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TRANSCRIPT OF DAY 5 – PUBLIC HEARING

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**PROFESSOR ELEANOR A BOURKE AM, Chair**  
**MS SUE-ANNE HUNTER, Commissioner**  
**MR TRAVIS LOVETT, Commissioner**  
**DISTINGUISHED PROFESSOR MAGGIE WALTER, Commissioner**  
**THE HON ANTHONY NORTH KC, Commissioner**

**MONDAY, 15<sup>TH</sup> OF APRIL 2024 AT 10.00 AM (AEST)**

**DAY 5**

**HEARING BLOCK 6**

**MS FIONA McLEOD AO SC, Senior Counsel Assisting**  
**MR TONY McAVOY SC, Senior Counsel Assisting**

**MS SARALA FITZGERALD, Counsel Assisting**  
**MR TIMOTHY GOODWIN, Counsel Assisting**  
**MR DAN STAR, KC, Counsel for the State of Victoria**  
**MS GEMMA CAFARELLA, Counsel for the State of Victoria**  
**MR LACHLAN CARTER, Counsel for the State of Victoria**

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**LAW IN ORDER**  
Where work flows.

<THE HEARING COMMENCED AT 10.05 AM

**CHAIR:** Good morning, welcome to today's hearing of the Yoorrook Justice Commission. This is a continuation of our inquiry into land injustice, hearing  
5 block 6. I would like to invite Commissioner Hunter to give the Welcome to Country. Commissioner Hunter.

**COMMISSIONER HUNTER:** Thanks, Chair. I would like to acknowledge we  
10 are on the lands of the Wurundjeri, of my father's lands. I would like to acknowledge ancestors and Elders and all those that came before us to give us voice in this room today and throughout the time of Yoorrook. And when I say Wominjeka, it means to come with purpose and that is what I hope we all bring to the hearings every single time we come into this room, so Wominjeka and  
15 welcome.

**CHAIR:** Thank you, Commissioner Hunter. I would just like to make some  
20 introductory comments before we get going, and thank you, Commissioner Hunter, for that welcome. And I would just like to introduce fellow Commissioners. Commissioner Hunter, who is the lead on the Commission's health inquiry. Commissioner Lovett, who is leading the Commission's land  
25 injustice, housing and economic life inquiry. Commissioner Walter, who is the lead on the Commission's education, economic life inquiry, and Commissioner North, who has recently joined us for the first time in these lot of hearings, so welcome. This Royal Commission has been tasked with uncovering the truth of the historic ongoing Systemic Injustices experienced by First Peoples in Victoria. I  
30 have said it is the most important work that I will ever do. It is the hardest task also for so many of us.

35 These land injustice hearings are about who we are, our identity, our relationships to place and Country, and the brutal impact of colonisation and loss. In 1968, Bill Stanner referenced the Great Australian Silence, leading to a failure to acknowledge the atrocities of the past, to forgetting that they happened at all. As a result, a different history arose in the Australian memory and formed negative stereotypes marginalising First Peoples and enabling continuing systemic  
40 discrimination. 60 years later, this last year in Victoria, we had a failed referendum. But we also had Yoorrook, formed on the advice of the elected First Peoples' Assembly. In addition to this, this State Government has been committed to treaty-making for almost a decade. The testimony provided to Yoorrook now includes our voices, your voices, the voices of all Victorians who have come before Victoria, before Yoorrook, for example, as having Suzannah Henty appear  
45 from another side.

This is historic. It will contribute to a more inclusive narrative about the founding  
of the State of Victoria. I expect the evidence gathered by Yoorrook to be used to  
educate the following generations about the shared history of this State. I  
anticipate that much of Yoorrook's work will also form part of an expanded and  
extensive education curricula for teacher education, professionals and within

TAFE. I would now like to ask Commissioner Lovett to say a few words, introductory words.

**COMMISSIONER LOVETT:** Thank you Chair and also thank you,  
 5 Commissioner Hunter, for that Welcome to Country and the importance of the  
 word Wominjeka as well. (Speaks Dhauwurd Wurrung) Yoorrook's land injustice  
 hearings commenced a few weeks ago in Portland, Victoria, which has  
 inaccurately been called the birthplace of Victoria. The evidence taken by  
 Yoorrook in the first week of hearings helped to clarify that the squatters came to  
 10 Portland to set up an illegal whaling colony. This then started a lawless land grab  
 across Victoria that changed the lives of First Peoples forever.

We heard from historians Richard Broome and Henry Reynolds about how the  
 occupation of Victoria by squatters was the swiftest and most rapid expansion of  
 15 any colony in European history. Professor Ellinghaus, Professor Andrews and  
 Professor Pascoe provided chilling evidence on the genocide that occurred through  
 Tasmania and Victoria.

Evidence was given to Yoorrook about the clear correlation between the rapid  
 20 expansion of squatters in the 1840s and the peak of massacres of First Peoples.  
 Yoorrook was told that even the Parliamentary Select Committee in the House of  
 Commons in Britain in 1837 considered the actions of squatters and the violence  
 against First Peoples in the colonies to be criminal against the standards of the  
 day.

25 We heard that in the paternalistic spirit of protecting First Peoples against ongoing  
 massacres, our communities were put on to missions and reserves. From this point  
 on First Peoples' lives were completely controlled, controlled by the State. As  
 Uncle Jim observed, missions were meant to protect First Peoples, but instead they  
 30 punished our people for practising culture and speaking language.

Aunty Jill told Yoorrook that if you practised your culture on the mission, you lost  
 your rations. Aunty Vicki described the resulting linguicide of Aboriginal  
 language that resulted from the forced removal to missions.

35 Professor Marcia Langton told the Commission the loss of Aboriginal languages  
 in Victoria is among the greatest in Australia, and that in turn Australia has one of  
 the largest extinction rates in the world: language extinction rates, to be clear, in  
 the world. Commissioners were deeply moved by letters read by Aunty Jill that  
 40 were written by Aboriginal women in the protection era who desperately wanted  
 to be reunited with their children or provide for their families.

We received evidence, the letter from Eliza Saunders in 1915 to the Board of  
 Protection, seeking permissions to leave the mission and occupy a home that she  
 45 was able to buy from the savings she had accumulated. She was denied her request  
 and her rations were ultimately taken away. She returned to South Australia and

was never able to buy her own home, despite having the means to do so. In Professor Reynolds' words:

5 "The original sin of Australian colonisation has the assumption that First Peoples didn't have property rights. The original sin was the beginning of the unbroken line of injustice for First Peoples that continues today."

10 Following the line of injustice that helps us connect the massacres in the 1800s and the detention of First Peoples on missions and reserves with the higher rate of incarceration and deaths in custody of our First Peoples in the present day, it helps us to understand why languages have disappeared and the resulting impact that this has had on our culture. This week, we will hear about the next important phases in Victoria's history as we begin to shift the focus of evidence from historical into contemporary issues. We will hear evidence about the resistance and transformation that First Peoples have managed to achieve against the odds. I will now hand back to the Chair to commence the formal evidence, thank you.

20 **CHAIR:** Thank you, Commissioner Lovett. May I have appearances please, Counsel, and ask you also to outline the evidence that will come before the Commission today.

25 **MR McAVOY SC:** Chair, Commissioners, I appear as co-Senior Counsel assisting in the hearing block this week and in the weeks following, together with co-Senior Counsel assisting Fiona McLeod SC, who is in the hearing room today.

30 **MS CAFARELLA:** Good morning, Chair, Commissioners, my name is Gemma Cafarella. I appear on behalf of the State of Victoria today. On behalf of the State of Victoria, I would like to thank you, Commissioner Hunter, for your Welcome to Country and acknowledge the comments made by you, Chair and Commissioner Lovett, on the importance and difficulty of this work. The State acknowledges that today's hearing is being held on the lands of the Wurundjeri people, and I acknowledge them as Traditional Owners of this land. Sovereignty was never ceded over this land. The State pays respect to Wurundjeri Elders, past and present, and I acknowledge all First Peoples Elders and First Nations people here today and also watching online. Thank you.

40 **MR McAVOY SC:** Chair, Commissioners, Counsel Assisting acknowledges that we are here today on the lands of the Wurundjeri and acknowledges all of the First Peoples of this place we now call the State of Victoria. We thank Commissioner Hunter for her welcome and we note the opening comments of the Chair and Commissioner Lovett. This morning we will hear evidence from a panel on the topic of resilience and transformation. That panel is comprised of Karen Jackson, Dr Julia Hurst, Uncle Graham Atkinson and Marjorie Thorpe. After lunch, Commissioners, we will hear from Craig Sandy, Surveyor-General of Victoria, and the evidence today will conclude with a panel on First Nations water rights comprised of Dr Erin O'Donnell, Dr Katie O'Bryan, Karmen Jobling and Will

Mooney. The last two are from the Murray Lower Darling Rivers Indigenous Nations. They are the witnesses for today.

5 In addition, before we move to the first panel, I wish to make a short opening for this part of hearing block number 6. Chair, Commissioners, as has just been described, today marks the continuation of the land injustice hearing block. The Commission has heard absolutely remarkable evidence already regarding the catastrophic impact on First Peoples of what was then called the Port Phillip district when the British arrived at this corner of the continent.

10 As Commissioner Lovett has just explained, Emeritus Professor Richard Broome described the speed at which the land grab in these parts occurred as the fastest ever European expansion in other territories. Commissioners, by the end of this hearing block, we suggest that the Commission will be satisfied that the British  
15 Government and the New South Wales Government in the form of the Governor, knew - knew that the arrival of British migrants in the Port Phillip settlement would be disastrous - would be disastrous for First Peoples. They knew because they had seen it all happen before, in Canada, in Port Jackson and particularly in Van Diemen's Land. But we say, Commissioners, the loss of life was not  
20 inevitable, but it was a known - a known consequence of the land theft that was to take place.

The evidence to be tendered will also show that as at 1835, when the Port Phillip settlement was created, the British Government and the New South Wales  
25 Government knew that the First Peoples of what was to later become Victoria had existing rights, and that those existing rights ought to have been protected. In some places, Commissioners, in the material that has come before this Commission, the 1835 proclamation by Governor Richard Bourke to the effect that people could only acquire interest in lands through the Governor of New South Wales and that  
30 squatters would be prosecuted for trespass. In some places, that proclamation is taken to have - to be an assertion of terra nullius over the whole of the colony.

However, the evidence will support an understanding of that proclamation that it was to be directed to the squatters as to their conduct and their lawfulness and not  
35 a denial of the existence of any rights in the possession of First Peoples. We know that Governor Bourke was appointed by King William IV on 3 December 1831, and we know about King William that during his reign - King William IV that during his reign, slavery was abolished in most of the British territories. And we know that, in 1836, King William IV also issued letters patent for the  
40 establishment of the State of South Australia, which specifically protected First Peoples' rights.

And interestingly, Commissioners, interestingly, the Commission and the letter of instruction to Governor Bourke from King William IV is missing, another  
45 document - another very important foundational document for the colony that can't be found, just as we are yet to see the final instructions to Governor Arthur Phillip

and are left to rely upon the draft instructions as an assertion of the acquisition of sovereignty.

5 It is also relevant to note that in the United States of America at the same time, a series of cases decided upon in the United States Supreme Court by Marshall J  
dubbed - those cases are dubbed the Marshall Trilogy - occurred between 1823  
and 1832. Remember, the Bourke proclamation was 1835. Marshall J determined  
that land could not be purchased by private citizens from the Native Americans;  
that was in 1825. It's very familiar words. It's the same as the Bourke  
10 proclamation. But then he went on in other judgments to say that the Cherokee  
nation existed and it was dependent upon the United States. And finally, in the  
third decision, setting out the relationship between native American nations and  
the Federal and State governments. So the British Government was aware of this.  
It was happening in the United States of America, and it was happening at the time  
15 that the instructions for Governor Bourke were issued by King William IV.

In the coming weeks, the Commission will hear evidence from community  
members, community organisations and government ministers and officers in  
respect of land, environment, water and statutory recognitions regimes such as the  
20 Aboriginal Heritage Act, the Native Title Act, and the Traditional Owner  
Settlement Act. While necessarily considering the present day arrangements and  
what is possible in treaty, we say as Counsel Assisting that the evidence needs to  
be understood in the context of the true history of this place.

25 At the end of this hearing block, Commissioners will be left in little doubt as to  
whether the application of the doctrine of terra nullius came much later than the  
1835 Bourke proclamation and amounted to a rationalisation after the fact of  
invasion and dispossession, and that there has been at play in the colonies in New  
South Wales and Victoria, a strategy of delay and obfuscation, of being seen to  
30 act, but not acting.

The decision in *Mabo v the State of Queensland (No 2)* in 1992 rejected the  
doctrine of terra nullius, and at that point - at that point, it would seem that the  
reliance upon that legal fiction to support the lawful acquisition of Victoria at least  
35 becomes arguable and possibly unsustainable, yet the various governments in  
Australia have continued on with the alienation of land, water and resources  
without seeking to engage properly with the very fundamental issue of their own  
legitimacy, nor seek the consent of First Peoples.

40 With those historical underpinnings in mind, we will call this week evidence from  
First Peoples as community members and academics, other water academics and  
First Peoples with expertise in international law. We will hear from government  
officers, Ministers of the government, finishing with evidence from the  
Honourable Jacinta Allan, the Premier of Victoria, at the end of the hearing block.

45

In part, Commissioners, the focus of these hearings will be upon the terms of  
reference that empower this Commission to inquire into historical injustices, but

also very much upon the pressing questions of continuing injustice and what recommendations may be made to ensure that the report of this Commission and its recommendations are given full weight and acted upon with purpose and in a timely manner.

5

In this regard, it is appropriate to remember the words of that great Aboriginal leader Charles Perkins as was recorded in his 1990 biography by author Peter Read. When speaking at the Rotary Club of Melbourne on 26 January 1984, he said:

10

"I am a descendant of a once proud tribe from Central Australia, the Arrernte people. Today we number very few and own nothing. We cringe like dogs with the prospect of the white backlash. We pray eternally that the white authority structure will not turn on us and impede what little progress we have made. We ask for land rights with tongue in cheek, knowing full well in our hearts that the land belonged to us in the first instance. We stagger and stumble into each other in confusion when our identity is contested and thus allow ourselves to be moulded by others. Our land, our pride, and our future has been taken away from us, and our people buried in unmarked graves. We wander through the Australian society as beggars. We live off the crumbs of the white Australian table and are told to be grateful. This is what Australia Day means to Aboriginal Australians. We celebrate with you, but there is much sadness in our joy. It is like dancing on your mother's grave. We cannot live in the past but the past lives with us."

25

The words of Charles Perkins are words of strength and defiance; they are words of resilience. Commissioners, it's clear from First Nations witnesses that appeared before these hearings those traits have not diminished or withered. This morning we will hear evidence from a panel on resilience and transformation, as I've said, comprised of Karen Jackson, Dr Julia Hurst, Uncle Graham Atkinson and Marjorie Thorpe. After lunch, we will hear from Craig Sandy, Surveyor-General of Victoria, and we will conclude the day with the First Nations water rights panel comprised of Dr Erin O'Donnell, Dr Katie O'Bryan and Karmen Jobling and Will Mooney as panellists from the Murray Lower Darling Rivers Indigenous Nation.

35

Commissioners, I propose now to request a short adjournment to ensure that the first panel of witnesses may be set up. Thank you.

**CHAIR:** How long are we talking?

40

**MR McAVOY SC:** Five minutes, please, Commissioner.

**CHAIR:** Yes.

45

**<THE HEARING ADJOURNED AT 10.28 AM**

**<THE HEARING RESUMED AT 10.31 AM**

**CHAIR:** Counsel, when you are ready.

5 **MR McAVOY SC:** Thank you, Chair. If the Commission pleases, I will call the first panel for today comprised of Karen Jackson, Dr Julia Hurst, Marjorie Thorpe and Uncle Graham Atkinson. I might swear each and then give them an opportunity to introduce themselves, Commissioners. And I'll start with this end and work my way along. Firstly, Karen, could you tell the Commissioners your name, please.

10

**MS JACKSON:** Karen Jackson.

**MR McAVOY SC:** And in the evidence you are about to give to the Commission, will you tell the truth to the best of your knowledge.

15

**MS JACKSON:** Yes.

**MR McAVOY SC:** Thank you. Dr Hurst, could you tell the Commission your name, please.

20

**DR HURST:** Julia Hurst.

**MR McAVOY SC:** In the evidence you're about to give Commission, will that evidence be the truth to the best of your knowledge?

25

**DR HURST:** Yes.

**MR McAVOY SC:** Thank you. Marjorie Thorpe, could you tell the Commission your full name, please.

30

**MARJORIE THORPE:** I am Marjorie Anne Thorpe.

**MR McAVOY SC:** In the evidence you are about to give to the Commission, will that evidence be the truth to the best of your knowledge?

35

**MARJORIE THORPE:** Yes, it will.

**MR McAVOY SC:** Mr Atkinson could you give your name to the Commission.

40

**UNCLE GRAHAM ATKINSON:** Yeah, Graham John Atkinson.

**MR McAVOY SC:** And the evidence you're about to give to the Commission will be the truth to the Commission to best of your knowledge?

45

**UNCLE GRAHAM ATKINSON:** Yes.



**MR McAVOY SC:** I might just start at this end with Karen Jackson. How do you prefer to be addressed for the purpose of this hearing?

**MS JACKSON:** Karen is just fine, thank you.

5

**MR McAVOY SC:** Thank you. Could you take a moment to explain to the Commissioners some of your background and introduce yourself. Thank you.

**MS JACKSON:** Hello. I do know most you, but I'm Karen Jackson, also know as KJ sometimes. Executive Director of Moondani Balluk Indigenous Academic Unit at Victoria University. A lot of my work is around transformation, I guess, in the suburbs of the west of Melbourne with Aboriginal community that have been stolen and displaced. Thanks.

10  
15 **MR McAVOY SC:** Dr Hurst, how do you prefer to be addressed for the purpose of this hearing?

**DR HURST:** Julia.

20 **MR McAVOY SC:** You don't want to be called Dr Hurst?

**DR HURST:** No, there is lots of knowledge here. I am fine with Julia.

**MR McAVOY SC:** Would you take a moment to introduce yourself to the Commissioners, please.

25  
30 **DR HURST:** (Indistinct) I am an Aboriginal woman whose family has been intimately connected to the Stolen Generations. My Mum was born in secret and then had a silent adoption here in Melbourne. Our history has been about reconnecting with our families in Sydney. Our family crosses Dharawal Country, and most of my work has been around story-telling connected to Stolen Generations belonging and finding connections to Country. I work at the University of Melbourne as a historian. I began that role in 2020 and I also work as a Deputy Director of The Australian Centre. I am an oral historian, so I work a lot with the National Library of Australia, and most of my work is about bringing stories across generations to life.

35  
40 **MR McAVOY SC:** Thank you very much. Marjorie Thorpe, how would you like to be addressed by - for the purpose of this hearing?

**MARJORIE THORPE:** Marj or Marji is fine.

**MR McAVOY SC:** Can you take a moment to introduce yourself to the Commissioners?

45

**MARJORIE THORPE:** My name is Marjorie Thorpe. I am a senior Tjapwurrung woman and Elder of the Gunaikurnai peoples of Gippsland.

**MR McAVOY SC:** Thank you. And Uncle Graham, how would you prefer to be referred to.

5 **UNCLE GRAHAM ATKINSON:** Yeah, look, I don't have an issue. I am often referred to as Uncle Graham. If people want to refer to me as Graham, that's fine as well.

10 **MR McAVOY SC:** And could you take a moment to introduce yourself for the Commissioners.

**UNCLE GRAHAM ATKINSON:** Just briefly. I inherited my Yorta Yorta Dja Dja Wurrung identity and culture from a very strong family background, upbringing, from my Elders and also my ancestors. Formally - was former Yorta  
15 Yorta governor's committee member back in 1998 to 2005. The - I was a former owner director of Atkinson Consulting Group, but I've retired from full-time work. Former chair of Native Title Services Victoria 2003, 2014, former co-chair of the Victorian Land Justice Group, 2005, 2010, currently a member of the Dja Dja  
20 Wurrung Clans Aboriginal Corporation and currently chair of the Dhelkunya Dja which means "caring for Country", the Dhelkunya Dja Management Board set up under the Recognition and Settlement Agreement that the Dja Dja Wurrung successfully negotiated with the State of Victoria back in September 2013. I am very involved in my community. My role in whatever position I have held has -  
25 has had one goal in mind, and that is, can I make a difference in what role I perform. And so that is where I - you know, the background that I bring to today's hearing.

