out and taken to its logical, taken to its logical outcome and talk of Treaties. So there has been some movement on a couple of those things. I think the genocide has been left behind a bit, but there's movement on the issues surrounding sovereignty and treaty, which is something. Two out of three ain't bad sort of thing. So that became clear to us that these issues haven't been changed at all. And despite the amounts of money that are being spent in the name of trying to improve the lot of Aboriginal people, nothing's basically changed. In fact, it's getting worse. If you look at the Closing the Gap report card recently and some of the reports about, you know, the, the phenomenon of child suicide in this country today is just horrendous, you know, and it's like, it's like the final solution. This is a, you know, we've had a number of final solutions in this country. You know what's next, as it were. And what's the next final solution. We want them to address these issues at international law. And they'd be bought into that you know, forced to acknowledge the international standards. And, you know, it goes for things like treaties, I think, and issues surrounding sovereignty. That's why we asked for an international opinion from the International Criminal Court for that purpose. Exactly.

MS FITZGERALD: And these, the need for an international opinion goes all the way back to the first establishment of the British colony, doesn't it? Starts with Captain Cook. And you say that at no point did the colonialists ever have jurisdiction. What do you mean by that?

UNCLE ROBBIE THORPE: Well, if the Crown says you need to get consent to occupy that land and apply our law there, well, they didn't do that. Doesn't that just knock them straight out in terms of their authority? So they're here by illegal means. They're not a valid legal operation. All they've got is force of arms. So that's, why don't they just say that to us. Tell us what you're saying here. Be clear. We understand what, you know. You tell us clearly where you stand, and we'll work out what our next steps in terms of what we need to do to liberate ourselves and

whatever. But don't keep lying about it and convoluting the whole thing. Be very clear. You know, it's very clear to us what the situation is, but they're not. And you've got you've got the numbers here. I think it's about 98% of the people in this country come from the Northern hemisphere. That's only a phenomenon that's only
 5 happened in the last 200 years. Our people have been here for hundreds of thousands of years in this country.

MS FITZGERALD: And what's your view about whether the state has the right to apply their laws over First Peoples or their, or First Peoples' Country?
 10

UNCLE ROBBIE THORPE: What do I think about that?

MS FITZGERALD: Whether they it is applicable, permissible?

UNCLE ROBBIE THORPE: Yeah. Well it's not. You know, like I said, we have a true law in this country. We have a legal process. It's our laws known by all of our community. Not many of our people know anything about the colonisers laws. Not, it's not the same thing, but it's just not applicable in this country in any you know, any lawyers mind, any judge's mind. How does this law apply here if you haven't got
 15 the consent, if you use force, isn't that just like a home invasion? You're trying to justify a home invasion of someone's home. And, you know, that's what it seems like to me. Is that okay? Is it? Why don't you tell the absolute, oh, it's okay to be a home invader? Okay. So okay. That's okay. You can do these sorts of things. Just let us know sometime, please. You know, you haven't got. You haven't got a right to
 20 occupy our land or apply your law here. Where do you get that from? Explain. Please explain. So that's what we're waiting for. But they don't want to tell you nothing. They just wait for us to die out here and so they can inherit the lot themselves. And whatever.

MS FITZGERALD: Your family has personal experience of colonial violence, the theft of children, life on the missions. What can you tell us about your family's direct experience?
 30

UNCLE ROBBIE THORPE: On both sides of my family, my mum and my dad. So
 35 they, you know, they suffered from acts of massacres. They were survivors of massacres. Yeah. The people who survived in Victoria was a very small group of people, you know, they were the remnants of a beautiful people right across this whole continent. So we're all the remnants. I think it was around about 1920. There was less than a thousand Aboriginal people alive. This is what they call the Land of
 40 Plenty here. Yeah. So it was you know, what happened to the Aboriginal people here. And we're very much a part of that. And that remnants of people who fought back incredibly, amazingly to be here today and talking about the things that we're talking about right here now. I'm a part of that. And I want to acknowledge my ancestors, all of my ancestors who died on battlefield Australia with a war that
 45 nobody really knows anything about.