**MR McAVOY SC:** Thank you very much. I propose to start with some questions about the battle for Lake Tyers and I might - might direct the first question to  
30 Marj, you are a member of the Lake Tyers Aboriginal Trust?

**MARJORIE THORPE:** Yes, I am a shareholder of the Lake Tyers Aboriginal Trust.

35 **MR McAVOY SC:** Can you tell the Commission from your own experience what the history is behind the Trust?

**MARJORIE THORPE:** In 1970, there was a legislation was passed after protest from Elders of Lake Tyers who protested at - at the - there was - they were going  
40 to close Lake Tyers Reserve down. So those Elders came to Melbourne and protested along with Sir Douglas Nicholls and members of the Advancement League and other people protested outside Parliament House to stop that from happening. And as a result of that was the 1970 Land Act which was established to manage Lake Tyers.

45 Prior to that, there was a significant movement of people from Lake Tyers into surrounding towns, and they were dispersed across Victoria at that point in time.

So a lot of people were - were moved. Prior to that Act, it was - it was a reserve, so people were not allowed off that reserve without permission. And if they did try to leave the reserve, they were rounded up and taken back by the police. So as a result of that Land Act, that was - the management of Lake Tyers was transferred  
 5 to those shareholders who were living on that 4,000 acres at that point in time, so that the adults received 1,000 shares and the children received 500 shares.

**MR McAVOY SC:** Just for those of the gallery and those watching online who might not know where Lake Tyers is, could you just explain in terms of where it is  
 10 in Victoria?

**MARJORIE THORPE:** Lake Tyers is situated in what was known by the Krowathunkooloong people as Bung Yarnda, and it was the people - the Wanagadi people were the actual people of Bung Yarnda at that point. And that was the  
 15 place where the missionary in the day, when the 90 or so people left of the Gippsland tribes, the Gunaikurnai, which were five tribes, the Krowathunkooloong, The Brataulung, Tatungalung, Braiakalung, and Brabiralung. So they were the five tribes of the Gunai people and Gunaikurnai people is what we call ourselves now. So that is in East Gippsland on the coast, and also very  
 20 significant Country in terms of - it's part of the water Country of Gippsland, so you have lots of rivers and lakes. And it's at the foot of the mountains on the Great Divide. And it's - so it's also a very important place in terms of its significance to our people as a camping place, a ceremonial place and a place where people came to seasonally, particularly for fishing and - and hunting at various times of the  
 25 year. And because of the climate it is a very nice place to live. It's where I live today, actually.

**MR McAVOY SC:** Thank you. Now, you mentioned about people being forced into nearby towns. Just - could you just help the Commissioners with what - the  
 30 names of some of those nearby towns are.

**MARJORIE THORPE:** So people were - so people were, after living all of their lives and generationally on Lake Tyers, at that point people were helped to be moved to the local towns. That was Bairnsdale, Orbost, the Latrobe Valley which,  
 35 at that point in time, was a significant industrial area in mining, and that was with are a lot of people were being moved to. Even from the slums of Fitzroy, people were just being taken to the work centres of which the Latrobe Valley was a major work centre in Victoria.

40 There were also people who were sent to places like Stawell and other country areas around Victoria. At that point in time, I know from family members who were part of that dispersal how they were told that they were going to be living somewhere else so all of their possessions, what they had, were packed up and they were supplied with linen and cutlery and the household needs to move into a  
 45 town, and so I am not sure what the numbers of people that were actually removed and I can't actually recollect exactly how many people were there at Lake Tyers when the Land Act came in, but it was significant enough to have a - you know, an

impact on the - you know, the separation of families who were moved. And these were people who had lived on a mission and a reserve all of their lives, and then to be put into a town, a white town, at that time was devastating.

5 I was actually growing up as a - I was born in Yallourn which is a mining town in the Latrobe Valley. My father left earlier than that point and he had left, you know, as a young man and he gained work in that mining town in Yallourn. And so we had a lot of relatives who were actually put into places around that area, and people struggled. They struggled essentially from racism that they were  
10 confronted with to begin with, but also struggling because they were in an alien environment that they, you know, to what they were used to living on a place like Lake Tyers where they were isolated and then put into, you know, major towns in Victoria where they were treated not very well.

15 **MR McAVOY SC:** I just want to ask you a couple of questions about that. Firstly, people - you said people were forced to leave, that people who were living at Lake Tyers didn't want go.

**MARJORIE THORPE:** I think coercion is probably a better term. It was, you know, waving the carrot of a better life. I actually got to meet the manager, the last  
20 manager at that - who was - her husband was Len Rule. This was Mrs Rule that I got to meet when I first went to Lake Tyers to work in 1991. And she was an elderly woman then, and she actually told me that that is what they did. She helped those people pack up and move to those places.

25 So - and, you know, that was, you know, the coercion that people would get jobs, they would be able to get a house and their kids would go to school, and, you know, they would live like everybody else in those towns, but the sad reality was very few were able to do that. So a lot of people, families separated, there was  
30 little work that they were able to get, the children, you know, didn't fare well in the schools at that time, and I actually seen that from another perspective as a young kid growing up and I was allowed to go to Moe or Morwell on the bus when I was just 14, and just seeing incidents, you know, that were shock to go me to see people being treated on buses and in towns.

35 **MR McAVOY SC:** And it may sound like a silly question, but on Lake Tyers Reserve, people were in a position of being protected and in company with other community members and family, it was a safer place to be than out in the reserve?

40 **MARJORIE THORPE:** I guess the people who were left were those who chose not to go and, you know, older people chose to stay, so I can't tell you what the actual selection process was at that point and how people were identified. So I'd say there was consent to go.

45 **MR McAVOY SC:** Now, this process commenced, I think you say in your statement, in 1962 and then there were protests which followed in Melbourne.

**MARJORIE THORPE:** In 1963, as I understand.

**MR McAVOY SC:** And how were you aware of that?

5 **MARJORIE THORPE:** Well, I was about nine years old at the time. I wasn't  
really aware of much else than my own little town and family. But I remember  
grandfathers and uncles coming in to visit us on occasions, and they were on their  
way to Melbourne. And these were the men who were going to Melbourne, and  
they actually got there via a farmer, a local farmer who had a truck and he brought  
10 those men down to go to Melbourne. And on their way they stopped at my parent's  
house for a cup of tea and a visit, and that is how I actually remember those men.  
And one of them was my grandfather, and, you know, we just loved seeing them  
anyway, but we didn't - we didn't understand at that point what they were going  
for. They came to talk with my father and visit with us.

15

**MR McAVOY SC:** We have a photo from your statement. I might see if we can  
have that on screen. Do you recognise that photo?

**MARJORIE THORPE:** Yes, I do.

20

**MR McAVOY SC:** Can I just describe who's in the centre of that photo?

**MARJORIE THORPE:** In the centre is Sir Douglas Nicholls and on - which side  
is it, the right-hand side is grandfather - Laurie Moffatt.

25

**MR McAVOY SC:** There are some other people in the background?

**MARJORIE THORPE:** I can't see that. And I think we had that discussion. I  
think that person was identified as Joe McGinness. We are not sure whether that  
30 was the man who came from Queensland or whether he was the Joe McGinness  
that we knew, Graham, I don't think it is.

30

**UNCLE GRAHAM ATKINSON:** I think so -

35 **MARJORIE THORPE:** I think it is the man who came from Queensland too.

**MR McAVOY SC:** The banner says, "Lake Tyers Aborigines".

**MARJORIE THORPE:** "Lake Tyers for the Aborigines".

40

**MR McAVOY SC:** "For the Aborigines".

**MARJORIE THORPE:** Yes.

45 **MR McAVOY SC:** So those are the men that you recall seeing at your house  
visiting.

**MARJORIE THORPE:** One of the men in particular was grandfather Con Edwards who was our grandfather, and he was married to my great-grandmother, Julia, and his son was Ron Edwards. And I'm not sure whether he was there or not. But certainly Pop Con was one of those men with - I can't remember his name,  
5 Foster, Bob Foster. There are other men there that were that came to visit us, and Mullet. Uncle - Pop Jim Mullet as well.

**MR McAVOY SC:** You said that as a result of those protests and the activism, the Aboriginal Lands Act was passed in 1970?  
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**MARJORIE THORPE:** Yes, that applied to not only Lake Tyers but Framlingham as well.

**MR McAVOY SC:** In essence, that legislation provided for a committee of management to manage the affairs of the Trust?  
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**MARJORIE THORPE:** That's right.

**MR McAVOY SC:** Now, you've had some role in managing the Lake Tyers Trust, have you?  
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**MARJORIE THORPE:** Yes, in 1991, I was the manager at the Trust for about four years at that point in time. Prior to that, I was actually a field officer for the Aboriginal Legal - Health Service, who was looking - from the health service  
25 point of view to looking at providing dental service and health - health services to Lake Tyers.

**MR McAVOY SC:** Is there any - are there any observations that you make about the experience of being on the land Trust and the way in which the government  
30 was involved in the management and upkeep of Lake Tyers?

**MARJORIE THORPE:** Well, in that time in '91 when I went there, the previous manager had passed away after being 12 months in the position, which was - he was a local man as well. That was the time of CEEP as well, so that was a - that  
35 was a working community and there was about 200 people living there, about that time, so it was a vibrant community.

I was a fairly young - younger woman then as well, so it was a bit daunting to go out to that community, but I was - you know, I think when I walked out there -  
40 when I went there and thought, this is a big job, and I actually went to my grandfather, Ronald Edwards, and said, "I don't know whether I should stay here or not. What do you think?" And it was him and his wife Julia who said, "We want you to stay and we will support you". So I had two young children at that time, I think they were four and six, and so I took up that job and worked in that role for  
45 that time. I must say it was one of the best jobs in my - I had ever had working in that environment. It was a rural community. In the days of ATSIC, everybody was pretty hopeful about the future and certainly there were strategies for various

communities and the strategy that we chose rather than arts and craft or anything else was a rural industry strategy. So we went to ATSIC with that in mind. We were a farming community. We produced cattle and that was the main industry at the time. We had a farmer, we employed people through the farm, but with a rural industry strategy we also looked at becoming, you know, growing chickens and other - other farm - farm animals, I guess, as part of a strategy for economic development.

We also realised that some of that was not sustainable. And certainly the cattle farm wasn't sustainable to begin with. So it raised a whole lot of issues for us which is what we were prepared to meet those challenges. And so it was about also looking after the land and looking after the bush and the lake, because the place is situated on a lake that is mainly sealed from the sea most of the year, and when the sandbar breaks is a time of big ceremony, and, you know, it's fishing. Fishing is the mainstay of the diet of the people at Lake Tyers and that is what most people did. We existed on fish, so that was - there were all sorts of things that we wanted to do and that was the aspirations at that point in time.

We also had - we also employed non-Aboriginal people from town who were skilled in, you know, things like welding, and other trades that worked with the men out there that we were actually having - had apprentices and training people up in those areas. So yeah, we used to make our own cattle grids and all of that stuff.

**MR McAVOY SC:** You have set out the aspirations and some of the things that were done in terms of the strategies for Lake Tyers. Was that made easier or more difficult by the legislation in the Aboriginal Lands Act?

**MARJORIE THORPE:** They didn't - there was not a problem with that. That was - I guess, prior to ATSIC it was managing the best that you could with, you know, with what you had. It was primarily a cattle farm. It was 1,000 acres pretty much cleared for - of the 4,000. That was for the farm and for the community. So the farm took up most of that cleared land and we had a farmer who was married to one of my cousins and he - we had farm apprentices and people were working to, you know, we actually produced the best cattle in the country at that time, I have to brag a bit. But before that, the cattle were, you know, there was not that same kind of management, so cattle were sort of just all over the place. At the end of that when the big drought in Queensland happened, we had farmers come down from Queensland to buy our cattle because of the - you know, the quality of that stock, so there was hope in that. But it wasn't - it wasn't really sustainable. You couldn't really employ any more than one or two farmhands as well as the farmer with that amount of cat that we could actually farm sustainably.

**MR McAVOY SC:** You are familiar with the term "self-determination".

**MARJORIE THORPE:** Mmm-hmm.

**MR McAVOY SC:** Is the arrangement that exists in relation to the land Trust at Lake Tyers what you would describe as an arrangement delivering self-determination?

5 **MARJORIE THORPE:** It's fairly complex to sort of - to assume that that's what it would be. That is what you would hope for, but the reality is that that - that was in 1991 to 1995. Since CEEP finished and all of that hope that I think that people may have had in ATSIC, and we did as a community, that's gone downhill, to this point in time which is it is in dire straits right now, so.

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**MR McAVOY SC:** Is the decision making left entirely to the community or is there interference in that process?

15 **MARJORIE THORPE:** So we have been - we had a period of time where we were under administration for 10 years with - the State Government run the trust for 10 years. And in that time, there were a number of administrative changes made to the Act. It was totally run by the State Government, and people felt like they went back to the mission days as a result of that. The buildings were - well, it looked like a prison farm, actually. I came - I came into that position six months after - six months after that, the finishing of the - of that time, and, you know, it was like - you know, it was very strange - it was a strange feeling. We had fences put up, for example, that were prison green fences aluminium fences, which were surrounding every house. It was a six-foot high fence around every house. Today those fences are falling apart because they are aluminium. They can't stand up to the winds, so they're falling over and there is no resource to fix them up.

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And going into the offices, the offices were not for the people; they were made for the staff who were working there. So there was signage up, we're not allowed to touch this, we're not allowed to do that. The first thing we did was take down the signs and put blue colour there and just open up the doors again for the community to reestablish themselves as, you know, the owners of the land, I guess, which we didn't feel like that during the time of the administration.

30

Yeah, it's been - it's been very difficult. It is been heartbreaking actually to see the disappointment, and particularly the Elders that had hope at that point in time to see - and today it is even more serious, because the - I guess the relationship with the State Government and there has been difficult State governments, different political persuasions, but it is been the same treatment that we have had about - for example, the share register itself. We don't even know whether - who's got the original copy of the share register, so there has been - there has been management that has been happening that haven't had the people with the skills to actually administer or manage a community such as that, and that's been - that's been a problem obviously because to manage a community of 200 people with, you know, a landmass of 4,000 acres, to do - because you are running a town basically, with people with minimal skills to do that, you know, that is going to be fraught with mistakes and problems, which is what's happening right now.

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**MR McAVOY SC:** Does that community still maintain hope?

**MARJORIE THORPE:** Well, I can honestly say from this point in time, and it was only from yesterday with more information, not very much. The fear right  
 5 now is that we are going to go under administration. A lot of people are actually wishing for that. I guess the fear then that if we you know we go willing under government administration, then that sets us back again as far as the term "self-determination", which I have forgotten what that means, but that's irrelevant to me, because I am sick of hearing that word, "self-determination", when the  
 10 reality is it's self-determination according to the whim of government and it's what we are allowed to have, what we are allowed to do and I don't see any difference to that concept right now, to what it is always been, and I am living there right now today as an Elder and seeing, you know, people in despair. Young people walking around.

15 There is no transport to Lake Tyers. There is - people don't have cars. A lot of people don't have cars, and the ones that do struggle to maintain them. It's 20 minutes into Lakes Entrance; that's the main town where we go shopping. So just to do that is a struggle for many people today. There's no - there's no public  
 20 transport and so people are reliant on others to get them into town, and most of the people are unemployed. They are on pensions. So it's very difficult.

And for the young people it is even worse because the school was closed down during the last five years, I guess, and local school at Nowa Nowa where our  
 25 school - all went to school, that was closed down arbitrarily in the town of Nowa Nowa. And we had a significant - always had kids going to that school. There's no school there now. Some kids aren't going to school. And that's become an increasing problem. And when our young people go to school living on the reserve, there's still - under the Act, it is still an Aboriginal reserve, so the  
 30 discrimination by people in town of us anyway is on - it's been negative, so - more so now because you know the situations that we are faced with.

**MR McAVOY SC:** I might take a moment here and ask the other panellists if any of the things that Aunt Marj has spoken about raise issues for you that you would  
 35 like to speak to the Commissioners about. Are there any things that strike a chord with you and your own experiences. Uncle Graham?

**UNCLE GRAHAM ATKINSON:** Yeah, I have heard this story so many times you know from the communities that I have been involved in, but Marj has given a  
 40 really good summary of, you know, the conditions and the struggles of having your human rights respected and the support for the community to develop in a sort of meaningful way that puts them on an equal footing with wider community.

I was just reflecting on Marj's story about Lake Tyers and how people were  
 45 coerced, was her words, to live on Lake Tyers, and it reminded me of my family and my ancestors' experience in living on firstly Maloga, that was a mission, that was on Yorta Yorta heartland. That was closed and then it was moved - it was

5 moved up stream to Cummeragunja, and the discontent that arose in the 1930s  
towards the mission management method of really oppressing and repressing  
people on those missions got to a point, and this is in 1939 where the community,  
and this included my ancestors and Elders of my extended family and my parents,  
they just walked off, and it became known as the Walk-off. And like Marj said,  
they walked off and they just got fed up with sort of living under a mission  
management-style of organisation, and they too had to disperse and find suitable  
employment accommodation in the surrounding areas, in places like Shepparton in  
the Goulburn Valley.

10

**MR McAVOY SC:** If I can just stop you for a second. You mentioned the  
mission management style. Just for the Commissioners' benefit, what are you  
referring to when you are referring to a mission management style?

15 **UNCLE GRAHAM ATKINSON:** I am referring to what Marj said earlier, about  
the people living on these missions. My ancestors weren't able - were not allowed  
to practice their culture. They weren't allowed to speak their language; in fact, they  
were punished, rations held back. And if you look around some of the missions  
throughout Victoria, it was a common practice that the - and it was referred to as  
20 mission management, and most people who found themselves living in those  
missions or reserves, they became very discontented and dissatisfied and wanted  
to look at better alternatives. So it was an oppressive regime, Tom - sorry, Tim -

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**MR McAVOY SC:** Tony.

**UNCLE GRAHAM ATKINSON:** Tony. I can relate to the stories that Marj has  
just shared with us, because you can go just about to any mission throughout  
Victoria - and there were - there were a lot of missions that were set up - and you  
could - you could sort of find similar experiences of the residents that were  
30 confined to those - to those situations. Yes. So I can relate to what Marj has - has -  
yeah, shared with us.

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**MR McAVOY SC:** Living under those conditions, does it have an impact on  
people's identity and self-image when your culture and way of being is -  
"oppressed" I think is the word that you have used?

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**UNCLE GRAHAM ATKINSON:** Yeah, look, I would even go so far as to say, it  
did - it did impact on people's self-esteem, self-image, you know, because there  
were very limited alternatives to that sort of - those conditions. Yeah, it did impact  
on people, I believe, psychologically, emotionally, and, yeah - and stories that I  
got from my parents. Both my parents lived on Cummeragunja Mission, and they  
shared stories with me, long stories of, you know, the terrible conditions that they  
lived under. And we were only too glad to leave the mission, you know, when the  
time came.

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**MR McAVOY SC:** Karen, Julia, is there anything that you would add to those  
observations?

**MS JACKSON:** Yeah. I want to say I remember that time of hope in the early days at Lake Tyers. I remember being really excited because you were doing brick making work down there. I thought that is phenomenal, because this is an amazing  
5 community doing really strong work and being strong in community, and you also had the cultural dance groups and those types of things. When things fall away from that strength and that hope, you can see land without capacity in the ways that you - that blackfellas needed has really big impact on community cohesion, and people end up - they are marginalised and erased in those spaces which  
10 fractures people's identity, wellbeing and belonging, and I see those things also happening to the Aboriginal community west of Melbourne. They haven't been quite as hopeful I think as what Lake Tyers has been. They are the things to sort of hold on to, I think, that we can do that work. We can be strength-based and grow in our spaces.

15

**MR McAVOY SC:** Without putting words in your mouth, are you saying that with the right resources and the right conditions, great things can occur?

**MS JACKSON:** Exactly, yep.

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**MR McAVOY SC:** Thank you. And, Julia, anything you wish to add at this point?

**DR HURST:** I took a note and the thing that popped out to me is this idea of coercion and this idea of silence and how we view history as more and more stories and histories are being told, the evidence of coercion is becoming much more clearer. And it becomes - it can become really what people's understanding of coercion is a matter of choice and stories of experience, so I am very aware of the language that you have used, Aunty Marj, to describe this history and these  
25 stories and I think we should take note of that description.

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**MR McAVOY SC:** A form of dealing that the Government has with Aboriginal people you have observed in other places and circumstances?

**DR HURST:** I think it's a form of dealing that amounts to an opportunity of choice, and when people aren't given multiple choices to control their lives and to make decisions that are the best for their family, singular pathways are created which means that impacts generationally on families and young people exactly what you have described and exactly what you say, when we are talking about -  
35 when we put coercion and self-determination in the same sentence in Australian history? Probably yes, we can.

40

**MR McAVOY SC:** And some of that the impact, the psychological impact that people - perhaps your parents, Uncle Graham, experienced, people who have been  
45 part of the reserve system, the mission system, do you have any observation as to whether that flows through the family then after that point?

**UNCLE GRAHAM ATKINSON:** Look, it is transgenerational. It was transgenerational. And, yeah, like, the irony of this is that some members were able to survive the mission management mentality and, when they were able to move away, they still kept in touch. They still - yeah, through their social interaction, they still were able to support each other that way. So, you know, it was often, you know, more than one family who'd move off the reservation. They also settled in the townships. For example, I talk about Goulburn Valley, Shepparton, Mooroopna, places like that. And those areas became smaller communities, but at the same time they become fringe camps too, like, you know, the flat set, at - sorry, between Shepparton and Mooroopna, where the local communities, they shunned - through their racism, they shunned Aboriginal people settling in those townships and it was just through their persistence - this is, you know, my family - their persistence that they were able to find work, find accommodation and, you know, then support their families. You know I am from a family of seven, and my parents, they had the work ethic, and it was through that that they were able to - they were able to survive. And it - yeah, there were other examples of that too with other families that decided to better themselves and move away - move away from the mission. Yeah, I hope I answered your question. I might have -

**MR McAVOY SC:** Thank you. Whilst you are talking about that part of the world, I might ask you some questions about the period around the Mabo decision and what flowed. It's the case, isn't it, that before the Mabo decision, you were involved in a claim made over the Barmah Forest. Can you explain that for the Commission, please.

**UNCLE GRAHAM ATKINSON:** Yeah, look, it goes right back to the 1880s. The Yorta Yorta have persistently strived for the recognition of their need for land, the recognition of their land justice or land rights. Back in the 80s, the mid-80s, the Yorta Yorta organised itself to lodge a claim with the Cain government and that was to regain the ownership of the Barmah Forest and also the Millewa Forest and there were other reserve areas around the Dungala, the Murray River. That was lodged with the Cain government but it didn't succeed.

**MR McAVOY SC:** But this was in the 1980s, you said?

**UNCLE GRAHAM ATKINSON:** Yes, in the 1980s.

**MR McAVOY SC:** During the period while there was a Labor Government federally?

**UNCLE GRAHAM ATKINSON:** The Cain government was in power, the State Government, and the Kirner Government. But it didn't succeed. So then coming up to the Mabo decision, you know, that the High Court handed down in 1992, the Yorta Yorta saw an opportunity there to have their rights and interest in land recognised. So two years after the Native Title Act - sorry, the year after the Native Title Act was enacted, that was 1993, a year after that in 1994, the Yorta

Yorta lodged the first claim - Native Title claim in Victoria. And, yeah, that was lifted people's spirits. The feeling around the community then amongst Yorta Yorta members was that "Hey, you know, there is a possibility that we might have a positive determination made by the Federal Court on our claim." Albeit, as you  
 5 know 1998, Olney J issued a negative determination on the basis that Yorta Yorta rights, and they were all - it was all contained in our Native Title claim, the tide of history had washed away our rights and therefore had extinguished our Native Title rights full stop.

10 And then, as you know, the Yorta Yorta didn't take that lying down. They first lodged an appeal to the Full Federal Court; same result. The appeal was dismissed. And so - you would know this, Tony - the Yorta Yorta organised themselves. And all this time I was on their governing committee. And my brother, Dr Wayne Atkinson, and I, all the way through those claims, we were staunch supporters of  
 15 each of those claims that up until then were not successful. And then in 2002, the High Court dismissed the claims. So that is not the end of the story but I will come back to this later. Yorta Yorta then had to go down the path of, and that was when there was a Labor Government had come back into government and Rob Hulls, the Attorney-General, he offered to the Yorta Yorta a co-management  
 20 arrangement of the Barmah Forest and the other surrounding forests that were part of the Yorta Yorta heartland. Yeah. So that was done, I think, in - in about 2004.

**MR McAVOY SC:** Can I ask you a question before we move on. Looking back now, what effect did the High Court decision have on the Yorta Yorta people?  
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**UNCLE GRAHAM ATKINSON:** A tragic effect. You know, I can remember how it - how it impacted on - they were devastated. And just in my own situation, I was - we were devastated, you know, Wayne - Dr Wayne Atkinson and I, who were part of - part of - we were applicants in that claim. We were just  
 30 shell-shocked and devastated that, you know, we went through the right process, hoping to get land justice, only to see our - our aspirations just, yeah, not supported by the State Government. And the irony of this also, Tony, is the State Government prior to 2004, that's when the Labor Government came back here in - into power in, I think, in 2002, but they were respondents to our claim. That's the  
 35 Yorta Yorta claim. And, you know, I sat in those hearings that many times and I couldn't believe - I couldn't believe what I was seeing. You know, the State Government represented by their legal team opposing our claim, and they succeeded. But I guess I don't know whether it was guilt or shame, but when Rob Hulls came into the position of Attorney-General, he took a more sympathetic  
 40 approach towards the outcome of that devastating decision of the High Court.

**MR McAVOY SC:** Now, the Yorta Yorta people have had a number of knocks over the years and always got back up. What can you say about what has happened since that time?  
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**UNCLE GRAHAM ATKINSON:** Look, some positive things have - have emerged. I said a moment ago that the State Government, supported strongly by

the Attorney-General, who was Rob Hulls at the time, he offered the co-management arrangement of the parks where Yorta Yorta could be involved in the management of those park areas and the waterways. However, it was a co-management arrangement. It didn't mean that the Yorta Yorta received

5 Aboriginal title to those areas, and that is the distinction between co-management and joint management, which is - which - joint management where those Traditional Owner groups achieved that, they also received Aboriginal title to those jointly managed parks.

10 **MR McAVOY SC:** Do you see that as an important aspect of the management? Is having Aboriginal title an important aspect of the management?

**UNCLE GRAHAM ATKINSON:** I think it's the only way to go. It's the only way for the government to demonstrate that it is serious, its genuine about giving

15 Traditional Owner groups the power of self-determination. And that's - that's where I see that as being an important part or element of joint-managed - joint-managed arrangements, parks and so on.

**MR McAVOY SC:** I will just hold you there for a moment, and I will come back to some more questions about this topic. I just want to ask the other panellists about their - their memory of how the rest of the Victorian First Peoples communities felt on hearing that Yorta Yorta decision and the loss of that case. Would anybody like to comment on that?

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**MARJORIE THORPE:** It was devastating. It was devastating, and I think to see that happen to the Yorta Yorta people was of concern to other groups about how they would fit. But I think we were quite naive when we went into this Native Title process and I think the legislation itself is flawed from the start, and it doesn't really address the needs of the First Peoples in this country. I think it homogenises

25 our people to a point where we're losing - we're losing aspects of who we are, where we come from, our culture, our connections to Country. Where the Gunaikurnai claim - I don't know whether we were the first cab off the rank, but we have the co-management of parks in Victoria, and, you know, there are still concerns about what rights do we really have in protection of Country through that

30 process as well, and we have got issues there. And it's also about Gunaikurnai, it is disregarding that there are five tribes of the Gunaikurnai peoples, five tribes that have language, boundaries, territorial boundaries. And so that's just all been wrapped up in one group of people and I think that takes away the essence of who we are and what we're about as people of the land and the connection that we have

35 to particular parts of our Country.

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**MR McAVOY SC:** Thank you for that observation. I might just ask Karen whether you had - what are your feelings about the decision affecting your people was?

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**MS JACKSON:** I was really devastated at the time, and I still get emotional about that time. I was there when that decision was handed down, and I just couldn't

contain myself. It was just so many horror and pain in that decision. I got the train and cried all the way back to St Albans thinking, "What the hell just happened?" That can't be right, because Yorta Yorta is so strong and Yorta Yorta has always had connection. Yorta Yorta mob are everywhere, we talk about Country and we are connected to that space and we know that space. It was one of the worst days of my life. That was a shock that happened based on white man's story not blackfella's story and all of that telling of connection and belonging.

5  
10 **MR McAVOY SC:** Do you have a similar feelings to Uncle Wayne in terms of disbelief that the State could do that to your people?

**MS JACKSON:** Exactly. I think everybody just believed it would be a winnable case, because we all believed in the strength of Yorta Yorta and we have all been connected to it. So I guess also, yeah, it was hard to believe. The other thing too, I guess, around Native Title and that whole legislation is that, you know, what you had to give up to actually go down that path is probably not a good path to go down. If you have to extinguish your land rights to have Native Title, then you don't get the capacity then to use land in the way that you should, in the way that you own it inherently, then it's not a good process either way, even though it was devastating for the response that we got.

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**MR McAVOY SC:** Thank you. Julia.

**DR HURST:** The only thing that I would add is that the case setting a precedent for other mobs to follow and the burden of proof of community to show ongoing connections just presented a really repressive authenticity that was reliant - sorry - on community to prove who they are, and it's - it's always the way. The burden of proof is always on community to tell story to educate and to prove ongoing connection and rights to country and doesn't take into account the legitimacy of the State. It's just - yeah.

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**MR McAVOY SC:** So that burden on the community to prove itself, you are criticising that?

35 **DR HURST:** Yes, yes, because people have inherent rights to land and Country, ongoing sovereignty, tangible and intangible heritage and culture that has been maintained in various forms, via - even if it's, you know, exile or survival in all of these different ways that actually haven't been controlled by the State, but in seeking to control these repressive narrow ways of being are enforced on communities to perform in a particular way in the hope that justice might be served.

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45 **MR McAVOY SC:** It's a - that method of controlling people's access to rights and power, is that something that you have seen before or you know of from different aspects of your research?

**DR HURST:** I have - I have come across - yes, yeah, from my PhD research in - in Western Sydney and the Blue Mountains of people trying to - trying to seek belonging and legitimacy through the State and of desperately trying to prove connection to Country in the eyes of the State and in the eyes of scholars and anthropologists and historians seeking other people to determine and legitimise stories, and, you know, there's huge - huge stories around movements in and out of place, movement to and from community in and off Country, other Aboriginal people moving on to Countries of other folks and being in better positions to speak to government and can - and can move in a particular way that other families were not able to, and all of this is a result of the State and colonisation and how people decided to move through these processes.

I was talking to Uncle Graham, you know, when we were having our Zoom, and I was saying I always think that people who have control of family, self and Country stories, have a really - have deep cultural wealth, that enables people to be well, and not everyone has that cultural wealth that they can draw on that - that fuels their energy to keep fighting against the State and other people.

**MR McAVOY SC:** Thank you. Turning back to you, Uncle Graham, there was an Aboriginal land rights claim under the New South Wales Act in relation to the Country on - under the New South Wales legislation.

**UNCLE GRAHAM ATKINSON:** Yes. Because - yes, Yorta Yorta don't abide by boundaries, you know, State artificial boundaries, so the - their - their Country straddles both the Victoria and the New South Wales - of the - of their ancestral land. It's - it's interesting, because there was some interest after New South Wales had passed its Aboriginal Land Rights Act. There was some interest that was actually shown. There was a bit of a ripple effect that resulted in groups like Yorta Yorta and others sort of putting pressure on the State Government to also introduce a Victorian Aboriginal Land Rights Act. But that got blocked by State Government. That didn't - it didn't go - it didn't go anywhere, and time then sort of moved on. And Mabo appeared on the horizon and the Native Title Act and the claims that were lodged.

I just want to say here, though, the Yorta Yorta haven't ceded their land. That needs to be understood. We have never ceded our land to anybody and we - and other Traditional Owner groups would echo that same - that same feeling. You know, we shouldn't be asked to prove that we have connection to Country, you know, that we have the right people for Country and all that - that's - was tied up with - you know, with the hurdles that you had to get over in the Native Title Act. It only took Olney J one minute - one minute. I was there. One minute to hand down his decision that just sort of swept away our - swept away our rights. But I - yeah, you know, Yorta Yorta still is persisting. It hasn't - hasn't given up the fight.

**MR McAVOY SC:** I just want to ask you a question about the ceding of your land. And you've heard the expression that sovereignty has never been ceded.



**UNCLE GRAHAM ATKINSON:** That's right, yeah. That's what we mean. We have never ceded sovereignty to our tribal land or ancestral land.

5 **MR McAVOY SC:** If the State or government agency say, "We acknowledge that sovereignty has never been ceded." What should they be prepared to do when they make that acknowledgment?

10 **UNCLE GRAHAM ATKINSON:** Well, there's a lot of unfinished business that that opens up that whole question. For the State Government to come and say, "Look, I recognise your sovereignty, there is your self-determination." You can't activate that without resources, and that would include compensation, you know, meaningful, reasonable compensation for the damage and the destruction that has been inflicted upon Traditional Owner groups, not least the Yorta Yorta and - but other Traditional Owner groups would echo that as well. You can't - it's very hard  
15 to get back on your feet if there are no resources that are provided to help you to then realise that self-determination in practice.

20 **MR McAVOY SC:** Do any of the other panellists wish to comment on that particular point? Marjorie?

**MARJORIE THORPE:** What Graham is saying is right, that we have not ceded our sovereignty. We assert that we are the owners of Country, and State Government won't listen to that, so there is always this push back by them to comply with their wishes, and it is usually via resources. So - and we're, you know, we are a poor people who don't have resources so it is very difficult to say, you know, "We don't need those." What is happening is our rights are being eroded continually. Particularly, you know, we had a successful Native Title claim Gunaikurnai, so-called successful, but one of the things that we managed to do at the outset is establish an Elders Council above the Corporation. There is a problem  
30 with corporation laws that don't fit into our way of thinking.

And so when we are talking about what we want and what our needs are, it is about our spiritual connection to Country, which means, you know, sites that we know of and we need to have as part of our ongoing wellbeing that we need to  
35 have access. We need to control those places so that they're the places how we stay well, if you like, and connected. You only have to look at the statistics today they are shocking - shocking right across the board from people in jail, people dying in custody, people who have been removed from their families, people who are, you know, being disadvantaged seriously in this society, because we don't  
40 have the capacity to deal with, you know, what has been put on us. You talk about us getting a Native Title claim we don't have - we have joint management. But we're not allowed to say no. We are not allowed to say no to mining pits happening in the middle of the bush, for example. And right now we can't say no to burning which we know is just another way of extraction of a resource which is  
45 the timber resource in East Gippsland in the forests where the logging is supposed to have stopped. We see the logging trucks going through all through Bairnsdale every night. And part of that - we've got - we know everyone wants a job. Those

people who were dependent on that logging industry now have all of this gear that they don't know what to do with. They have invested heavily in it. One of the things we see now happening is fire management, which is shocking right now and what they are doing when they're saying they're doing cultural burns, that is  
5 rubbish. That is absolutely shocking to see what those cultural burns are doing. They are putting roads through forests which create tunnels for wind channels when a fire comes. Well, it is all over. We are talking about burning coastal forests which have never had fire history, never been burnt, and you know the destruction of habitats of animals which are our totems, but also our sites. You know, this is  
10 what we are told. We went into the agreement of joint management but we don't get to say no, "These are areas that you shouldn't burn; these are the areas that need protecting." Because they are very important places, and that is in our stories that these are important places, and there's no understanding or total disregard by those in power.

15 You know, sadly, we don't have control of those Native Title bodies; they are controlled by lawyers, Native Title lawyers, who have made a nice living off our backs and off our land. And so it is very difficult to deal in the Native Title arena. And you know, I can say that from my experience in the Gunaikurnai claim, but  
20 also in the Eastern Maar claim which is going on now, it is not good. It's not good. We are subjected to this trauma of continually saying, you know, "This is not right. We need to have a better deal here, a fairer go" about what we are talking about when we're saying what happened to our people was almost total  
25 annihilation as it has been said in Victoria particularly where it was wholesale killing off the blackfellas because of the thirst for land, the hunger for land by those people who came here. They had no qualms about murdering us outright. So the plundering, the rape and pillage of our people in those early days is still felt today.

30 The fraction - you know, the - the children who have been removed and the people who have been dislocated is just horrific and we are still trying to recover from that and it is ongoing so where is - so where is the justice in that, when you are talking about - this is our Country, this is our land. We want a better deal. We  
35 want a fair deal. You know, it is more than compensation, it is about reparations, because what was taken from us needs to be restored as best as we're able to. We talk about management. It's not corporate management. It is not white man's law about making money because that is really what corporation law is about. We are talking about law that looks after the people, all the people no matter who you are, and looks after the land which is essential. I think that is what you see in other  
40 countries in the world don't destroy your land. In other countries in Europe, they don't destroy the land like they do in this country.

I think it's because the white man has no respect for land, only what he can get out of it to make a profit off it. Whereas the blackfellas don't have that way of  
45 thinking, and what we are trying to do is survive with integrity about our cultural values and our understandings and how we treat each other. You know, they're

some of the values that we have to offer in this cruel world, I suppose, of where it is all about money and not about people.

5 So, you know, that's what we are seeing. We are seeing - we are seeing - you only have to look at cities like this and the homelessness in the street and the desperation and people who are in terrible circumstances. What our people did on those reserves is looked after each other as bad as it was. That is what we always held as part of our integrity as human beings, was to take care of the people and take care of the land. That's the fundamental foundations of our lore, and that is  
10 what we understand - that's our obligation, not about rights or anything, it's one of our obligations as First Peoples of this country, that's what it is. And that is not reflected in what negotiations with the State is hard, cold, you know, legal technicalities about whatever.

15 So when you interpret that about what you actually get, you know, we're having this battle with the Native Title bodies about destruction of sites right now, and they don't have much of a say because it is all about - the contractors that are employed aren't Aboriginal. Even if they are Aboriginal people, they have lost sight of what - you know, the essence is what we are talking about is, you know,  
20 this country and what it should be.

**MR McAVOY SC:** Thank you very much for sharing that - those insights. I have kept you a little bit longer than I intended. We ought to have had a break before this. And I might ask the Commission if it is now a convenient moment to take a  
25 morning tea break, 15 minutes? Is that sufficient?

**CHAIR:** 15 minutes?

**MR McAVOY SC:** 10? If the panel is comfortable with 10, a 10 minute break.  
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**COMMISSIONER LOVETT:** That is fine, thank you.

**MR McAVOY SC:** Commissioners, Chair, at 12.05.

35 **CHAIR:** Yes, thank you.

**<THE HEARING ADJOURNED AT 11.55 AM**

**<THE HEARING RESUMED AT 12.09 PM**

40 **MR McAVOY SC:** Thank you, Chair. It is my intention to finish with this panel by approximately 12.45, which will leave some time for a lunch break. The Surveyor-General is scheduled to be - commence evidence at 1.15. I can indicate that in the circumstances of the lengthy session this morning, I would be - I would  
45 intend to commence him at 1.30 pm, so that there is a 45-minute break for lunch. However, I am in the Commission's hands on that matter.

**CHAIR:** Thank you.

**MR McAVOY SC:** Now, before the break, we heard some evidence about the Yorta Yorta Native Title claim and then some evidence about the Gunaikurnai  
 5 Native Title claim and the outcomes of that. I would just ask Uncle Graham to perhaps let the Commissioners know about his experience in the Dja Dja Wurrung process.

**UNCLE GRAHAM ATKINSON:** Yes, okay, yep. Just as a segue into that I  
 10 want to also say that after the Yorta Yorta case didn't succeed, there was a really strong feeling amongst Traditional Owner groups here in Victoria about whether any claim would get up, and, yeah, there was a lot of cynicism, scepticism around the Traditional Owner community about that. In 2003, there were two things that happened, the Labor Government was elected in 2002, and you had new Ministers  
 15 coming in that were still reeling from the - from the Yorta Yorta decision and really felt that they needed to do something to mend the fences, so to speak, and Rob Hulls was - became a really good ally of the Traditional Owner community then. Also it was as though he - the State Government was wanting to make up for their success in contributing to the negative determination against Yorta Yorta. It  
 20 was as if they wanted to, yeah, overcome that and mend the fences, so to speak.