MS FITZGERALD: And is it your view that that war is still ongoing?

UNCLE ROBBIE THORPE: Absolutely. Because there's been no official end of it. And you think that would be the first thing they'd do was actually have an official end of hostilities before we sat down and negotiated and spoke about anything.

5 Surely that's got to be the process that occurs right now. Before you can talk about treaties, before you can talk about truth telling, end the hostilities, the duress, undue influence that has been put out there on Aboriginal people. Make it clear that this is a safe place to do this stuff. It's got international scrutiny over it, because we don't

10 really trust the system. Look what it's done to us in the, in all this time. Every law that they ever made for us is, it seems, got a little bit of a genocidal character about it.

MS FITZGERALD: The law has historically been used as a tool to classify control and dispossess First Peoples. Is that still happening now, and what laws are to

15 blame?

UNCLE ROBBIE THORPE: Well forced removal of our children, which is very clear that they're using their laws to, to break up our families. The fact that we're dying in their custody when they haven't got jurisdiction to put us in there in the first

20 place. So any time they do make a law like that is, it's offensive and insulting and an attack on who we are. And so I think every law they ever make specifically for Aboriginal people, initially it was a lot of laws that were made in this country. Then this was a *terra nullius*. It wasn't any people here, but there was a lot of laws made. How do they work that out? You know, that's um, needs to be questioned. And any

25 of these laws ever done any good for Aboriginal people? Is there one law that you could mention that was actually good, hasn't been there to take away our rights or put us in our place and control us? I don't think you can. You can tell me a law that out there that's any good, including things like reconciliation, native title. They're no good.

30 **MS FITZGERALD:** What are your views on whether the Traditional Owner Settlement Act has given good outcomes?

UNCLE ROBBIE THORPE: It's very problematic because who are they talking to

35 as the Traditional Owners? Has that been clarified? Who they are? I know that there's a lot of misrepresentation that's in the interest of the government to make sure that the true representation is not really there, and that I'd rather have people who are prepared to sell out and consent to what they're saying, rather than to fight for the things that, like the sovereignty and the issues of genocide, that those things

40 are going to come from the what you call the 'Traditional Owners', which is a problematic word too. You know, why don't they just call us owners. What's this? You know. What's this traditional word mean? Tradition is that we've already traded off our land somehow. And I don't know. We're the owners of this land. We're the sovereigns of this land. So that needs to be made very clear. We never consented to

45 anything here. It's all been by force of arms.

MS FITZGERALD: What are your views about whether the Native Title Act has given good outcomes?

UNCLE ROBBIE THORPE: No. Totally. Totally bad, very divisive. I think it's
 5 considered to be the lowest form of entitlement in this country. It's less than a
 pastoral lease, which is for foreign wild animals, I said, so it's hardly something to be
 jumping up and down with joy for, you know, it's putting us in our place at the very
 bottom of the entitlement regime. So that's hardly good enough. And, and I think it's
 very sinister, the whole thing, how that was created in the first place. And, you know,
 10 we always talked about land rights and self-determination, not native title and
 reconciliation. They're very far removed from what we were talking about and
 demanding. This is what we ended up with. And that was all, you know, plotted and
 planned by certain groups in this in this country, the legal profession in particular,
 you know, there's a lot at stake here. And they know, you know, they're keen to hold
 15 on to this, this, this beautiful land here to extract everything they can get out of it.
 They know that they're not from here. And then why would you call this your home?
 You know, you've only been here for 200 years. I think there's actually turtles around
 that are older than the colony of Australia. It was still living things that are older than
 this continent- this place called Australia, you know, and we have this amazing
 20 history and lore that goes back to the beginning. What we say, the beginning. Why
 would we give that up?