**MR McAVOY SC:** If I can just interrupt for a second. You were right in the centre of that as the Chair of the Native Title Services Victoria, I think it was?

**UNCLE GRAHAM ATKINSON:** That's right. And the second influence, I  
 25 guess, was - in 2003, just before that, the Native Title representative body then known as Mirimbiak Nations Clans Organisation lost its representative body status. It was deregistered. In - so something had to be done to fill the gap. In 2003, the Native Title Services Victoria was established to fill that gap, and not  
 30 long after that, I was elected as the Chair of the organisation. So this is in 2003 and my board and the chairperson was also on that board, Eleanor, and others and others, we needed to look more closely at the - whether the Native Title Act was the right vehicle for settling claims.

**CHAIR:** So in 2003, from then to 2005, that was a critical period because the Wotjobaluk  
 35 claim was already in the pipeline and it received a positive consent determination, so that was the first - 2005, that was the first positive consent determination that was achieved in Victoria that benefited the Wotjobaluk and also the BGLC who became the Traditional Owner group entity. Another interesting development  
 40 occurred around about that time, because there was still a lot of talk about whether the Governor - trying to get the Native Title Act to settle your claims, there was still a lot of scepticism and discontent about that being the vehicle to settle claims.

**CHAIR:** The Traditional Owner community, you could say, came together with the support  
 45 of Native Title Services Victoria, and in 2005 saw the establishment of the Victorian Traditional Owner Land Justice Group, also known as the Land Justice Group. It comprised of representatives from 21 Traditional Owner groups

throughout Victoria. It also pushed the government, and in this case it was the State Government who were now supporting our concerns that the Native Title Act, which required a litigated settlement of a claim, they were looking at an agreement, an alternative agreement-making process.

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So the Land Justice Group agitated for an alternative system to settle. At that time - I can't remember it off the cuff, but there were several, including Marj's that she mentioned before, but there were several Native Title claims on foot. It was taking an average of 20 years for there to be a settlement of these Native Title claims. But the Land Justice Group continued to go down the path of supporting a non-litigated process through the Federal Court and adopting an agreement-making process or an alternative agreement-making process which entailed the Traditional Owner groups negotiating directly with the State Government on the settlement of the Native Title claim as opposed to relying on the Federal Court structure to settle a claim.

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**MR McAVOY SC:** Just before you continue, I just wanted to ask, you said that the Native Title claims were taking an average of 20 years -

20 **UNCLE GRAHAM ATKINSON:** Or more.

**MR McAVOY SC:** Or more. Is there some effect that - on the community from being involved in this sort of litigation for such a long period?

25 **UNCLE GRAHAM ATKINSON:** One significant downside, and we saw - I saw this effect with my own eyes - some people didn't make it. They didn't last the journey. You know, our Elders, many of our Elders didn't see positive outcomes, and that was - excuse me, that still chokes me up today. You know, good people that put their shoulder to the wheel to win, to gain our, you know, our rights, land justice rights, yeah, didn't last - last the journey. And I always - I still think about that because it is a very emotional one. Yeah, so in answer to your question, Tony, yes, there were quite a number of people who dropped off along the way because of ill health or because of age, and it was - a journey is a very stressful journey. It takes a lot out of you, and I could see amongst people who were part of that journey, I could see the stress and the struggle they were having, but we -

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**MR McAVOY SC:** Sorry, did some people find that traumatic being involved in the litigation, do you think?

40 **UNCLE GRAHAM ATKINSON:** Oh yes. Yes. And we rallied around amongst ourselves to support people that were, you know, traumatised or - because, just jumping back to the trial process under the Federal Court, you know, these people were put in the witness box and they were cross-examined about their identity. And it was - it was terrible to see the - the pressure; that was traumatising. I saw that with my own eyes because I sat in on most of the hearings. And I still - I can still remember those - those experiences but we didn't have - well, we had Native Title Services Victoria which, you know, then I was - became the Chair of. We

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5        tried a more proactive approach to settling the claims, and we tried to fast-track  
 and not have the process bogged down with legalese or lawyers, and it was all so  
 costly, very costly, a very costly process, so we, in a way, provided support to TO  
 groups across Victoria on managing their Native Title claims and as Marj said  
 10        before, Gunaikurnai - sorry, after - after Wotjobaluk received a positive consent  
 determination, then there was Gunditjmarra or Gunditj Mirring positive consent  
 determination. Mind you, this is two decades after the introduction of the Native  
 Title Act. And then in fast forwarding forward then, I think it was about 2010,  
 Gunaikurnai got their consent determination and it was an interesting claim. It was  
 15        a hybrid claim, that Gunaikurnai took to the Federal Court under the Native Title  
 Act, but it also - also used the newly established Traditional Owner Settlement Act  
 to also enter into an agreement with the State Government directly. But -

15        **MR McAVOY SC:** I might ask you if you can just explain for the Commissioners  
 your view about the Traditional Owner Settlement Act now. Can you move to  
 that?

20        **UNCLE GRAHAM ATKINSON:** Yeah, look, I will try. The Traditional Owner  
 Settlement Act, it was an alternative agreement making Act, that is, it didn't have  
 to go to the Federal Court to be litigated. It only required you to organise your  
 Traditional Owner group to negotiate directly with the State Government on your  
 agreement area. And what you were trying to achieve was what came out at the  
 end of the process, a Recognition and Settlement Agreement, an RSA, as opposed  
 to a consent determination.

25        Now, the Land Justice Group, when it did its consultations with the wider  
 Traditional Owner community, it never presented the Traditional Owner  
 Settlement Act as an either/or - an either/or outcome. It came down to a choice  
 which the Traditional Owner group could make. And some of them chose a hybrid  
 30        model, that is, they chose to continue with their Native Title under the Native Title  
 Act but they also chose to take advantage of the Traditional Owner Settlement Act  
 and that is what Gunaikurnai did and they were able to get settlement of their  
 claim in 2010.

35        The interesting part here, Tony, is that my group - and I just need to fill in a gap  
 here - after the outcome of the Yorta Yorta claim, the learnings that I gained from  
 that, I didn't want to see that experience repeated, and with my Dja Dja Wurrung  
 identity, I was asked to get involved with the Dja Dja Wurrung claim. Now, the  
 Dja Dja Wurrung claim was lodged in 1998, 1999, and sadly, that claim, a bit  
 40        before I came on the scene, that claim, that was only for four small parcels of land  
 and that was part of the Future Acts process, those claims didn't pass the  
 registration test through the National Native Title Tribunal. So when I got  
 involved with the - with the Dja Dja Wurrung, we said, look - and we agreed and  
 that was under the auspice, then - under the auspice, then, of the previous rep  
 45        body, that is, Mirimbiak Nations Aboriginal Corporation, we needed a better body  
 to support us in that claim. So we were able to do that, and hence the Native Title  
 Services Victoria came on the scene. I was appointed as a Chair. That was a

position I held until I stepped down. I stepped down - I chose to step down in 2014, but the - in 2008 to 2009, the Land Justice Group negotiated with the State Government then, and that was with Robert Hulls, who was the Attorney-General, to look at a better system than the Native Title Act.

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So he engaged Professor Mike Dodson - Mick Dodson, and Mick was appointed as the chair of a steering committee that Rob Hulls set up, and it was a steering committee to look at the establishment of a Native Title Settlement Framework Policy, and this was a really important outcome of that steering committee. The people who sat on that steering committee were - I think it was five Land Justice Group reps, and they were chosen from the Land Justice Group itself, its membership, and there was also a negotiating team from the State Government of the various agencies that were part of that including the Department of Justice and other agencies. The fifth position was then occupied by the Chief Executive Officer of Native Title Services Victoria.

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So Mick Dodson chaired that committee over 2008. At the end of 2008, he presented his report, and the title of that report was Native Title Settlement Framework Policy. The push at that time as well from the Land Justice Group was we needed our own Act, State Act, hence the Traditional Owner Settlement Act. And that was the Act that Traditional Owner groups could go to or use to settle outstanding claims. Many of these claims as I said before, were on foot for - oh gosh, some 20 years or more.

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So both houses of State Parliament with the support of the Land Justice Group passed the Traditional Owner Settlement Act in September 2010. The First People to take advantage of that Act was Marj's group, the Gunaikurnai, and - but they were also continuing with their Native Title Act. So - so that's where the Dja Dja Wurrung also joined that queue or became part of that process, and with the support of Native Title Services Victoria, we were also then able to manage our Recognition of Settlement Agreement with - directly with the State Government. And on the - in March 2013, we signed that agreement with the State Government.

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**MR McAVOY SC:** And I think in your statement, you refer to the Recognition and Settlement Agreement processes as perhaps forming a high watermark in terms of settlements for Victoria, at least.

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**UNCLE GRAHAM ATKINSON:** Yes.

**MR McAVOY SC:** When you say that, you are referring to those settlements that include the Dja Dja Wurrung?

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**UNCLE GRAHAM ATKINSON:** Yes. It was one - oh it was the first comprehensive settlement, because it - it sort of included the detail of the various agreements that came under an RSA, such as a Land Management Agreement, a Land Use Activity Agreement.

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**MR McAVOY SC:** Are you aware of how many Recognition and Settlement Agreements there are in place at the moment?

**UNCLE GRAHAM ATKINSON:** I think there's seven.

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**MR McAVOY SC:** And is it your view that there should be attempts to enter those types of agreements wherever the Traditional Owners seek them?

**UNCLE GRAHAM ATKINSON:** Look, I have to say here, and I'm prepared to go on record about this, I am dismayed that our Native Title representative - representative body isn't doing more. I think it is incumbent upon First Nations Legal and Research - they are the representative body once badged under Native Title Services Victoria - I am amazed that they are letting these opportunities slip through their fingers and still persisting with the Native Title Act. Now, I know - I know also that there are some Traditional Owner groups that are looking at both, the Native Title Act and the Recognition and Settlement - the Traditional Owner Settlement Act.

Look, I went to the Eastern Maar determination that was - that was done last year and it was a - look, it was a - I come away with fixed feelings. I was really pleased that they had their land claim recognised - their Native Title claim recognised, but it was for only 80 per cent of that claim area. They still have to go back for the other 20 per cent, but they have to go back through the Federal Court system, which is a trial, to gain the other 20 per cent, and what came out of that - what startled me when I attended that - that event, was - they've been working on that for the last 20 years, and why does it have to take that long to resolve these, you know - these claims. Something is wrong. Something is not - not working. So I am - look, I had have to say I am less an advocate of the Native Title Act, more an advocate, supported by my Land Justice Group colleagues, of the Traditional Owner Settlement Act.

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**MR McAVOY SC:** I gathered that.

**UNCLE GRAHAM ATKINSON:** Yeah.

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**MR McAVOY SC:** Do any of the other panellists have any comments they'd like to make about the Traditional Owner Settlement Act?

**MARJORIE THORPE:** I guess, you know, with disillusionment of our people going through this long drawn-out process is - is obviously very stressful, to say the least, and I think part of what is missing in all of this, that people aren't and don't have the opportunity to be fully informed about what these - what the legislation actually means in the long-term, so it seems to me that this is all about making a deal for access to land and resources, and I don't believe that our people have been properly informed or understand exactly what this all means. You know, it's quite technical legal stuff.

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And from day one that I have been involved in this, I have actually, you know, been disengaged and disappointed and all of that and got back on to the Eastern Maar claim because, you know, of the issues that I see there that particularly have left out important matters that should be dealt with before you even go into those processes. And the Eastern Maar claim, they're quite aware of my objections to that. And - but, you know, without going into the blame game and what is wrong, what I see is not happening is that, you know, what I just mentioned, is the people aren't properly informed or understand exactly what this all means, and also our people, because this has been offloaded on, you know, on Elders' shoulders. You see this cherry-picking for, you know the oldest person, well, you know, sadly with that responsibility on their shoulders, you know, as Graham says, you know, they're getting really - they're dying as a result of the pressure that they've - that has been put on their shoulders to actually, you know, play that role.

I don't believe that in my experience - and I could only talk about the Gunaikurnai and Eastern Maar - I don't believe that there has been enough effort by government, whether it is State or Federal Government, about making sure they are talking to the right people, and that doesn't matter how old those people are, but it is about clan groups. It is about people, you know, who have that right. And I know it is quite complex, and particularly so with people who have been dispersed, people who have been removed. You know, that is something that we are still grappling with right now. But I think that the people who have always been on Country and held on as best as they're able to their knowledge and their connection, it's those people that are being, you know, sort of pushed to the way, kind of, for convenience, but I reckon that those people are the ones who really need to be - because these are the younger generation as well, who is going to have to carry this through and improve on it and deal with the fallout from all of this disappointment, because the disappointment is ongoing.

You know, you think you have got a Native Title claim and you have got some land. You don't have any land. You know, I live on the end - on a reserve that is surrounded by forest that we are told is ours, you know. The first thing they did was change all of the tracks in Lake Tyers Forest. You can't make your way - the traditional track going through where we used to take into Lakes Entrance is gone. It is not there. I can't even find my way around that forest. They took the bridge out. So it is all of this changing the environment, if you like, but it's also access to sites within that forest that you don't have. It is protection of those areas as well that is not happening, and that needs to happen because you need the young people and the people who - you need to be able to welcome back people who have been lost for whatever reason. There needs to be that society that you continue the culture. It is no good having a culture if no one knows what it is about.

And that's what is happening, I see out there. That is the disappointment that the old people, most of them are gone now, the generation of, you know, Elders sitting here is, you know, it's left now to the young people. And I don't know that there has been enough investment in this process to make sure that this is enduring and it is a legacy that we can really, you know, put a light to and say, "This is, you

know, this is a good job." Because at the moment it is all ad hoc and it really seems to me that it is about convenience and extraction of the resource.

**MR McAVOY SC:** Thank you.

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**MARJORIE THORPE:** And getting consent to do so.

**MR McAVOY SC:** I just want to turn to Julia for a moment. One of the things that Marj mentioned was that the disconnection from Country and with all of these discussions around treaty and Native Title and Traditional Owner settlement, it leaves the considerable Stolen Generations community in a particular - a particularly difficult place. Are you able to comment on that?

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**DR HURST:** Yes, I can comment from a personal and, yeah, perspective maybe and -

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**MR McAVOY SC:** Do you mind sharing that with the Commissioners?

**DR HURST:** Of course. It's an honour to share. The question is where to begin. And I think if I follow my Mum's story, there is always so much work to do for her own wellbeing - I get emotional - for the work of her kids, myself and my sister, and the grandkids to find belonging. And similar - similarly to what other people have talked about, the process of finding family and being off Country presents a lot of barriers, not just being off Country locally but being off Country at a state-wide level. And I think for my - for our story, from my family's story, our family was always, when my family finally reconnected once, you know, laws and policies changed regarding adoption Acts in Victoria and my Mum's birth mother sought her out, the family was so open with their - their belonging and their identity, but it was just a usual way of knowing, and the family actually couldn't communicate very clearly to my Mum what their belonging meant, and what - and that it was a lived experience that happens when you are near people and culture and community, knowledge and connections learnt and discovered by being close to people.

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And so my Mum has always worked so hard, up until her birth mother passed away and the old uncles and aunties have passed away, to try and find connection with - with the family, but the family didn't understand her experience, didn't understand why she was always so - her wanting to know, because it was such - such an everyday occurrence for them that's so unusual for her. So I guess the experience really is of isolation as a Stolen Gens person and often people who I have talked about and about people that I have talked to about this also say, "Well, you know, if you can't find your way back to Country come and connect in with our mob."

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But it's - it's a very different experience and especially now as families and policies and ways of knowing Aboriginal people are becoming smaller and smaller. You have to be able to identify family connection and groups, and the

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way that policies and legislation work these days, it's not in line with the lived experience of the Stolen Gens. It's the burden of proof again to prove who you are, and so I think there's a real - there's a real reckoning there of how - how the State deals with families who are not just - not just individual families, I mean not just  
 5 individuals who are Stolen Gen, but families now who claim this identity because there is nothing else left for folks to claim.

And you can have a deep connection on paper, you know. Like, my family has a long paper trail in Sydney of back to ancestral belonging, but it is not a lived  
 10 experience for my family because we have been here, and so there is this - like, I was noticing today, just listening to Uncle and Aunt, this is the - the stories here are of lived experience. It doesn't matter how much work you do unless you have lived these experiences and these stories. You know, it's a lot of work to catch up, and to try and make sense of - of the history and identities.

15 And the young ones, like, our little kids want to - want to acknowledge and identify who we are. They are staunch and proud, you know, as toddlers, and I think we owe that to them to find a way in - for them to find their way in. Like, we are constantly - we have talked about it a number of times now in this panel, but,  
 20 you know, I worked a lot with Peter Read up at ANU doing oral histories and working in Sydney. And in one of his papers, he's written that dispossession is a legitimate experience of being an Aboriginal person, and I think we often are forced to focus on, you know, survival and ongoing connection to culture, but the reality is that is that, yes, families have been dispossessed and that doesn't occur  
 25 outside of these processes or outside of policy making or law.

**MR McAVOY SC:** Thank you. Karen, you have done some work particularly in the Western suburbs, I think, on culture and identity and the impacts of removal. Can you share any of that with the Commissioners?  
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**MS JACKSON:** I guess importantly, it's around - it's the same sort of story as Julia was talking about. But people who are marginalised in their own community and they are off Country find it really difficult to understand a connection to actually feel like they belong and to have self-esteem in their own identities. So a  
 35 lot of my work in the Western suburbs of Melbourne has been enabling people to connect to Country. Country in all of its ways of being, for them to see Country in their own backyards, even though it's not their Country, and to undertake cultural practice, so that they then can undertake daily acts of repair to see Country and know Country and feel like they belong.  
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And once you feel like you belong, you have more of a, voice I think, and having a voice is really important for Aboriginal people who have been erased and marginalised and are not seen in policy and practice in the ways that they're treated.  
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A number of people in the West of Melbourne have had their children taken away from them or they've been taken away. They've been taken out of schools. They've

been abused in all sorts of ways. And I think the importance of relationality and how people understand each other and a community and a collective is a really important space, and it's really important for people who think they are helping communities but they are not to understand what it means to be relational, and  
 5 when you are off Country it is really, really important and policy doesn't - policy doesn't see that. Policy doesn't see the importance of blackfellas and how we relate to each other and how we relate to Country, and that needs to shift in order to give space for all community in all sorts of spaces.

10 **MR McAVOY SC:** Are you in a position to talk about what sort of shift is necessary, do you think?

**MS JACKSON:** I think it's the shift of white-stream Australia understanding how much they have terrorised Aboriginal people and understanding that they have  
 15 enacted genocide on Aboriginal people, and that justice in any form, whether it's land or whatever, if it's not - if justice isn't - if land or other means of connecting aren't given with proper justice and understanding black people's experiences, black participation and black decision making, then it is just more of a colonial violence on those people.

20 And I think that's important around how to shift - the hard part is to do that shifting, but it is - it is not for blackfellas to make white-stream shift. They have to do it themselves, and I think part of the work the Yoorrook Commission is doing in telling the truth can shift some of that, but there needs to be a lot more work  
 25 from white-stream Australia to do that shifting. It's not for blackfellas to do that all the time. Yeah.

**MR McAVOY SC:** I might ask you now if you can just talk for a moment about the Aboriginal history archives at Melbourne University and documenting political  
 30 struggle. Are you able to do that?

**MS JACKSON:** Briefly, yeah, and it's Victoria University not University of Melbourne.

35 **MR McAVOY SC:** That is what I thought.

**MS JACKSON:** The big sandstone place.

**MR McAVOY SC:** I knew it was wrong as I was saying it, because I've been  
 40 there.

**MS JACKSON:** That's right, you have, yeah. So I am really proud that Victoria University houses Gary Foley and Dr Bruce McGinness' Aboriginal History  
 45 Archive that documents the Aboriginal black power movement that I term Aboriginal Fitzroy. Aboriginal Fitzroy is where I knew - I came to know community. I was not part of a community, but when I arrived in Aboriginal

Fitzroy I knew community, and the work that happened in Aboriginal Fitzroy is just phenomenal in its impact on those families and communities.

5 The self-determining community-led ways of empowering Aboriginal community and empowering Parkies, empowering people who are lost, people who came to find community, has had a really long-lasting impact on all of those people who are involved in that space. So the Aboriginal History Archive holds thousands and thousands and thousands of documents which are being digitised to share openly, to change curriculum in high schools or in university teaching, but also so do extra  
10 projects with community to help heal. So one of the recent ones was around the closure of the Northland Secondary College when Jeff Kennett was Premier, and being able to bring that group of young secondary school students together again to talk about their experience in that space actually helped heal a lot of those people, helped them talk about their trauma of what happened and how they were  
15 discriminated against, how they were seen as, you know, black people who had no future, no promise. But their work was absolutely phenomenal in keeping that school going, and going to the Equal Opportunity Commission and putting a case into that space.

20 So it is those sort of stories that are in the Aboriginal History Archive that I think are also great for truth-telling and for shifting the ways mainstream Australia thinks about Aboriginal people in more of a strength-based ways rather than that deficit model. It's - it's a really amazing resource. I am really proud that we have that.

25 **MR McAVOY SC:** There's limited places or mechanisms for keeping those particular stories, isn't there?

30 **MS JACKSON:** Yes, yeah, yeah, yeah, and ways of sharing it. I think the other thing that we do at Victoria University in Moondani Balluk is to bring community in to talk about the archives what is in there for them to share their knowledge of what is in those things. We had an amazing photo day of Marj and Senator Thorpe coming in and talking about all the photos from the Aboriginal Health Service. And so that is really strength-based things. There are so many materials. That is  
35 the other thing about space, everyone is now putting their hand up saying, "I have got more things", so we're running out of space to actually hold the physical material so we are having all of those sorts of conversations as well, yeah, it's a good space.

40 **MR McAVOY SC:** Thank you. Commissioners, there are a number of areas I had intended to cover with these witnesses. With the schedule that we have for today, it's not going to be possible for me to finish all of those matters, and I propose that we adjourn now for lunch and start at 1.30 with the Surveyor-General. We have materials that have been provided by the witnesses which go to many of the issues  
45 that we were going to cover, but the very detailed nature of the evidence that we've been able to receive from these witnesses has meant that we could only take the evidence at a certain pace. And I - I suggest that, with the Solicitors Assisting

and your indulgence and the witnesses' indulgence, we may need to ask them if they might return at some later stage if we can fit them in to finish their evidence. I think that's the best we can do at this stage.

5 On that basis, Commissioner, I would thank the witnesses for their attendance today, and I ask that the matter - the hearing be adjourned now for lunch to return at 1.30 for the Surveyor-General. That will leave a half an hour for lunch. Is that suitable or would you rather come back a bit later?

10 **CHAIR:** Okay, otherwise we are going to run - all right, thank you, thank you. Thank you all very much, Graham, Marj, Julia, Karen, all wonderful to hear these stories. Great to hear things from the past too and from different places, very important for us, thank you. Thank you. We will adjourn until - 1.30, was it?

15 **MR McAVOY SC:** 1.30.

**COMMISSIONER LOVETT:** Look forward to having you mob back. There's still so much to unpack. Thank you.

20 <**THE HEARING ADJOURNED AT 1.00 PM**

<**THE HEARING RESUMED AT 1.35 PM**

25 **MR McAVOY SC:** Thank you, Chair. The witness now ready to give evidence is Mr Craig Sandy, the Surveyor-General for Victoria, and I will be appearing as Counsel Assisting with respect to this witness. His legal representative is also present and might announce his appearance.

30 **MR STAR KC:** My name is Dan Star and I appear with Lachlan Carter for the State of Victoria whilst the Surveyor-General of Victoria, a public servant of this State, gives his evidence. Thank you, Commissioner Hunter, for your welcome this morning which I did watch online, and I thank you, Chair and Commissioner Lovett, for your comments which I watched with much interest. I acknowledge the Wurundjeri people of the Kulin Nation, their Elders past and present and thank  
35 them for allowing us to have this hearing on their land. I acknowledge that sovereignty over these lands was never ceded. I pay my respect to all First Peoples present here today in this hearing room, or watching online now, or at a future point in time. The Surveyor-General is the first of a number of State witnesses to give evidence this week in this significant hearing block on land, sky and waters.  
40 The Surveyor-General is present and ready to give his evidence. Thank you.

**MR McAVOY SC:** Thank you Commissioners. Mr Sandy, could you please tell the Commissioners your full name.

45 **MR SANDY:** My name is Craig Leslie Sandy, licensed surveyor.

**MR McAVOY SC:** And you hold the position of Surveyor-General of Victoria?

**MR SANDY:** Yes, I do.

**MR McAVOY SC:** And I ask whether the evidence you're about to give to this  
5 Commission of Inquiry is - will be the truth to the best of your knowledge?

**MR SANDY:** Yes, it will be.

**MR McAVOY SC:** And you have prepared a statement in advance of giving  
10 evidence to the Commission?

**MR SANDY:** Yes, I - yes, I have, Tony.

**MR McAVOY SC:** To your knowledge, the contents of that statement are true  
15 and correct?

**MR SANDY:** Yes, they are.

**MR McAVOY SC:** I understand, Surveyor, that you have an opening statement  
20 which you'd like to make to the Commission?

**MR SANDY:** Yes, I do.

**MR McAVOY SC:** Would you like to do that now, please?  
25

**MR SANDY:** Good afternoon, Chair and Commissioners. Thank you for the  
invitation to provide evidence to the Yoorrook Justice Commission in this hearing  
block 6 on land, sky and water. I would like to acknowledge the Traditional  
Owners of the Country on which I live and work, the Wurundjeri people, and pay  
30 my respects to their Elders past and present. Thank you to Commissioner Hunter  
for your welcome to Wurundjeri Country - I also tuned in this morning - and in the  
spirit of Wominjeka, I come with purpose today. I would also like to acknowledge  
Traditional Owners across the entire State.

35 I accept sovereignty was never ceded by First Peoples. I acknowledge all First  
Peoples in this hearing room today and online for this important truth-telling  
process and Royal Commission.

40 I am the 26th Surveyor-General of the State of Victoria since 1851, a position I  
have held since 7 August 2017. The Surveyor-General of Victoria is the State's  
primary authority on land boundaries and has functions and responsibilities that  
relate to land surveying, land status and electoral boundaries.

45 I provide an important leadership role to the land surveying profession which has  
approximately 400 practising licensed surveyors who perform property surveys for  
the community. I lead an office known as Surveyor-General Victoria, which  
provide authority of land surveying, Crown boundary approvals, Crown plan

drafting and geographic place-naming services to the Government and to the private sector.

5 My role and responsibilities as the Surveyor-General are more fully explained in my written statement dated 12 February 2024. In preparing my statement for the Commission, and for my appearance to give oral evidence today, I have reflected on the historical role of the Surveyor-General in this state, its legacy and my current work.

10 There have been four Surveyors-General for New South Wales prior to the declaration of Victoria as a colony that operated in the area we know as Victoria prior to 1851. The position of Surveyor-General has historical significance and has played a major role in land settlement and land administration within the State. I have reflected on the work of my predecessors in title. My written statement to the  
15 Commission includes various acknowledgements and in summary these include: I acknowledge that Surveyors-General both past and present played a role in the dispossession of First Peoples from their land; I acknowledge that under the direction of the governors and governments the role of Surveyors-General has accepted the premise of terra nullius; the survey and legal instruments produced  
20 from this work were one of the important steps which ultimately resulted in the dispossession and removal of First Peoples from their lands in this State; the land systems established in New South Wales initially and subsequently in Victoria did not recognise the occupation and possession of First Peoples; I accept and deeply regret that the presence on Country of Surveyors-General or surveyors under  
25 direction has caused First Peoples communities significant trauma and diminished their ability to care for Country, practice culture and exercise their rights; I acknowledge that this contributed significantly to a loss of culture and language and impacted the physical, spiritual and economic wellbeing of First People.

30 In addition to these and other acknowledgements in my written statement, I have continued to reflect on the historical events, laws and practices that led to the dispossession of First Peoples from their lands through the settlement and alienation of what is presently referred to as Crown land. I have also watched, listened and read parts of the evidence given to the Commission including the  
35 lived experience evidence from First Peoples in this hearing block. I recognise and respect the strength and resilience of First Peoples in talking about their lived experiences of injustices, including injustices with respect to land.

40 The evidence of my work to prepare to be a witness to this Commission has reinforced my understanding of the dispossession and removal of First Peoples from their land and the seriously adverse impacts this has had and continues to have on the physical, spiritual and economic wellbeing of First Peoples in this State.

45 With all this in mind, as the current Surveyor-General of Victoria, I take this opportunity to formally and sincerely apologise for the role that Surveyors-General past and present and surveyors working under our direction



have had in the process of dispossession of land from First Peoples of the area now known as Victoria.

5 In making this apology, I accept the actions performed by Surveyors-General did not understand the First Peoples' complex land systems that were, in fact, already in place. I also understand that Surveyors-General and surveyors employed by them were possibly the first Europeans seen by First Peoples. The work of these early surveyors began a cycle resulting in the removal of First Peoples from their lands.

10 The impacts of that dispossession are still being felt by the First Peoples today in many profound ways as I have acknowledged in my opening statement. The work of surveyors has been a part of a broader systemic process that enabled land injustice to occur and continued to occur. As the current Surveyor-General of  
15 Victoria, that is why I have taken the step I have today to publicly and genuinely apologise for the role of surveyors in the process of land dispossession of First People in Victoria. Thank you for allowing me to say these opening comments. I am now here to answer questions that hopefully assist the Commission's inquiry.

20 **MR McAVOY SC:** Thank you. Would you prefer to be called Mr Sandy or Surveyor-General? Do you have a preference?

**MR SANDY:** No, I am happy to be -

25 **MR McAVOY SC:** I will use the formal appellation and call you Surveyor-General.

**MR SANDY:** Thank you.

30 **MR McAVOY SC:** Firstly, I just want to have some discussion about your experience and role. You are trained as a surveyor through an undergraduate degree.

**MR SANDY:** Yes.

35 **MR McAVOY SC:** In applied science, specialising in surveying - majoring in surveying.

**MR SANDY:** Yes.

40 **MR McAVOY SC:** You have worked in both the private sector and in government in the role of a surveyor?

**MR SANDY:** Yes, I have.

45 **MR McAVOY SC:** And you worked in the Northern Territory for four years?

**MR SANDY:** Yeah, just under four years.

**MR McAVOY SC:** And I understand from your statement that you had some exposure in the Northern Territory to issues involving First Peoples?

5

**MR SANDY:** Yes, I was involved with determining the extent of rights in relation to the landmark Timber Creek case. As the Surveyor-General for the Northern Territory, my - my role was to locate the physical assets of the various utilities, to ensure that when it went to court, they understood the extent of the area that could be claimed.

10

**MR McAVOY SC:** You also had some role with respect to the Blue Mud Bay sea claims matter.

15

**MR SANDY:** Yeah, I didn't have involvement directly with the Blue Mud case. However, I did have involvement with other determinations after the Blue Mud Bay in relation to the Kenbi Land Claim. The Northern Territory Government created an agreement with the First Peoples, being the Larrakia people, to allow recreational fishers access to the intertidal zone, and so my role was to determine the intertidal zone.

20

**MR McAVOY SC:** You have been in this role as Surveyor-General since 2017?

**MR SANDY:** Correct.

25

**MR McAVOY SC:** That's correct? And that role involves a range of tasks, some of them, not all - well, not all of them directly related to each other; is that fair to say?

30

**MR SANDY:** Yes, that is a fair statement. So -

**MR McAVOY SC:** We will come to what each of those roles is in some more detail later, but you are - you have a role with respect to the Geographical Name - Place Names Board?

35

**MR SANDY:** Yes, so my role is as the Registrar of Geographic Names.

**MR McAVOY SC:** And you have a role with respect to the - as the Registrar of the Surveyors Registration Board?

40

**MR SANDY:** Yes, so I am the chair of the Surveyors Registration Board.

**MR McAVOY SC:** And then you have other roles which more discretely fit within the Surveyor-General's office; is that correct?

45

**MR SANDY:** Yes, that is correct.

**MR McAVOY SC:** You are not a historian?

**MR SANDY:** No, I am not.

5 **MR McAVOY SC:** But it is fair to say that in preparation for the evidence that you are giving here today you have had some research done or you have undertaken some research yourself to understand the historical issues pertaining to the Surveyor-General in Victoria?

10 **MR SANDY:** As a surveyor, we need to understand history generally and particularly in relation to land matters, but yes, for - for preparation I have done some additional reading.

**MR McAVOY SC:** And on top of that - I might not have the year correct, but you  
15 have undertaken some - you took up an offer made to government officers to attend short courses at Melbourne - University of Melbourne; now, that's correct?

**MR SANDY:** That's correct.

20 **MR McAVOY SC:** Was that in 2023?

**MR SANDY:** Yes, it was.

**MR McAVOY SC:** And the two subjects that you undertook and were  
25 micro-credentialed for is Indigenous and Other Sovereignties and Understanding Treaty.

**MR SANDY:** Yes.

30 **MR McAVOY SC:** How do you find those courses?

**MR SANDY:** I found them of interest. I found them intellectually stimulating,  
and I particularly enjoyed the interaction with many of the other participants who  
35 came from various places that I have lived and worked throughout my career.

**MR McAVOY SC:** Places outside of Victoria?

**MR SANDY:** Yes.

40 **MR McAVOY SC:** And were they senior management public service employees or were they from a range of fields?

**MR SANDY:** I can't really say, because I didn't really ask some of them. We  
interacted on the material that was in front of us. We didn't necessarily ask each  
45 other our various roles.

**MR McAVOY SC:** Were there other members of the Victorian Government there that you knew?

5 **MR SANDY:** There - there were. I didn't know them all, but there were some that I did know.

**MR McAVOY SC:** So was - just exploring this with one more question, was the offer made to the government officers to undertake courses for these specific courses or courses related to Indigenous sovereignties or treaty matters, or were they - was it a more generalised offer?

10 **MR SANDY:** So my understanding is that Melbourne Uni offered these particular courses that related to sovereignty and treaty and the Victorian Government offered them to us in part or in full, and I believe there were four of which I have done two so far.

**MR McAVOY SC:** Did you find those courses helpful in gaining a deeper appreciation of the subject matter?

20 **MR SANDY:** Absolutely. They - the material was excellent. The lecturers were excellent. In fact, I believe one of the lecturers appeared in this block 6 hearing the other day, Professor Langton. So yeah, I found it interesting, stimulating and beneficial to this and my other work.

25 **MR McAVOY SC:** How long did each of those courses go for?

**MR SANDY:** They were about 10 weeks each.

30 **MR McAVOY SC:** And is it something that you think government officers generally would benefit from?

**MR SANDY:** Those involved in land transactions or that may be involved in - in treaty discussions or treaty processes, absolutely.

35 **MR McAVOY SC:** Thank you. Now, I just want to move on to some historical issues. You are here representing the office of the Surveyor-General.

**MR SANDY:** Yes.

40 **MR McAVOY SC:** That office has a history which is really older than the first settlements in what is now known as Victoria. It was one of the first offices to be created in the new colony of New South Wales; would you agree with that?

45 **MR SANDY:** As I understand it, yes.

**MR McAVOY SC:** Prior to the establishment of Victoria as a separate colony from New South Wales, the Surveyor-General for the initial area covered by New South Wales was the surveyor for this area now known as Victoria; that's correct?

5 **MR SANDY:** Yes.

**MR McAVOY SC:** And you know that in 1836 the New South Wales Surveyor-General was Major Thomas Mitchell?

10 **MR SANDY:** Yes, I do.

**MR McAVOY SC:** Who later became Sir Thomas Mitchell and was the first Surveyor-General to travel to Victoria, the Territory now known as Victoria; is that correct?

15

**MR SANDY:** I believe so.

**MR McAVOY SC:** At paragraph 6 of your statement, if you just want to have a look at it - you've got it in front of you?

20

**MR SANDY:** I do.

**MR McAVOY SC:** In that statement, and indeed in your opening comments, you've acknowledged the role of Surveyors-General both past and present in the  
25 dispossession of Aboriginal people from their land. When you acknowledged the role of past Surveyors-General, are you referring to all Surveyors-General of the British colonies in New South Wales including Major Mitchell, or are you referring it to only those that have come into existence since the creation of the colony of New South Wales - the colony of Victoria?

30

**MR SANDY:** Predominantly I would say I am acknowledging on behalf of those who were appointed for Victoria; however, I do know that what we know as Victoria now was part of New South Wales previously and there is some link  
35 between our offices. The office of Surveyor-General in New South Wales created - was known as Port Phillip district office, which Robert Hoddle was appointed as chief surveyor and he became Victoria's first Surveyor-General, so - so there are some links between the offices.

**MR McAVOY SC:** Yes. Just to be clear, I don't propose to ask you about whether  
40 your office or the State of Victoria is now responsible for the actions of Major Mitchell, okay? I'm not going to ask you about that. But I do want to take you to a few historical matters involving him. You were familiar enough with the story of Major Mitchell to know that he undertook expeditions seeking to map the areas around the coast, what they referred to as the interior?

45

**MR SANDY:** Yes, I do.

**MR McAVOY SC:** And are you aware of expedition 3 conducted by Major Mitchell?

**MR SANDY:** Yes, I am.

5

**MR McAVOY SC:** And expedition 3 ran from about the junction of what is now known as the Murray and the Darling Rivers down towards Swan Hill then headed south towards Portland; you are aware of that?

10 **MR SANDY:** Yes, I am.

**MR McAVOY SC:** You are aware he coined the name Australia Felix, meaning happy Southland?

15 **MR SANDY:** Australia Felix.

**MR McAVOY SC:** Yes. Is that what I said, Felix?

**MR SANDY:** Felix, yes.

20

**MR McAVOY SC:** Do you accept when he gave that territory that name publicly, he created a land rush in that part of the colony of New South Wales?

25 **MR SANDY:** Yeah, I - I guess - you know, when he described Australia as Felix, he was describing it as this amazing country with lots of water and therefore could sustain crops and - and various livestock, so I guess that may have led to - to people wanting to come here.

30 **MR McAVOY SC:** You can't say whether he knew that or not, but at the time there was a lot of pressure on the New South Wales Government to release lands, you were aware of that?

**MR SANDY:** Yes.

35 **MR McAVOY SC:** You are aware of the Port Phillip Association attempting to enter into a treaty at Port Phillip Bay.

**MR SANDY:** Yes, I am aware of all of that.

40 **MR McAVOY SC:** Yes. And so with that knowledge as to the pressure on the New South Wales colony to release land and for the availability of land, the naming and publicisation of parts of the south-eastern continent as being a lush and fertile place was always going to have an effect on the demand for land by settlers, wasn't it?

45

**MR SANDY:** Yeah, I can accept that premise.

**MR McAVOY SC:** Now, you know where the town of Robinvale is?

**MR SANDY:** Yes, I do.

5 **MR McAVOY SC:** And you're aware that when he was in the area of Robinvale in 1836, Major Mitchell murdered a large number of First People? Are you aware of that?

10 **MR SANDY:** I am aware of the massacre described as Mount Dispersion, yes.

**MR McAVOY SC:** So on some accounts that number was 30 people; you are aware of that?

15 **MR SANDY:** I - I have heard various numbers and I've seen various numbers reported in various literature. The New South Wales Government gazette all - doesn't refer to 30; it refers to another number. But it says that was more than the number it gave, yes.

20 **MR McAVOY SC:** Now, he also named the place that where that ambush and then subsequent massacre occurred by the hill nearby and named it Mount Dispersion; you are aware of that?

**MR SANDY:** Yes.

25 **MR McAVOY SC:** And that appears to be in celebration or in honour of the dispersion of First Peoples he had murdered and pushed away?

30 **MR SANDY:** I - I have not seen the official reason why he gave it that name, but it seems a reasonable - it seems a reasonable explanation.

**MR McAVOY SC:** You are aware that the term "dispersal" or "dispersion" was the euphemism used for massacre?

35 **MR SANDY:** I didn't know that was the case, no.

**MR McAVOY SC:** Mount Dispersion is in New South Wales; you accept that?

**MR SANDY:** Yes.

40 **MR McAVOY SC:** And Victoria - but Victoria didn't exist at the stage when this happened; it was all the New South Wales colony. I can tell you this, Surveyor, later in this hearing block, we expect the statement of Mr Brendan Kennedy to be tendered, and he will give evidence in relation to that statement to the effect that he is a Tati Tati man being the local people from this area he says:

45 "There is a place near called Major Mitchell Lagoons at Wakool Junction where Mitchell did more massacring. He massacred here at Mount Dispersion, massacred

here and there all along the way. He has monuments built everywhere. These are monuments of conquest. We want to deconstruct all these monuments of conquest and reinstate our traditional meanings and connections to these cultural places within Country, revive the meaning - that's the Bumbang is the real name".