MS FITZGERALD: You refer to the existing legal system and precedents that First
 Peoples had before colonisation. Was that a legal system that could sensibly regulate
 25 affairs for First Peoples now?

UNCLE ROBBIE THORPE: Absolutely, totally. I really believe in the you know, I
 really believe that our law is so far superior than what we've been subject to, that
 they can take a leaf out of our book. Now, when you go to someone else's country,
 30 don't you? Shouldn't you go through their customs instead of bringing your own rule
 book with you and enforcing that - it doesn't work right? It's caused a hell of a
 problem here. One of them is ecocide. Disrespect for the law of the land. Look what
 it's done. You know, those things would never have been allowed to happen under
 our, you know, under our control. You couldn't do that to the land. It was just so far
 35 removed from the way that we set our values, the way that we look at the earth and
 everything about it. I'm not impressed by all this. This is very ugly to me. It's cold.
 It's dead culture. And where we had a living, vibrant society with birds. It was
 everything. It was alive. That's all gone. You know, that really hurts. We, we're a part
 of that. I see Aboriginal people as part of the natural environment. We're part of the
 40 ecology. We're where man fits in the scheme of things. And we understood our place
 on the planet. The people who got here recently don't know nothing about what we're
 talking about. They're so removed from their own Country they've been
 dehumanised, dispossessed. It's for me, the original people who came here was like
 the zombie apocalypse.

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That's sort of how it's panned out for us, if you know what I mean. You know,
 they've had no understanding and no education. It was just, you know convict penal

colony, was established as a convict penal colony. So it's not really great foundations, are they, to build on. They still need to go through our customs and get our consent to occupy our land. And, you know, we didn't, we need to know where everyone fits in our society. Everyone fits somewhere. You don't just have, can't be
 5 over there hanging around. You need to fit in somewhere so that, that's a problem for this country. In terms of our law, they've got no interest in fitting into the, into the law of this land. In fact, quite the opposite. They're out here to destroy this land and its people. That's so very clear to me and hasn't ended up, ended yet. And the proof of that - there's no Treaties, still haven't got consent. So when are they going to do
 10 that? When are they going to fulfil what their Crown told them to do? Get consent, you know, because everything can be played out there. We're not you know, we understand. We're very clever people. We've managed to survive for at least 120,000 years in a socially organised way, doing ceremonial law, going back that far. So, you know, we're a civilised society here.

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MS FITZGERALD: What opportunities do you see for First Peoples to govern themselves using existing precedents?

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UNCLE ROBBIE THORPE: How do we govern ourselves using?

MS FITZGERALD: Yeah what areas do you see would be, are ripe for that where you think you should be able to govern yourselves?

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UNCLE ROBBIE THORPE: You know, we've got an inalienable right to be able to govern ourselves, and no one's got a right to say we can't. That's what we were doing before anybody else turned up here. There's not much in the way that's sort of given us that opportunity, because that's what we'd be doing straight away. You know, we're forced that can conform to their, their constraints. There's always constraints when they make laws to these things you have to abide by, you know,
 30 hang on. You don't make the law around here. And where do you get the authority? So, you know, it's still, I still feel we need to go back to Cook's instructions, you know, start go, go right back to the very beginnings of British colonialism in this country, which began here in, in my Country, the on the 90 mile beach Krowathun Country. We actually seen Cook. We knew what their intent was then. And they go
 35 shooting cannons at our people trying to force your way into this land. You know, it's very clear what their intent was. But we knew exactly what this represented. You know, we'd been around, we'd been trading with the rest of the world for hundreds of thousand years before the British turned up here, and we still can't work out. How did the British guy Cook discover this country when it was called New Holland?
 40 There's a lot of people we need to look at this history. It's all lies. As they admitted to *terra nullius*, the legal fiction, you know, that hasn't been resolved properly yet. They went from *terra nullius* to native title, which is probably a worse situation than *terra nullius* itself. So, they're not really they're not really fair dinkum. You haven't got a good intent or good faith. No, really good faith, so at this point.

45

MS FITZGERALD: What is the current situation in Victoria? Who are the proper sovereigns?

UNCLE ROBBIE THORPE: Well, if you talk to the State government lawyer, they're saying that we are, we never ceded our sovereignty, according to what was stated to Yoorrook on the 27th of April 2023, that we'd never ceded our sovereignty.

5 Can't we go to that, go to that point and start negotiation from that point. And then you need to recognise well the law of the original people that needs to be given acknowledgement and status, at least equal weightage in terms of the colonisers law, in fact, more. This is our land, right. Right. So, are they prepared to do that? You know, they just can't say that we never ceded our sovereignty. So how does that play

10 out exactly? So, tell us, you know, we can negotiate from that position, you know but we, you know, we need some time for healing. We need some time to get our act together, put our, our, our structure back in place like our Elders. They're missing in action here. And yet they're critical in terms of our law because they hold our law. They speak for us. Our people recognise that. But that's, they're not given any

15 acknowledgement. So that needs to happen. And you need to establish these Elders Councils who are the bloodline back to the territory. There's a well-established law here that needs to be acknowledged. And, you know, we still have that knowledge, and we have men's business. We have women's business. We have initiation of youth into our law, and we really did have a proper structure here. So that we need some

20 healing and mending of that before we can sit down and talk in a serious way with the colonial construct here.

MS FITZGERALD: The cases you've brought in the High Court show that the colonial legal system is not able to question its own foundations. Where could the

25 State go if it really wanted to sort out this issue of sovereignty?

UNCLE ROBBIE THORPE: Well, that's why we're asking for that. An International Criminal Court set up for these specific purposes to give us an advisory opinion, at least, about the sovereignty of this land here. And you think that Australia

30 would take any notice of that? But that question needs to go there and, you know, the crimes of genocide, you can't get the State to look at themselves in regards to that. They haven't got the capacity in that sort of law. That's why there's international systems, are set up. So we need to take it to the International Criminal Court. I think

35 of justice.

MS FITZGERALD: In the cases you brought relating to genocide, at the time, genocide was not a part of domestic law. Since 2002, it has been a part of domestic law. Are you aware of any, whether any one has ever been prosecuted for a crime of

40 genocide since it entered the law books in 2002?

UNCLE ROBBIE THORPE: I'm not sure if there's 1 or 2. I'm not. I don't really know, I don't I couldn't tell you into -

MS FITZGERALD: Any relating to the treatment of Aboriginal people?

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UNCLE ROBBIE THORPE: Not, not in regards to that. But you know, and it's a doctored version of an international law as well. It's, it was, they incorporated rather

than adopted in, in full as it was as international law, 1948. Why do they why do they have to incorporate? Because they doctored it and they we ended up with an attorney general who overlooks the Act. And unless you can, he has veto power on anybody who can use that Act. It's hardly an international law. And what it was meant to be, is
5 take, it totally takes out the whole meaning and spirit of that act.

MS FITZGERALD: So, the State has to be involved in pressing charges of genocide.

10 **UNCLE ROBBIE THORPE:** Or agreeing that these could be.

MS FITZGERALD: Can be brought.

15 **UNCLE ROBBIE THORPE:** Yeah. So, which is, you know, I think that's really offensive and an insult. And what is the international law say about that? Well, you know, why didn't Hitler just say, no, we're taking care of this internally. Go away. We'll do that. No need to get.

20 **MS FITZGERALD:** We'll press the charges don't worry.

UNCLE ROBBIE THORPE: Yeah, we'll sort that out. We'll see if there's any validity in these claims that they're making here. And so that's you know, I think that's really insulting and offensive that the whole purpose of this international law was to make sure that people like ourselves who are, who are claiming these things
25 are happening, need to go to an unbiased, impartial system where we're not going to get it here. We know that, you know, we're you know, we're the most jailed people on earth, not just men, women and children as well. You know, they're not really listening to what we're saying, it seems. And although, you know, the whole right. Where do they get the right to apply their law here? You know, we want to ask that
30 question there as well. Can someone clarify all this for us you know.