5

Now it is called Robinvale. I want to show you the government gazette. Can we have the slide, please. You have seen the advance.

**MR SANDY:** Yes, I have.

10

**MR McAVOY SC:** This document is the government gazette in relation to the massacre of people at Mount Dispersion by Sir Thomas Mitchell, or Major Mitchell as he was then known. And so there is no doubt that he did it, that it occurred and he was the perpetrator, you accept that?

15

**MR SANDY:** Yes, I have - I've seen the New South Wales Government gazette.

**MR McAVOY SC:** Yes.

20

**MR SANDY:** It describes the events and I have no reason to - to not believe that.

**MR McAVOY SC:** Yes, if we can just see the next slide, please. Yes, one more, please. Now, the quality of this particular slide in terms of its readability, if we can zoom in on the first column on the top left, we might be able to adjust - you've seen this document before, haven't you? It is a clip from The Australian from 1836.

25

**MR SANDY:** Yeah, I have. Yep.

30

**MR McAVOY SC:** It talks about the expedition of discovery referring to Major Mitchell's third expedition; you are aware of that?

**MR SANDY:** Yes, I have seen this before.

35

**MR McAVOY SC:** It talks about the massacre of some - some report it as being as high as 30 people being shot as they run away and swam across a river to get away from the ambush of Major Mitchell. And this was all on the basis - it reads from that particular article that he was worried because they had been following him. So you've read that?

40

**MR SANDY:** I've read that, yes.

**MR McAVOY SC:** Now, I suggest to you that since that time, Sir Thomas Mitchell as he is now known, since that massacre, he is had a cockatoo named off him, the Major Mitchell, but I understand that the - I suggest to you that the name has recently been changed on account of the acceptance of the massacre at Mount Dispersion, that the mount continues to be named Mount Dispersion. There are -

45



there is a species of grass called Mitchell Grass which is named after him, which is all throughout the interior of the country. There is a town in southern Queensland on the lands of the Gunggari Mandandanji named Mitchell in his honour and a string of monuments around the country in his honour, including  
5 some 30 plus in Victoria. You are aware of all of those facts?

**MR SANDY:** Not all of them. The monuments, I know about them. I've seen some of them. I've visited some of them. Those monuments, however, are not my  
10 responsibility.

**MR McAVOY SC:** I don't suggest that they are, and those monuments are put up by local historical societies.

**MR SANDY:** Local historical, yep.  
15

**MR McAVOY SC:** But you've been to some of those monuments. What was the purpose for attending on those monuments?

**MR SANDY:** So in my role and in my private life, I travel around the State of  
20 Victoria to understand what's there and learn more about its history and - and various other things that I can find. So as I come across some of these monuments - I don't always know what they are in advance, I just stop in and have a look and I read what they are. So some of the ones I've seen relate to the fact that Major Mitchell passed through here and they are commemorating 100 years since that or  
25 some time. Others are where - for instance, at Mount Macedon near where I live, there is a lookout there named after Mitchell. So it says that he - he named Mount Macedon as he - as he passed through on that journey.

**MR McAVOY SC:** Did - from memory, did any of the monuments that you  
30 visited record that he was a mass murderer?

**MR SANDY:** No, none that I recall.

**MR McAVOY SC:** Now, it's not suggested that you or your office is responsible  
35 either legally or morally for the actions of Thomas Mitchell in ambushing and massacring possibly 30 people because he felt uncomfortable that he was being followed, but I suggest to you that there are some issues which flow from that fact which are relevant to you. Firstly, Surveyor-General's role was an integral part of the British invasion of those territories that took the lands by lethal force in many  
40 cases; do you agree with that?

**MR SANDY:** Yes, we were certainly part of that system, yes.

**MR McAVOY SC:** And secondly, there is a legacy of feeling held by people,  
45 which is apparent in the statement of Brendan Kennedy, towards the name and, I suggest to you, the office of Surveyor-General by reason of what their - what has occurred in the past; do you accept that?

**MR SANDY:** Yes, I have had other people express those feelings to me also.

5 **MR McAVOY SC:** The First Peoples - you don't have any issue with the expression of some lack of regard, if I can put it that mildly, for the Surveyor-General by people such as Brendan Kennedy?

10 **MR SANDY:** I - I have never met Brendan, so - so, you know, I can't express comments around what his feelings might be. However, others have expressed similar thoughts.

15 **MR McAVOY SC:** And indeed the people of - the Gunditjmara people of the Portland district whose Country was invaded in a massive rush described as the fastest ever expansion of European settlement with all the attendant loss of life, you wouldn't have any issue with their feelings of disregard for the Surveyor-General's office, would you?

20 **MR SANDY:** As I said, I - you know, I've met people from that - that group. Some of them expressed those sorts of feelings, yeah, I understand that.

**MR McAVOY SC:** Not new to you?

**MR SANDY:** It's not a new concept, no. No.

25 **MR McAVOY SC:** I just want to draw your attention to this book, the Limits of Location. I understand that it is a book that you are familiar with?

**MR SANDY:** I have - I have not read that one, no.

30 **MR McAVOY SC:** I want to just have a little bit of a discussion with you about the role of the Surveyor-General beyond the massacres. In that book, the first chapter looks at the roles of Surveyors-General in shaping the colony of Australia. And I'll tell you that the authors of the first chapter observed that:

35 "The Surveyor-General had the role of overlaying the land with a British system of lines and grids and names, when the land already had all of those things, when the land already had its own names and maps of stories and territory and connection to land and language already existed, and were recorded in art and in story and in oral histories."

40 You haven't read that chapter, but that explanation of the cultural impact of the Surveyor-General's work, do you have any comment to make about that?

45 **MR SANDY:** I'm - I'm not - I'm not denying what that chapter describes, because I describe it to be true. However, as Surveyors-General and - I know from reading about past Surveyors-General that many of them also sought to capture some of that existing language, and therefore, certainly here in Victoria, we know that

many of our towns and parishes have names that are derived or are actually First Peoples' language, because they sought to capture some of that.

5 **MR McAVOY SC:** But the overwhelming effect was that in applying the British surveying system of lines and grids and names, there was the effect of scorching the landscape of the culture and law that already existed?

10 **MR SANDY:** Yes, so that is the principle of terra nullius, and I've acknowledged that Surveyor-Generals past, whether it was a disregard or an ignoring, predominantly did their work based on that principle.

15 **MR McAVOY SC:** So I am not suggesting to you that they exercised a legal principle. What I am suggesting to you is that their role in bringing to the landscape a British system had the effect of pushing the existing system away?

**MR SANDY:** Yes, I agree with that.

20 **MR McAVOY SC:** And I suggest to you that whilst we have been discussing it in terms of the historical sense, would you accept that the process of negatively affecting culture and lore which is embedded in the landscape, in this - the landscape in this country, that process is continued every time a new suburb is mapped out on the city fringe?

25 **MR SANDY:** Yes. So I said in my statement that despite the decision in favour of Mabo in 1992, many of our land systems have not altered, and therefore that - I agree with your statement. Can I just say, however, that the Surveyor-General is governed by the laws of the State of Victoria. Whilst I might agree with that statement, I still have to follow the existing laws.

30 **MR McAVOY SC:** Does that mean that the rights and interests of - the existing rights and interests of the First Peoples don't get recorded?

35 **MR SANDY:** They get recorded according to the legislation that we have at the moment.

**MR McAVOY SC:** Is it the case that the language in which the system is established doesn't permit you to record the existing stories or connections that the Traditional Owners have to those lands?

40 **MR SANDY:** Probably not in the way that First Peoples would like that to occur.

**MR McAVOY SC:** Are you saying that it is possible in some sense?

45 **MR SANDY:** If we are - if we're talking about mapping, we have ways to map various rights and interests.

**MR McAVOY SC:** And -

**MR SANDY:** Have we mapped the rights and interests of the First Peoples prior to colonisation? The answer is no.

5 **MR McAVOY SC:** Post colonisation, Surveyor, or in the present day, so -

**MR SANDY:** Only to the extent we have been requested.

10 **MR McAVOY SC:** If you were asked to map those interests today across the State of Victoria, those interests which the witnesses who have appeared before this Commission say are continuing and vibrant interests, replete with culture and stories and art. Is that something that you could do if you were requested by the Government to do that?

15 **MR SANDY:** Yes, we could.

**MR McAVOY SC:** You have the ability to do it technologically?

20 **MR SANDY:** Yes, I do.

**MR McAVOY SC:** Do you have the resources to do it.

**MR SANDY:** Well, that's another discussion.

25 **MR McAVOY SC:** Is that - are you saying no?

30 **MR SANDY:** If we were requested to do it, a request would come to us. We would hope there would be some resourcing provided to us to enable us to do that. If we had to do that under existing resources, then it would be a matter of we would have to determine our priorities and prioritise.

**MR McAVOY SC:** You have the capacity within your office of the Surveyor-General's office to undertake that work at present?

35 **MR SANDY:** At present, I would say we don't. Our focus is on other government initiatives at the moment such as the Big Build and various other initiatives, some of which are related to State parks and forests.

40 **MR McAVOY SC:** I will just follow that point of the Big Build for a moment then come back. You accept that the Big Build is likely to impact on the very rights and interests that we're talking about?

**MR SANDY:** Yes, I am.

45 **MR McAVOY SC:** In your office at present what is the staffing number?

**MR SANDY:** Approximately 85.

**MR McAVOY SC:** And how many of those staff are First Peoples, Victorian First Peoples?

5 **MR SANDY:** That have identified as First Peoples, the answer is one.

**MR McAVOY SC:** And do you think that that is a satisfactory level of employment in an office so integral to the management of the lands for this state?

10 **MR SANDY:** No, I do not.

**MR McAVOY SC:** And what steps have you taken to increase the staff numbers?

15 **MR SANDY:** So when I started, there were no First Peoples employed in the office. My first approach was to - to look to employing First Peoples in - in a space where - that they could have the most impact, so - so the first role that we put out for First Peoples was in geographic naming, and we have employed people in that area, and I'd love to have some more. In terms of land surveyors, our land  
20 surveyors have got to go through a training process, so a degree and then post-degree training, and so because we can't just go and find First Peoples with that training, we started by offering scholarships to try and attract First Peoples to surveying roles.

25 **MR McAVOY SC:** Surveying - scholarships in terms of funding tertiary education?

**MR SANDY:** Correct.

30 **MR McAVOY SC:** And how successful were you?

**MR SANDY:** We've - so the scholarships were specifically for women and First Peoples, and I believe of the seven scholarship holders we have had two that have identified as First Peoples so far.

35 **MR McAVOY SC:** Have any of them completed their study?

40 **MR SANDY:** My understanding is that at least one of those have, and unfortunately we weren't able to attract them. They took a role in the private sector.

**MR McAVOY SC:** Now, before I just move on, I just might give the Commissioners an opportunity to ask any questions of the Surveyor-General in relation to those matters.

45 **CHAIR:** I just notice in your statement, Surveyor-General, you talk about the custodianship rather than ownership, and custodianship sort of means

responsibility for rather than owning. Can I tell why you used that term rather than owners?

5 **MR SANDY:** Yes, so there was a number of reasons I use that term. So in some of my readings of First Peoples, they actually refer to custodianship of the land, and I am trying to think of who it was. I can't recall. It may have been in Ockwell's book. I would be going into personal opinions which I won't, but, you know, really, we are all custodians in some form, because we all have a - we all have - you know, we all live for a period of time and then we pass on to others, so in  
10 many respects we are all custodians.

**CHAIR:** A land title doesn't call you a custodian.

15 **MR SANDY:** It calls you a landowner.

**CHAIR:** Yes.

20 **MR SANDY:** Yeah, I understand your question and I - yeah. I know that in the Torrens title, it talks to - talks about ownership.

**COMMISSIONER LOVETT:** You said you had one Aboriginal staff member, or someone who identifies as Aboriginal and Torres Strait Islander. What level in the organisation are they?

25 **MR SANDY:** In - in terms of Victorian Government, I - I - I think it is VPS 4 at this moment in time.

**COMMISSIONER WALTER:** And how does that VPS 4 align with other people - was it 80? How many do you have?

30

**MR SANDY:** 85.

**COMMISSIONER LOVETT:** 85 staff. So what are most of the majority of the people in VPS in that area?

35

**MR SANDY:** So in the place or geographic namings, there is only five - four staff. The manager of that area is a VPS 6 and reports directly to me. The other staff in that area, we have another VPS 4 then we have a VPS 3.

40 **COMMISSIONER LOVETT:** But in parallel to the 85, where does it sit, the four?

**MR SANDY:** We have quite a number of VPS 4 staff because our surveying roles - there's a level of training and then postgraduate training. Licensed surveyors  
45 achieve VPS 5, and then those who are above are senior licensed surveyors.

**COMMISSIONER LOVETT:** And you made reference before to resourcing, ability to be able to, you know, map Country from a Traditional Owner perspective. Have you put any - any proposals forward for government to consider investing in such work?

5

**MR SANDY:** At this stage, no, I haven't.

**COMMISSIONER LOVETT:** Okay.

10 **MR McAVOY SC:** I might continue on. Prior to this Yoorrook process -

**COMMISSIONER HUNTER:** I would like to say there is also the Shire of Mitchell in Victoria not far from where I live only established in 1994, so I just wanted to - quite recently. So you have made your opening comments in your apology about what has happened, and you have got, "I acknowledge Surveyors-General both past and present played a role in dispossession of First Peoples from their land". In making that apology, what are you going to do differently moving forward?

15

20 **MR SANDY:** It is not what we I am going to do differently; it is what we are doing. Before this Commission commenced, I was already looking at what we could do better. In the former Department of Environment, Land, Water and Planning, I worked closely with the First Peoples self-determination group within there and we had various discussions, mostly around geographic naming. But we also talked to them about engaging in relation to the work that we do around the Traditional Owner Settlement Act. And - and so there is things that we have already been doing before I had to start researching for the Yoorrook Justice Commission. And when I say we have started, it is a journey, and we are only just beginning.

25

30

**COMMISSIONER HUNTER:** Thank you, I just - plenty of people come before us with apologies and I think it is not just the apology; it is what it comes with. So just want to note that, so thank you.

35 **MR McAVOY SC:** Thank you, Commissioner Hunter. I might just -

**COMMISSIONER NORTH:** I might ask, Mr McAvoy, in paragraph 60, Mr Sandy, you refer to the 2021 government review of the Land Act and seemingly it has some effect on the matters that we are discussing, that is recognition of Indigenous interests in land. Can I tell us where that's at?

40

**MR SANDY:** Specifically, no, so I have not been involved in some of the reviews that have occurred at this employment. I know that Land Use Victoria has been involved in those, but I can't give you an update. I don't have that information.

45

**COMMISSIONER NORTH:** Well, you have referred to it in paragraph 60 for some purpose, obviously.

**MR SANDY:** So - so I agreed with the sentiments of the statement that I included, and - and where I can assist, I will. At this point I have not been asked to assist.

5 **MR McAVOY SC:** Are you aware that the review hasn't been made public or completed?

**MR SANDY:** I - I'm not currently aware of where it is at.

10 **MR McAVOY SC:** Now, I just want to take you to your role as chairman of the Surveyors Registration Board. In brief form, can you explain to the Commissioners what that board does?

15 **MR SANDY:** So the primary role of the Surveyors Registration Board is to licence or register licensed surveyors to perform what we call cadastral surveys which is property boundary surveys, and to train people to become licensed surveyors.

20 **MR McAVOY SC:** And to ensure that a particular standard is kept in terms of the performance of the role of surveyors?

25 **MR SANDY:** So - so the board keeps the standard, so - so has the ability to discipline licensed surveyors. In terms of setting the standards for surveying, that falls to my role as Surveyor-General.

**MR McAVOY SC:** Okay. And as the chair, you have ultimate responsibility for that board?

30 **MR SANDY:** Yes, I do.

**MR McAVOY SC:** On the government website for the board, you are aware there is a document called the survey practice handbook?

35 **MR SANDY:** Yes, I am.

**MR McAVOY SC:** And on that government - the government website, the surveyor practice handbook comes with a warning in the following form:

40 "Many sections of the handbook are now out of date and should be used with caution."

Are you aware of that -

45 **MR SANDY:** That's correct.

**MR McAVOY SC:** You are aware the website makes that disclaimer?



**MR SANDY:** I do.

**MR McAVOY SC:** Have you looked at part 3 of the handbook?

5 **MR SANDY:** Yes, I have.

**MR McAVOY SC:** And part three of the handbook is titled, "Surveyor's practice handbook part 3 land surveying law and administration".

10 And section three is titled, "land settlement and the role of the surveyor"; you're aware of that?

**MR SANDY:** I am.

15 **MR McAVOY SC:** And that - that section is noted as having been compiled by a person named AC Brown and is noted as being the 1994 update.

**MR SANDY:** Yes, I am aware of that.

20 **MR McAVOY SC:** And the other sections of that handbook have all been updated to around about the same time, 1994; is that right?

**MR SANDY:** Correct.

25 **MR McAVOY SC:** And the - I suggest to you, and I don't suggest you will know this off the top of your head, but a search of that particular section of the handbook in relation to land settlement and the role of the Surveyor discloses that First Peoples are only mentioned three times in that whole section, first with respect to incidents with "natives" at the 1803 Sorrento attempted settlement, secondly, in  
30 in relation to the Port Phillip Association Plan to establish a right to possession by purchasing land "from the natives". So that is the Batman treaty reference. And third, by quoting the Bourke proclamation of 1835. The document does not mention the 1992 Mabo (No.2) decision.

35 **MR SANDY:** It suggests it's very much out of date.

**MR McAVOY SC:** You have been in this position since 2017?

**MR SANDY:** Yes.

40 **MR McAVOY SC:** Is there any process by which you systematically review the documents of the Surveyors Registration Board to ensure that they are updated?

45 **MR SANDY:** Yes, we do. That particular document, I was surprised to find it on the Surveyors Registration Board website, to be honest. So I am taking steps to move it back to its rightful place, which is on the website of the Surveyor-General

of Victoria. And in addition, have commenced a process to update that document and to ensure that it reflects the true history of Victoria.

5 **MR McAVOY SC:** The purpose of a surveyor practice handbook is to guide surveyors in the carrying out of their work, isn't it?

**MR SANDY:** Yes, it is.

10 **MR McAVOY SC:** And it's to ensure that they have the right information to allow them to do their job properly?

15 **MR SANDY:** So the reason the document is up there is it's - it's been put there for surveyors to use as a historical reference, but when it's severely out of date, then there is questionable value in a document that is so far out of date, which is why I have taken steps to update it.

**MR McAVOY SC:** Well, I appreciate you have taken steps now to update it now that it is been brought to your attention, but -

20 **MR SANDY:** No, these actions were taken three years ago.

**MR McAVOY SC:** The update process was commenced three years ago?

25 **MR SANDY:** Yes.

**MR McAVOY SC:** So when will that update be completed?

30 **MR SANDY:** That is a good question. I am hoping we might have it completed in the next two years.

**MR McAVOY SC:** It is going to take five years to update that document?

35 **MR SANDY:** There - there's a significant amount of work to go into updating it. Firstly, there is very little mention of any history prior to 1803, of which we know that First Peoples occupied Victoria for a much longer period prior to that than since 1803. And since then, as you mentioned, that the 1992 Mabo case is not in there, and the ramifications of that there's - which means there is no mention of Traditional Owner Settlement Acts, so it requires a significant upgrade.

40 **MR McAVOY SC:** The consequence of that document having been available to surveyors for the past 30 years is that 3 decades' worth of surveyors have looked at that document to provide the underpinning for their work and they are encouraged, it would seem, to do it without reference to the actual law of the land. Do you accept that?

45 **MR SANDY:** Now, I understand where you are going with that question, so while it's a reference material, the training of surveyors is - it follows a different course

to just looking at that document. That's really a reference material. Also on the board's website, there are documents that talk about a professional training agreement and what is required to complete a professional training agreement, and that provides step-by-step guideline to surveyors in the legislation and what we expect of a licensed surveyor before we allow them to be registered.

**MR McAVOY SC:** Do you accept that it might be concerning for the Commissioners to hear that that document is still available on the website, though?