MS FITZGERALD: You said that a Treaty is premature until other processes have been concluded. What needs to happen before Treaty?

35 **UNCLE ROBBIE THORPE:** I believe that it needs to be an official end of hostilities, an acknowledgement of where we, where we're standing, like the also a statement of agreed facts, an end of hostilities. Then we can begin. And there's not just one group of people here. There's something like 300 nations you need to be
40 dealing with. They've all got different stories of colonialism and, and how that's all developed. So, everyone needs to have their own say here. They're fiercely independent, our peoples like, everywhere. Like you look at Europe, you know, the map of Europe is not quite as detailed as the map of Australia, but there's a lot of people in there that no one else can speak on behalf of. And there's all the issues and troubles that have been going on there, because you just haven't got the right to speak
45 for someone else's Country. So that needs to be acknowledged. But the main thing is end the hostilities first. We don't trust you. Is there a safe place for us to talk to? Is there an opportunity to heal ourselves and put some of the things that you damaged

back in place. You know, there's some time before we can just launch into a Treaty and sign off on a Treaty, that's only going to exacerbate the problem. I think it's pretty dire to begin with. So, you know, we don't want to go there. It's up to the State. Got to show a bit of good faith and intent there.

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MS FITZGERALD: So, you can go as a strong negotiating party, not a weak negotiating party.

UNCLE ROBBIE THORPE: Absolutely. You know, and you know, we're entitled to that. You know, we owe it to our ancestors. We owe it to our children's children, children and this land. You know, the spirit of this place. You know what we call it. The land is our mother. And needs justice, too. Needs recognition. Because all of our law stems out of here. Ultimately, from our land comes from our land.

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MS FITZGERALD: In Victoria, the State has designed the terms of reference for Treaty negotiations. Do you see any issue with that?

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UNCLE ROBBIE THORPE: Well, why do you need to have a Treaty negotiation after that? As far as I'm concerned, that is the negotiation, the terms of reference and conditions. What if we apply them? Shouldn't that come from our people? These are the terms of reference and conditions that we're going to do this Treaty process. Whoever holds that spear is running the show. So, they soon took upon themselves to create these terms of reference and condition. And the other thing about who asked the Victorian Government to do a Treaty in the first place? Can they give us a name? Was it? Who can they point to that says that we wanted to do a Treaty with Victoria because where that where, where a treaty came from recently was came out of the dialogue meetings for the national constitution, not the state one. So, who asked the state of Victoria in the first place, why did they rush off and go and write the terms of reference and conditions and appoint all that, their old bureaucrat mates and all these positions and, you know, even the Truth Commission, you know, which is supposed to oversight this Treaty process and make sure it is a truthful process. So, it's damaged that, it's got to work with what we've got. You know, this is a small step in the right direction, but it is a long way to go on it.

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There's a lot of education. And you know, what is the willingness and is there any, you know, are they willing to take this step? I don't really believe they are. And for them to force, force their way into the process, like I said, no one asked the State of Victoria to do anything. You know, they are the problem. They're the ones that caused all these problems. It's an issue of who is actually responsible for Aboriginal people in the State of Victoria. Is it the national government or is the State government or any of them? You know, I think the '67 referendum said that because of the criminal neglect of the Aboriginal people in Victoria, the federal government is going to take responsibility for their affairs. So, we should we do the Treaty at the international level, the national level or the colonial state level? You know, there's that issue that needs to be spoken about and explained clearly. I think it's clear to me that no one in this country has got the authority or the capacity to do this type of work, so that's why it needs to go to the international court.

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MS FITZGERALD: What is the best that we at Yoorrook can achieve operating from within the system?

5 **UNCLE ROBBIE THORPE:** Well, we're talking about the truth here. Is that, is it a
 sign that the Crown is actually going to consider that? And, you know, there may be
 that maybe the time has come that they will do that, you know, and so that's
 important to be a part of this, guide it, shape it up. And I think the treaties anywhere
 10 else in the world have taken up to 20 years, 30 years to, to actually settle. So there
 could be a lot of a lot of work to come in regards to this and we're on the back foot
 here, you know, we're, you know, the odds are against us and the system's got all this
 power. We need to be brought up to a level where we can actually, you know, if
 you're talking about informed consent without, you know, duress or undue influence,
 15 you need to do that, make it a fair negotiation. Otherwise, you know, people will see
 through it. And I think if you, if you deal with the truth initially, you save yourself a
 lot of time, energy just by dealing with a truth. So that's what we're looking for. This
 is the nature of our people. We're bound by the truth. Our law works that way. It
 doesn't work otherwise. And we'll find that. We'll find the problems with it sooner or
 20 later, just the way it is. It's like most laws, actually, except some laws, you know, this
 is how it's meant to be. But we're very much a part of that.

The truth will sort it out. And we're constantly arguing the point about certain things
 amongst ourselves, even, you know, so we get it refined or give it defined. And that's
 25 what we do. That's why we met for so long sometimes. We didn't walk away from
 the meeting until we were, was a consensus around everything, and everyone
 understood everything. It might have seemed like it took longer, but in the long run it
 did. And it was a lot shorter time spent on these issues and they got resolved. You
 know, I think we have a better way of law. And even the wider community started to
 30 acknowledge that as well. They said no, they. Must prefer the way that Aboriginal
 people operate, particularly in this country. You know, you're doing yourself a
 favour if you acknowledge the Aboriginal people and their land rights. And what that
 means for all people. Everyone's children, you know. You know, the way we were
 thinking was that, you know, the footprint that you leave behind is going to affect the
 35 generations down the track. We're very considerate of that. And I think the wider
 community is starting to realise. Yes, that's obviously the considerable thing. The
 considerate thing to be doing. Otherwise, what are we leaving for our children? All
 of us. And that's these are the things that may impact and bring us together, you
 know, cause we all love our children, aren't we? And we all love this beautiful
 40 Country. What are we doing here? Let's get real about it.

MS FITZGERALD: And you were talking about it adopting First Peoples' laws as
 possibly being a double-edged sword. How do you see, why do you say it will cut
 both ways?

45 **UNCLE ROBBIE THORPE:** I just think that's the nature of the truth. It's like it's a
 force in itself. I see a, I see a thing called the spirit of truth. It's like a living entity in
 its own right, and it's hard to control it. And so that's what may give us an

opportunity. We say we're truthful, honest people, you know, bring it on, talk about the truth to us and see where everybody stands. You know, and this system hides away. It's secretive. It's not forthcoming that, you know, the whitefella law doesn't teach its children the law. It's an, it's something that for a small group of people in a privileged position to have knowledge of law and how it all plays out. Whereas our people, we all needed to know the law. You didn't grow as a person until you actually went through the law. The system of law. So no one was unknowing about the law. And that's, that represents a big difference in the societies that we are, and it's reflected in our young people. That was, there was respect for it because they knew it. Now, if you don't understand the law, you've got a habit of not respecting or understanding, and that's going to step the wrong way. You know, it gets me, why don't they do this? You know, you've got an education system when you teach them the fundamentals of law.

At least they don't do that. So, it tells me that there's something there's a problem there in their system. But you know, I believe in the truth, and I know its power, and it's like, it's indestructible. It'll always keep resurfacing until we get it right. And that's something we can run with. And I don't think anyone has a mortgage on the truth. And it needs to be played out, you know, put the facts out there. Put it out there and see, see where we stand. Everybody. And I think Aboriginal people are afraid to do that. So that's why you know, this is why it interests me. The Truth Commission. I think it's an important part of this, this Treaty business. It needs to underpin the Treaty business. Actually, you know, we need to know why we're having a Treaty. You need the wider community needs to know why we're having a Treaty. So, you never give them, as you know, as much information around the truth as possible before informed consent decision making can happen. So I think it's pretty, pretty fundamental that, you know, the idea of truth is put up front and centre.