10 **MR SANDY:** It is concerning, and that's why I am looking into it, because it was this process that identified that it's located in the wrong location.

**MR McAVOY SC:** But part of - you accept that part of the difficulty for a truth-telling Commission such as this one in dealing with government agencies is that government agencies are very slow to make any cultural shift. Do you accept that?

**MR SANDY:** Yes.

20 **MR McAVOY SC:** And you accept that the Terms of Reference request that this Commission of Inquiry make recommendations as to how the Victorian Government might be better at its job and deliver on treaties and make amends for its past injustices. Do you accept that?

25 **MR SANDY:** Yeah, I - I'm looking forward to those recommendations.

**MR McAVOY SC:** And one of the difficulties, I suggest to you, that the First Peoples of Victoria have, and this Commission will have by extension, is that these types of documents continue to exist within the Victorian bureaucracy, and they get turned up in the course of these processes, and the Government officer in question turns up and says, "I am really sorry it shouldn't be there", but they're there. Do you accept that that is a problem?

**MR SANDY:** Yes, I do.

35 **MR McAVOY SC:** How does the government - how does your agency deal with that, ensure that there aren't these documents, that there is a cultural shift in your agency to ensure not only the spirit but the actual terms of any changes that are recommended by this Commission are embedded and cannot be deviated from?

40 **MR SANDY:** So I'll only answer the one that has been recognised. I will ensure that the document is removed. We will progress the update to it before we put it back in its rightful place. Because these are important documents, and the fact that it's out of date means that we haven't put another focus on to some of these things.

45 **MR McAVOY SC:** Listen, that wasn't the question I asked. I asked how does the Commission ensure that the cultural change in government agencies that is needed

is actually performed? What - how can - what do we say as to how your agency - we will narrow it down - as to how your agency to go about becoming the type of agency which proactively and properly participates in the change that's necessary to see these - the treaty process is successfully undertaken?

5

**MR SANDY:** So the way that we do anything is we identify it, we create an accountability process, and we operate to that and report that to our superiors which are, you know, through to the Secretary or the Minister.

10 **MR McAVOY SC:** If there is no performance against those accountabilities, what is the consequence?

**MR SANDY:** I try not to put myself in that position. However, if - you know, if there's no accountability and you haven't performed, then you will either be removed from office or - you know, that is probably the ultimate.

15

**COMMISSIONER HUNTER:** Can I just ask how can we be assured there are no other documents like within your department that don't reflect a true history of our people and then don't take into account what it means? Because we are talking about land.

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**MR SANDY:** I will only talk about the areas that I have focus in. I won't talk broadly about the department.

25 **COMMISSIONER HUNTER:** But in your -

**MR SANDY:** In my area -

**COMMISSIONER HUNTER:** How can you assure me that you will look at all these documents and then these documents will be updated, and that that there's nothing floating around like Mr McAvoy has pointed out. How can we be assured of that?

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**MR SANDY:** So - so our - our website where we - we make many of these documents available is reviewed frequently. The - the land.vic.gov website.

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**COMMISSIONER HUNTER:** You can say that that's reviewed, but Mr McAvoy has shown us a document that hasn't been reviewed since 1994.

40 **MR SANDY:** That sits on the surveyor's website which is a separate website. We are in the process of updating that website and looking into all the documents that are on there. And this process identified one that probably shouldn't be there which we acknowledge.

45 **MR McAVOY SC:** There is no - there is no replacement document.

**MR SANDY:** Not at this stage.

**MR McAVOY SC:** Not ready to be uploaded to the system.

**MR SANDY:** Not at this stage.

5

**MR McAVOY SC:** Sorry, Commissioner.

**COMMISSIONER LOVETT:** In the review process you undertook three years ago - was it three years you started it? What type of engagement, not consultation, engagement have you been doing with Traditional Owners to involve them through this process so far?

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**MR SANDY:** We didn't get to that stage.

**COMMISSIONER LOVETT:** In three years.

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**MR SANDY:** In three years.

**COMMISSIONER LOVETT:** Do you think that's an issue?

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**MR SANDY:** Yes.

**COMMISSIONER WALTER:** Could there be immediately something on the website to indicate that it is out of date, and you are undertaking a review and changing it, something that could be done straightaway?

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**MR SANDY:** There is already an acknowledgment that it's out of date.

**MR McAVOY SC:** You'd accept though, that the acknowledgment is not that it's out of date particularly with respect to First Peoples?

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**MR SANDY:** It doesn't go that specifically.

**MR McAVOY SC:** Now, the question I asked you a few moments ago about ensuring that the cultural change happens within the Surveyor-General's office, and by extension how it might be done in other agencies, you answered that, you know, there must be accountabilities and hopefully people are held to account for their performance or non-performance, you would accept that it's not inappropriate for executives of the government to have in their contracts of employment conditions requiring performance of the self-determination principles or performance in relation to the treaty outcomes that the government might enter into?

40

**MR SANDY:** I don't think it is specifically in my contract, but it's certainly in the performance documents that I work towards.

45

**MR McAVOY SC:** So if you failed to perform in respect of the self-determination principles, is that a matter of - in respect of which you could be subjected to some disciplinary action?

5 **MR SANDY:** Yes.

**MR McAVOY SC:** Are you aware of any government officer in the Victorian Government having been subject to disciplinary actions for under performance of the self-determination principles?

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**MR SANDY:** Not to my knowledge.

**MR McAVOY SC:** You came to the Surveyor-General's position in 2017; is that correct?

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**MR SANDY:** That's correct.

**MR McAVOY SC:** By that time, the First Peoples self-determination policy framework had already been established in Victoria and was under way. You - I am going to put a proposition to you, that self-determination for First Peoples requires the government and those who work with the government to have a sound understanding of the history and lore in relation to First Peoples, you would accept that?

20

25 **MR SANDY:** Can you say that again, please?

**MR McAVOY SC:** That those who work with government - that, sorry, self-determination, the performance - I am sorry. I will withdraw that. You would agree that to ensure that self-determination is afforded First Peoples, government and those who work with government need to have a good understanding of the history and law relating to First Peoples?

30

**MR SANDY:** Yes.

35 **MR McAVOY SC:** And you clearly have a personal interest in treaty and Indigenous sovereignty because you undertook short courses at the University of Melbourne. How well informed would you say the Surveyor-General's office is in relation to those matters?

40 **MR SANDY:** It is hard to quantify. I mean, we are talking about a group of 85 people. So I will talk for myself. I have spent a significant amount of time ensuring that I - I learn about - that the history that is required understanding the treaty process and where we as a group, Surveyor-General Victoria, may be involved in the process. It is something that we as a group speak about from time to time, because there are matters that we deal with. For instance, we have staff learning sessions if you like where we talk about some of the projects, so some of our staff would mention the work that they are doing, specifically in relation to

45

Traditional Owners Settlement Act. So we do have those discussions, but can I quantify the knowledge of the staff? No.

5 **MR McAVOY SC:** The fact that the practice handbook has stayed on the website for who knows how long indicates that there may be some deficiencies in some parts of the organisation in terms of their knowledge and understanding of the lore and culture of First Peoples?

10 **MR SANDY:** Yeah, I wouldn't necessarily agree with that, so we all have a responsibility to do our cultural safety training which we encourage our staff to do, and where it's considered mandatory they do that. Our surveyors are required to understand the application of the law in relation to the surveys they perform, which includes surveys that involve actions under the Aboriginal Heritage Act as well as the Traditional Owner Settlement Act and others. So from a surveying  
15 perspective, my surveyors would have a - a good understanding. However, in terms of First Peoples' cultures and laws there would be a knowledge of learning that they would still need to do.

20 **MR McAVOY SC:** Thank you. Now, the - your office has produced a strategic plan for the years 2020 to 2025?

**MR SANDY:** Yes, we have.

25 **MR McAVOY SC:** And that strategic plan, I suggest to you, at page 6 shows that the Crown land was proximately 35 per cent of the land in Victoria in 2020, and by information provided to you from the Valuer-General's office was valued at approximately 300 billion. You are still aware of that figure from your -

30 **MR SANDY:** So - so we're - we are aware of that figure. It is referenced as a government source but it doesn't specifically refer to the Valuer-General, so we had someone produce that document for, and while we checked that there was a government source for it and we did go and have a look at it, the Valuer-General's valuations we would take as the value that it actually is.

35 **MR McAVOY SC:** And so the math would tell us that with 35 per cent of the land as Crown land, the remaining 65 is non-Crown land and therefore in private hands, and in that strategic plan, in that plan, you have identified that it is freehold, but it might also be leasehold or other forms of private ownership?

40 **MR SANDY:** It is private ownership, yes.

**MR McAVOY SC:** And the figure that is in the document is 2.3 trillion but you don't say that that is necessarily correct?

45 **MR SANDY:** No, the 2.3 trillion was directly from the Valuer-General's and we refer to the Valuer-General's reference to that one.

**MR McAVOY SC:** There are a number of questions I might have had for you, but I'm aware of the time. And I just I might ask you, on page 26 of that document there is some information in relation to airborne gravity surveys.

5 **MR SANDY:** Yes.

**MR McAVOY SC:** That is a new area for the Surveyor-General's office is it, or relatively new?

10 **MR SANDY:** Well, it is a project that has now been going since 2019, but it was a new survey when it commenced, yes. It is the first of its kind in Victoria certainly, maybe even the first of its kind in Australia.

15 **MR McAVOY SC:** The purpose of this airborne gravity survey is to measure the airspace in a sense that it might be commodified in the way that land is commodified is that correct?

20 **MR SANDY:** No, that is not correct. You - you're applying the principles in a different way to what we are. The purpose of that survey is to understand gravity, the value of gravity, and how it applies to us determining the height. Predominantly, most heights are measured above sea level, which we refer to as the Australian height datum. However, that has some historic biases and some errors, and so by utilising this technique, we can actually produce a better heighting system.

25 **MR McAVOY SC:** Yes. Now, I just wanted to take you to - I think I might take you back to page 13 of that plan, which shows that the Surveyor-General's responsible for leading in five areas including diversity and capacity, and that Surveyor-General Victoria team leads on geographic place names including  
30 Aboriginal place naming. Do you accept that that's what is on that page?

**MR SANDY:** I do accept that.

35 **MR McAVOY SC:** And that is still a current organisational chart in terms of the allocation of those duties?

**MR SANDY:** Mostly it is. The groups identified in that particular strategy have changed in their name; however, predominantly it describes our current structure.

40 **MR McAVOY SC:** I just want to take you to page 27 of that document. And it is fair to say there has been some work that your office has had directly with First Peoples of Victoria in relation to geographical place names?

45 **MR SANDY:** Yes, there has been.

**MR McAVOY SC:** The system of place naming in Victoria is one where there are local place naming authorities appointed?



**MR SANDY:** That's correct.

5 **MR McAVOY SC:** Some of those local place naming authorities have included First Peoples organisations?

10 **MR SANDY:** So where First Peoples are responsible for land, then they can be the naming authority. In most instances, however, the local government are the naming authority, with the exception of some government agencies.

**MR McAVOY SC:** But there - so - but there have been some cases in which First Peoples have taken up the opportunity to be the local naming authority?

15 **MR SANDY:** Yes there are, so any - any - any land that has been provided to First Peoples for their occupation, control or responsibility, that they form the naming authority.

20 **MR McAVOY SC:** And there's a geographical place names advisory panel appointed by the Minister.

**MR SANDY:** Yes, there is.

**MR McAVOY SC:** That is the Minister for Transport and Planning?

25 **MR SANDY:** It's the Minister for Planning.

**MR McAVOY SC:** Planning. Are there any First Peoples on that panel?

30 **MR SANDY:** Not currently.

**MR McAVOY SC:** When was the last time a first person - there were First People on that panel?

35 **MR SANDY:** 2020, I believe.

**MR McAVOY SC:** 2020. And I think that that person was Mr Paul Paton.

40 **MR SANDY:** I believe there might have been two, but Mr Paul Paton was one of those.

**MR McAVOY SC:** When he was replaced, do you know -

45 **MR SANDY:** Well, let me stop you, if I may. At the time in 2020 when Mr Paton's term expired, panel members were not replaced.

**MR McAVOY SC:** So there have been no replacement of the panel members, the position in which Mr Paton -

**MR SANDY:** Not at this - not at this moment, no.

**MR McAVOY SC:** Okay. Now, I just have a short observation to make and -

5

**COMMISSIONER LOVETT:** 10 years celebrating Indigenous languages and we don't have anybody in 2020, nobody represented to be able to help to assist and enable.

10 **MR SANDY:** It's not quite that simple. So the panel is put in place to investigate naming matters.

**COMMISSIONER LOVETT:** Yes.

15 **MR SANDY:** As they come up. In terms of the Decade of Indigenous Languages, we take a different approach to that. We - we don't rely on the panel, so our First Peoples place naming officer is responsible for - for leading that work, and he's working closely with our department's First Peoples determining and reform group, and we - we're doing things differently to what we did in 2019 when it was  
20 the Indigenous - the international year of Indigenous language.

Predominantly in 2019, myself and others in the team, we didn't fully understand the engagement needed with First Peoples, and so our approach was to create a series of initiatives, some of which were First Peoples-led and some were not. We  
25 understand really it should be First Peoples leading these, so our approach is to engage with them rather than us creating the initiatives, engage with them and then support them in whatever initiatives they believe they need to take.

30 **COMMISSIONER LOVETT:** So I mean, it is still a junior role within the department or within your group. I guess what I am trying to get at there is nobody on that ministerial - was it ministerial-appointed?

**MR SANDY:** It is ministerial-appointed.

35 **COMMISSIONER LOVETT:** Yes. And no Aboriginal voices on there since 2020.

**MR SANDY:** Because none have been appointed since then.

40 **COMMISSIONER LOVETT:** Do you see that as an issue?

**MR SANDY:** It would be an issue if we'd needed to use the panel, but the panel has done its work, the last that it was called, and should we need to appoint a new panel then we would appoint people -

45

**COMMISSIONER LOVETT:** No panel members exist anymore?

**MR SANDY:** There are four panel members that exist.

**COMMISSIONER LOVETT:** Right now.

5 **MR SANDY:** Right now.

**COMMISSIONER LOVETT:** But no First Nations people.

**MR SANDY:** No First Nations.

10

**COMMISSIONER LOVETT:** You have determined there is no First Nations voice needed?

**MR SANDY:** That is not quite -

15

**COMMISSIONER LOVETT:** I don't understand what you're saying, though. It's sounding a bit vague to me, which is why I am questioning -

**MR SANDY:** It's sounding a bit vague because we went through a process to try to appoint some more people to the panel.

20

**COMMISSIONER LOVETT:** Yes.

**MR SANDY:** And we weren't able to appoint them, and the Government has made a review of those types of panels and is in the process of removing some of those, including the geographic place names advisory panel. However, that doesn't prevent the Minister from appointing committees to investigate naming matters.

25

**MR McAVOY SC:** If I might, Commissioner Lovett. The panel itself is drawn from to populate committees to then do particular tasks?

30

**MR SANDY:** That's correct.

**MR McAVOY SC:** It's not the case that the panel sits full time?

35

**MR SANDY:** That's correct.

**MR McAVOY SC:** And who was the relevant minister at the time, the - Mr Paton's term expired?

40

**MR SANDY:** So I believe it would have been - Minister for Planning would have been Minister Wynne at the time.

**MR McAVOY SC:** Now, unless the Commissioners have some further questions about that panel and that process, I understand that there's a lot more detail that we could discuss with this witness in relation to that, but I am also conscious of the

45

time. Surveyor-General, you've, at the request of the Commission, prepared some slide presentations with respect to the Coranderrk and Lake Condah reserves.

**MR SANDY:** Yes, I have.

5

**MR McAVOY SC:** Those PowerPoint presentations are in the Commissioners' material. Given our time restrictions today, I don't propose to take you through them as I had, but I can indicate that the process of identifying the land dealings with respect to those particular missions is very insightful in terms of the way in which First People's reserve lands are dealt with, and you would agree that, in each case, part of the land that was set aside was ultimately granted in part to non-Aboriginal returned servicemen?

10

**MR SANDY:** In the Lake Condah case, yes.

15

**MR McAVOY SC:** Not in both cases?

**MR SANDY:** I didn't recall seeing any soldier settlement in the Coranderrk land.

20

**MR McAVOY SC:** Commissioners, I would encourage you to take some time to review the slides at a convenient time. I don't intend to take the witness through them now. Those are my questions of this witness. Unless the Commissioners have any other questions, I propose to sit down.

25

**CHAIR:** A lot of material that we haven't got (indistinct) when we got the material. So it's important that we check the pieces we wish to. And I would suggest that relating to the Coranderrk one, the reference, we would want to do so?

30

**MR McAVOY SC:** It may be possible, Chair, to direct some further questions to the Surveyor-General in writing for response if there is anything that arises from the material.

35

**MR SANDY:** Happy to answer any questions in relation to it either now or after.

**CHAIR:** Thank you, you have been of assistance.

40

**COMMISSIONER LOVETT:** Anything further you would like to say you haven't been able to say today?

40

**MR SANDY:** No, only in closing that I thank the Commission for the invitation to come and talk to you. I - I reiterate the words of my apology and my - my opening statements, and I am looking forward to the recommendations of the Commission, and I will do anything I - I need to assist you in your inquiry.

45

**MR McAVOY SC:** I understand that my learned friend Mr Star has one matter of clarification he would like to add.

**MR STAR KC:** For the assistance of the Commission, I would want to clarify something for the committee if the Commission wanted that clarification because I am not sure if it was clear enough what he was saying if it was what  
5 Commissioner Lovett was interested in, I could clarify that with the witness.

**COMMISSIONER LOVETT:** Thank you, I understand what he was saying now.

10 **MR STAR KC:** Thank you, Commissioner.

**COMMISSIONER LOVETT:** I have two minor things, sorry, data sovereignty, your department is committed to under the framework transferring data back to Traditional Owners, what are you doing about that, if anything?  
15

**MR SANDY:** The first case of that is Budj Bim and some of the work that - we were involved in some of that. I think it's a good model for data sovereignty across Victoria, but, you know, that is the start of a journey.

20 **COMMISSIONER LOVETT:** One other thing was, when was the last time the Acts that you were governed by were updated?

**MR SANDY:** The three main Acts that I work under are the Surveying Act which was 2004.  
25

**COMMISSIONER LOVETT:** Yes.

**MR SANDY:** The Geographic Place Names Act which was 1998, and the Surveyor Coordination Act which was 1958.  
30

**COMMISSIONER LOVETT:** And when - thanks for that. The question is, though, when were they last updated? The recency of the updates, the last couple of years, have they been updated?

35 **MR SANDY:** So the Surveying Act was updated on 1 March 2023. In terms of the other two, I couldn't tell you the exact dates when they were updated.

**COMMISSIONER LOVETT:** And any - any reference to Traditional Owners or Aboriginal Victorians in that 2023 update?  
40

**MR SANDY:** No -

**COMMISSIONER LOVETT:** Given the government's commitment to self-determination on a pathway to treaty and what not?  
45

**MR SANDY:** I don't believe so. The updates related to the passing of a Commonwealth legislation.

**COMMISSIONER LOVETT:** That could have been an opportunistic time to make some further additions to that Act.

5 **MR SANDY:** We - we were not given that opportunity.

**COMMISSIONER LOVETT:** Thanks.

10 **MR McAVOY SC:** Nothing arising, Chair. The witness might be excused.

**MR SANDY:** Thank you, Commissioners.

**CHAIR:** You want to keep going?

15 **MR McAVOY SC:** Yes, Ms McLeod is taking the next witness, witnesses, which are the panel of - in relation to water. If they might have a moment just to assemble themselves, thank you.

20 **CHAIR:** Yes.

**COMMISSIONER LOVETT:** Thanks very much. Surveyor-General, thank you.

**<THE HEARING ADJOURNED AT 3.02 PM**

25 **<THE HEARING RESUMED AT 3.05 PM**

**MS McLEOD SC:** Thank you, Chair. I appear with this panel session with Ms Weinberg. The panel we have this afternoon is Dr Katie O'Bryan - sorry, it's slightly out of order as I go along the line - Dr Erin O'Donnell, Will Mooney and  
30 Karmen Jobling. And I should ask how you would like to be referred to in this session. Would you prefer Doctors, or first names, because witnesses have chosen both, so I am in your hands.

35 **MS JOBLING:** First name for me.