MS FITZGERALD: Uncle, those are all of the questions that I have for you. Thank you for coming and giving evidence here for us today.

<VIDEO OF UNCLE ROBBIE THORPE'S EVIDENCE CONCLUDED.

(Audio drop)

UNCLE ROBBIE THORPE: Anthony put this small documentary together. It hasn't been released yet.

COMMISSIONER LOVETT: I'm sure it will be worth the wait.

MS FITZGERALD: Because it takes a little while for the tech to catch up, maybe if you're happy to, if the Commissioners have any questions, we can do that first and, in fact, end with Uncle Robbie's documentary on the way out.

COMMISSIONER LOVETT: Happy with that.

MS FITZGERALD: Just so (crosstalk) you're here all evening. Obviously, I've asked all the questions that I have. If the Commissioners have any questions?

5 **COMMISSIONER LOVETT:** Thanks for the time and effort. I know it's been a journey and a long fight, and you continue to fight. You are continuing to fight as well. So just building on there, yeah. Just, you know, we understand the mammoth effort that you've undertaken over many years. You know, this is not just the years that Yoorrook has been operating but the years of advocacy and resistance that you continually show as well on making sure that the issues are on
10 the forefront of everyone's minds. So, thank you.

UNCLE ROBBIE THORPE: I say thank you to the Commission for giving me the time to have a say too.

15 **CHAIR:** Thank you, Robbie. There is always something to learn and, for me, the court documents with the lion - was it a unicorn or not? I mean, that just blows your mind. We're in fairyland.

20 **UNCLE ROBBIE THORPE:** It's all about getting stamps on your documents. I think you'd understand that Tony. A big part of the law is actually getting to that point, which is really difficult, particularly for people like ourselves.

25 **CHAIR:** You've spent so much time getting there, though. You've spent so much time getting there. So, thank you for the presentation. Thank you for sharing it with us.

UNCLE ROBBIE THORPE: Thank you for your time.

<THE WITNESS WAS RELEASED

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MS FITZGERALD: Ready to play the documentary now.

COMMISSIONER LOVETT: Thank you.

35 (Video "Robbie Thorpe Documentary" played.)

"It's not easy to say what Uncle Rob says and to believe it. It makes people uncomfortable.

40 This country's based on acts of terror and policies of ongoing protracted genocide.

Let's stand up now. We have got the opportunity. Our ancestors didn't have a chance. They were gunned down like they were dogs.

45 He has never swayed from his opinion and his political view. He's never backed down. He's never - he's always put 110 per cent of himself and every ounce of

himself into the movement and the struggle, and even when there was times, it was just -

5 What I'm getting at, your Honour, this country is guilty of genocide. There's no doubt in my mind. Everything that I've read in the Genocide Convention, Australia is guilty of.

10 Australia is a Commonwealth country without a treaty. A treaty for me is a peace making instrument of international law.

If we do a treaty, we write it, you sign it. (Cheering and applause)

And that underpins the constitution that we write for the people, by the people."

15 (Video "Robbie Thorpe Documentary" stopped.)

20 **MS FITZGERALD:** Thank you, Commissioners. I think that is now, in fact, the end. And, yes, as I said, I don't have any further questions, and so I might hand over to the Commission. That is all of the evidence that we're calling today.

CHAIR: Thank you. We conclude our sitting for today and we'll be back tomorrow morning, 10 o'clock, I'm presuming. Thank you. Adjourned.

<THE HEARING ADJOURNED TO THURSDAY, 28 MARCH 2024