**MS McLEOD SC:** So, Chair, I will first go along the line. And then as this is the first panel session dealing directly with water, we will commence with an explanation around water and the significance of water. So can I ask each of you starting with you, Karmen, along the line in reverse order, do you undertake to tell  
40 the truth today to this Commission to the best of your ability?

**MS JOBLING:** Absolutely.

45 **MS McLEOD SC:** And you, Will?

**MR MOONEY:** Yes, I do.

**MS McLEOD SC:** You, Katie, and you, Erin.

**DR O'BRYAN:** Yes.

5 **DR O'DONNELL:** Yes.

**MS McLEOD SC:** Thank you. Commissioners, this hearing block is focused on land injustice as we have heard and the history of dispossession of land, theft and loss of economic benefit. Today's panel is the first time the Commission is  
10 considering water and water rights. The panel are aware that we will be calling Traditional Owners and a panel later in this hearing block, and we will hear evidence on Country from Elders and those with cultural authority to speak for Country and to hear directly from First Peoples about the significance of water.

15 Commissioners, we acknowledge in this procession the enduring spiritual cultural connections to waters of First Peoples and their cultural authority to speak for water, rivers and river Country. Can I invite each of you to introduce yourselves and your work. Commencing with you, Karmen.

20 **MS JOBLING:** Well, first I'd like to acknowledge that we are meeting on the unceded land of the Wurundjeri people, pay our respects to everyone here today and viewing online. My name's Karmen. I'm the executive officer of the Murray Lower Darling Rivers Indigenous Nations.

25 **MR MOONEY:** Hi. My name's Will. I work for the Murray Lower Darling Rivers Indigenous Nations as well. Likewise, I would like to acknowledge Traditional Owners, particularly everyone viewing online. I am/project manager at MLDRIN. I have worked in various roles collaborating with First Nations around water justice in the southern Lower Darling Basin.

30

**MS McLEOD SC:** Katie.

**DR O'BRYAN:** I am Dr Katie O'Bryan. I'm with Monash University, and I too would like to pay my respects to the - to the Wurundjeri Woi Wurrung people.  
35 And I have been researching Indigenous water rights for a number of years, following about a decade working in Native Title.

**DR O'DONNELL:** My name's Erin O'Donnell. I am a settler heritage person speaking to you on the lands of the Wurundjeri Woi Wurrung, and I pay my  
40 respect to Elders past and present and everyone joining us online. I have been working in the water space for over 20 years, and more recently in the last five or six years on Indigenous water injustice. I'm a lecturer in the University of Melbourne and I'm also a member of the Birrarung Council, although I am not wearing that hat today.

45

**MS McLEOD SC:** Thank you. And, Katie and Erin, you are two of a number of authors of a document called Caring for Country: Overcoming the Twin Legacies

of Terra Nullius and Aqua Nullius, that we'll come to sometime this afternoon. Thank you. Commissioners, water exists in, on, under and above the land. It exists as freshwater and salt, in the soil and in the atmosphere, in cycles of scarcity and abundance. It is vital to the survival of all species, and we acknowledge the  
 5 thousands of years of knowledge of adaptation to First Peoples and other species in balance with the seasons. Water is also revered in many forms as the expression of spirit or the divine and recognised in some limited way in this state as living  
 ecological entities attracting legal rights. So can I ask the panel then to start here  
 10 with the discussion around the recognition of these notions and the discussion of the declaration known as the Echuca Declaration.

And if I can start with you, Karmen and Will. What is the Echuca Declaration and how was it created? Perhaps if we could bring it up on the screen.

15 **MR MOONEY:** Commissioners, thanks for the opportunity to discuss this really important piece of work which MLDRIN led in 2007. So the Echuca Declaration is a foundational and visionary document that directly contends with and confronts  
 the settler state's assertion over control of water and the dispossession of First  
 Nations from control and maintaining responsibilities and obligations relating to  
 20 water. As the name suggests, the declaration was made in the town of Echuca on the Murray - banks of the Murray River in northern Victoria. In 2007, a number of Traditional Owner groups from the southern part of the Murray-Darling Basin came together to discuss, I guess in the wake of the millennium droughts, during  
 the millennium droughts when the worse impacts of water allocation was being  
 25 faced directly by First Nations.

**MS McLEOD SC:** When were those years, Will?

30 **MR MOONEY:** The millennium drought, as the name suggests, was from the early 2000s, really until about 2010, 2011 when the first rains really came and broke that drought. I suppose that time exacerbated the impacts that the things people have been experiencing as a result of the overallocation of water and the Crown's assertion of control over water. The Echuca Declaration contests the  
 Crown's assertion of control and ownership of water. It states that the Crown has  
 35 illegitimately asserted its control, and it seeks to reimagine rivers and water as a living being to which First Nations have obligations and responsibilities through  
 lore and custom to care for. And -

40 **MS McLEOD SC:** I will just pause you there. I don't want to miss the detail. I will check if we can get that up on the screen so others can follow.

45 **MR MOONEY:** So it contains a preamble that I suppose spells out the legacy of the colonial settler state in position of law over First Nations water rights. And then it also lays out a platform to, I guess, address and rectify that situation through a mechanism which the declaration defines as cultural flows. And cultural flows are water entitlements that are legally and beneficially owned by First



Nations of an adequate quality and quantity to improve the conditions of life of First Nations in all aspects.

5 **MS McLEOD SC:** Sorry, let me pause you there. Can we get a copy of the Echuca Declaration up on the screen, please. So, sorry, just breaking it down, Will, so we capture the detail of it. You said the preamble sets out some important foundational concepts including this notion we're familiar with, these discussions around land that sovereignty was never ceded.

10 **MR MOONEY:** That's right. So the preamble -

**MS McLEOD SC:** If we can zoom into the top half of the page.

15 **MR MOONEY:** I guess it really describes the situation that the authors could observe at that time, which was a situation whereby the Commonwealth of Australia and the States had asserted - I think it uses the terminology of a competing sovereignty over water. And it rejects that assertion by the colonial States. And then it goes on to map out a series of mechanisms whereby that illegitimate assertion could be addressed, I suppose, or overcome to some extent.  
20 And then it contains a number of articles that really, in quite a lot of detail, specify what cultural flows are. So it establishes the definition of cultural flows. Then it talks through how cultural flows should be delivered, how volumes and quantities required should be developed. And MLDRIN, I suppose, to bring this up to a contemporary conversation, we still regularly go back to that document. Because it  
25 was - a lot of forethought went into its preparation.

**MS McLEOD SC:** Just to frame this, MLDRIN represents Traditional Owners from here.

30 **MR MOONEY:** Yep. So MLDRIN has representative members from the southern Murray-Darling Basin. So again, this is another artefact of settler state law, but the Murray-Darling Basin is broken up into a southern and northern section. So the southern section runs from around about the Lachlan River in New South Wales into Victoria into South Australia where the Murray enters the ocean  
35 on Ngarrindjeri country.

**MS McLEOD SC:** And the number of TOs who are involved in MLDRIN?

40 **MR MOONEY:** I might refer to Karmen to give us a bit - an updated summary on membership.

**MS JOBLING:** Yes. So we have 20 representative members from 20 nations. Each nation can have two reps.

45 **MS McLEOD SC:** And this document, what was the motivation for this document?

**MR MOONEY:** I think you could look at this document as an intervention in the water space. In 2007, there was a lot happening. Of course, we had - we were in the grip of the millennium drought. It was also the year that the Commonwealth Water Act was brought into law. There was a live national debate around water and around the state of the Murray-Darling Basin and the impact of drought and the impact of water extraction. First Nations, I understand, needed to intervene in that space. There were also discussions around the development of a Murray-Darling plan. So it was the first time that the Commonwealth had asserted its authority over water management. It was a strategic intervention in the public discourse about - about water. It was really an assertion of First Nations rights, substantive rights to control, own and manage water on their Country.

**MS McLEOD SC:** So you mentioned the term "cultural flows" and the need to determine cultural flows in this document. What is the difference between environmental flows and cultural flows? Because environmental flows, as I understand, can have a cultural benefit.

**MR MOONEY:** That's correct. So I think the context is important - is illuminating here, because at the time when the Echuca Declaration was developed, there was a discussion about a need for environmental flows to return water from consumptive use to the Commonwealth environmental water holder or to a mechanism where it could be managed for environmental outcomes. And I believe that First Nations at the time recognised that that was important but they also recognised that there was a self-determining right for nations to - nations needed to be able to also control how water is managed and used on Country.

So cultural flow is fundamentally different because it is grounded in the - self-determines of nations to use that water as they see fit, and to use that water to improve the conditions of their life as well as to care for Country. And it's - I suppose the declaration makes it very clear it is an inherent sovereign right of those nations to have that control and to, I suppose, contest the Crown's assertion of control of overall water.

**MS McLEOD SC:** We might just zoom out for the full document again, please. The document or the declaration also makes reference to - the actions of the Federal and State Governments have not taken proper care of the Country and made all of the land and water sick and unhealthy, that many of the plants and animals have died out and have never returned, and have failed to properly care for Country and not have allowed us on to our lands and waters, denying our basic human rights in our sacred places. So do you want to both say something about that and the environmental stewardship or responsibility and rights attached to that of First Nations people for the environment?

**MR MOONEY:** I will make a passing comment then open it up to others, I think. Yes, I think that is one of the foundational elements of the declaration, is that recognition that not only has the settler state imposed its ownership and control over water, but it's done a really poor job for caring for waterways and caring for

Country in that intervene is 200 or so years. So, you know, it's asserted control over waterways or managed or mismanaged waterways to the extent that - I think it uses the terminology of ecological collapse, and the First Nations have been - borne some of the worst impacts of that environmental degradation. This is a critical part of the declaration and the platform to, I suppose, reassert that right.

**MS McLEOD SC:** Karmen, do you want to add anything to that?

**MS JOBLING:** That covers pretty much that plan.

**MS McLEOD SC:** So, Erin and Katie, can I ask you to reflect on the declaration initially and then more broadly this concept I want to move to of acknowledging rivers, waterways, as having legal personage or recognition under law.

**DR O'DONNELL:** So I think what the Echuca Declaration sets out is the enduring legacy of aqua nullius which is the assumption by the settler state they could assume all authority from the control and care of water. And in doing so, since British invasion, what has occurred as the imposition of settler state sciences and ways of knowing, settler state frameworks for water extraction. The Water Act 1989 constructs water solely as a resource for human domination and exploitation. This sits completely at odds with the Echuca Declaration and what cultural flows mean to Aboriginal people and to the notion of water as a living entity. So what we are - what we are now witnessing is over two centuries of mismanagement which is giving that ecological collapse, but it stems from the assumption, the theft of the authority to speak for water.

**MS McLEOD SC:** Just to explain the history of this. We have had considerable focus in this hearing block on injustice in respect of land and the illegal seizure of land by the squatters, the commutation of that seizure into Crown land and Crown claims, so how is water treated alongside land, or was it even considered initially?

**DR O'DONNELL:** So I think we will draw here - Katie can jump in as well if you need to - we will draw here on the work particularly of Lana Hartwig and Sue Jackson who have documented these waves of dispossession. But when it comes to water you can see dispossession both as coupled to land and the land theft, but also as decoupled from land. So aqua nullius, and I will acknowledge both Katie and Virginia Marshall as the people who were the early users and coiners of this term, aqua nullius stemmed from terra nullius and the belief that land belonged to no one and therefore water belonged to no one and available for the British to impose those laws.

That was compounded by the land theft and the specific ways in which land passed into private ownership and there are multiple terms of that, both private ownership and, of course, Crown land, because water went beneath land. So when Aboriginal peoples had their lands stolen, the water went with that. In 2004, so a few years before the Echuca Declaration, all the states and territories and the Commonwealth Government signed up to the National Water Initiative. I should

pause there and acknowledge some states signed up later. But there was a national water initiative agreed to in 2004 which formally committed to decoupling land and water. This is a process that had been underway for some time and was now formalised as government policy. That constituted, really, the second round of  
 5 dispossession, because you can see the relationship between the growth in formal recognition of Traditional Owner land rights, and then this move to decouple land and water. They occurred at about the same time and it meant that as land rights were returned, water didn't necessarily flow with this. It did in some instances, particularly in New South Wales, but not in Victoria.

10

**MS McLEOD SC:** So to use the old language, "riparian", when you are talking about water flows you are talking about above groundwater?

**DR O'DONNELL:** Both above and below, so land ownership in Victoria  
 15 included the ability to drill for groundwater and to access that, as well as to access water from creeks or rivers. Licences have been required now for over 100 years to access water for commercial uses for irrigation purposes both from aquifers and from surface water. But land ownership was always part of that; you couldn't get a licence unless you had the land to use it on.

20

**MS McLEOD SC:** And for domestic use, if you were the owner of the land or occupier of the land, which does not recognise First Nations occupation, but if you are an occupier of land you can take for domestic purposes.

**DR O'DONNELL:** Yes. Domestic and, I should note, stock purposes. There has always been a commercial use associated with the domestic and stock requirements.

**MS McLEOD SC:** We will come back to the legislation in a moment. Katie, can I  
 30 ask you if there is anything you want to add about this notion of aqua nullius?

**DR O'BRYAN:** The only thing I would add is that it - just building on what Erin said, it is almost like a double dispossession, really, the water rights going with the land when it is dispossessed the first time around. When land comes back, it  
 35 comes back without the water so it is a double dispossession.

**DR O'DONNELL:** Just on that, the triple dispossession, which is now the case because of the water market because the cost of water is so enormously high that it puts it out of the reach of most Aboriginal organisations.

40

**MS McLEOD SC:** Will, Karmen, was there anything you wanted to add in reflection of that, the notion of aqua nullius?

**MR MOONEY:** Yeah. I think we may get to it later on, but certainly the water  
 45 market in the southern Murray-Darling Basin is perhaps the most difficult, if not one of the most developed and mature in the world. I believe it is in the order of 30 billion the value of water entitlements in the southern basin, so a huge asset and

huge asset base and a huge wealth that has been accumulated through that process that Erin and Katie have described.

5 **MS McLEOD SC:** Erin, can I come back to you. You are the author of a published report - I think it is published - in terms of repairing our rivers; has that now published?

**DR O'DONNELL:** This would be the book chapter, I think, yes.

10 **MS McLEOD SC:** Could you explain to us what does it mean to give water legal personhood and what are the elements of that recognition?

15 **DR O'DONNELL:** So this is a global movement. Water has been recognised as having personhood in various ways. There are rivers and wetland and lagoons and lakes in different parts of the world where water has received personhood or recognition as a living entity or a combination of both. So personhood is a little bit similar to a corporation. It is the idea that you have the power to hold rights and duties in law. So what we understand by that is you can go to court and sue people. You can also be sued. So there are now rivers like the Whanganui, for 20 instance, that has this legal personhood that enables them to do that. There are other rivers like the Birrarung which are recognised as living entities but not legal persons. So in the case of the Birrarung, that means the settler law recognises something that Wurundjeri people have known for millennia, that the river is a living being but it doesn't confer that living being with any specific settler legal 25 rights. So the Birrarung does not have the right to sue people under its current legislation. It is not a corporate entity; it doesn't have legal personhood. But it is alive, and in doing so, that presents a very profound challenge to the Water Act and its construction of water as a resource.

30 **MS McLEOD SC:** Thanks, we might just take the declaration down now for a moment. The Birrarung is otherwise known as the Yarra River that flows through upper regions of Melbourne through the metropolitan and down into the bay, and it's a river that many Melburnians are very familiar with. So what does it mean that it has been recognised in a limited way as having legal personhood but not 35 any particular rights? What does that mean in practice?

40 **DR O'DONNELL:** So, yeah, I guess in practice it means - it's almost more of a symbolic recognition than a significant legal change in that respect. It would not be possible for people to rely on the Birrarung legislation in order to sue the river, for instance. There is no legal entity there for them to sue. But - and this gets back to my previous comment - in acknowledging that the river is alive, and it's the river and its lands are alive. Now "lands" has a very specific definition under the Act. It refers to specific gazetted lands. But in doing so it is starting to recognise the river more holistically. It is seeing the river in situ. It is seeing the river as 45 connected to its lands and dependent on that relationship. Aunty Margaret Gardiner, who was a member of the Birrarung Council, reminded us that the river needs its lands. And this is what that legislation starts to lay out. So it doesn't

immediately create new rights and powers for the river, but it does say the mode of caring for, of knowing this river, must change, because it is now alive. And what that does is draw all of the various government agencies, the local governments, the water authorities, Parks Victoria, everyone who's got

5 responsibilities under this legislation for the river, it draws them into a different relationship with this river in which the river is alive and they can start to think about a relationship of reciprocity and obligation, rather than one of exploitation and domination.

10 **MS McLEOD SC:** You are referring to the Yarra River Protection (Wilip-gin Birrarung murrn) Act, a Victorian statute.

**DR O'DONNELL:** Yes.

15 **MS McLEOD SC:** What is the significance of the protections under that Act if there is a development proposal that impacts on the river and riverlands? Can somebody nominate as the Lorax to speak for that river, or do we not have that protection in place?

20 **DR O'DONNELL:** I will acknowledge I am a member of the Birrarung Council. I am not going to speak to, I guess, the actions of the council. But we have been appointed as the voice of the Birrarung. So in certain circumstances we are able to speak for the river and ensure that the river's voice is heard and there are a number of legislative provisions within that piece of legislation that enable us to do that,

25 one of which requires us to advocate for the interests of the river. There will always be complexity about that, because it is contingent on resourcing. We are a very small organisation.

**MS McLEOD SC:** So we see other models for the legal recognition, for example,

30 Whanganui River, Aotearoa, New Zealand, the Ganges and another river in India, where these protections are extended beyond the current Victorian protections for the Yarra Birrarung. What is the next step in terms of Victorian protections? We will come back to reforms towards the end, but I just want to capture this while we are on this topic now. And perhaps if you are on the council, you may not be able

35 to speak about this, but others may want to jump in as well.

**DR O'DONNELL:** I think - yeah, the next step - the major flaw that I see, and I say this as a researcher, in the Birrarung legislation, is that - there is probably many flaws, but the one that I see particularly is the lack of connection into the

40 Water Act. So if we were to see a next step for this piece of legislation or the next reform for it, we need to bridge that gap. At the moment, the Birrarung Council is not responsible for any of the water that flows into the river; the Victorian Environmental Water Holder continues to hold the water on behalf of the environment of the river. The Victorian Environmental Water Holder is not a

45 responsible public entity under the Birrarung legislation, so the Birrarung Council has no ability to work with that entity or to hold that entity to account, and they

don't have to consider the Yarra River protection principles or the fact that the Birrarung is a living entity.

5 I am not for a moment suggesting that they don't do those things, but they  
 certainly don't have to. There is - this is a problem which is a global problem.  
 There is only one river anywhere in the world that has been recognised with any  
 form of legal rights that also has those rights to water and flow attached with that,  
 and that is a river in Ecuador. Every single other river and lake that has received  
 10 this kind of recognition does not have any water rights, and that is including the  
 Birrarung in the sense that those rights are held by a completely separate  
 organisation, so I would see bridging that gap as crucial.

15 **MS McLEOD SC:** Am I right that in Ecuador there's constitutional protections of  
 the environment?

**DR O'DONNELL:** Yes, the Ecuadorian case emerged from the constitutional  
 recognition that all rivers have rights. So it is an interpretation of the court to say  
 they therefore must have minimum flows in the river.

20 **MS McLEOD SC:** Confirmed by the Inter-American court.

**DR O'DONNELL:** Yes.

25 **MS McLEOD SC:** So, others on the panel, reflecting on that discussion around  
 legal personhood and whether this is a useful mechanism to protect waterways or  
 the environment of the waterways or whether it is another colonial construct, is  
 there a value here in pursuing this sort of recognition?

30 **MS JOBLING:** I think just reflecting on some of my time with the Wurundjeri  
 Corporation in the development of the Act and then seeing the Birrarung Council  
 sort of hit its stride, another gap for the corporation was it's a limited amount of  
 land, as Erin was talking about. So it's definitely an understanding it would be  
 preferable it would not be restricted as gazetted land; it should be expanded. I  
 think, you know, it is really the first case in the State where you have got  
 35 Traditional Owners who have got a legislated seat having a say with other  
 stakeholders where a sense of Traditional Owners are there as rights holders  
 amongst those stakeholders so that is being constructive. I'd also say it depends on  
 governance, really. Wurundjeri was able to negotiate membership appointed from  
 its own ranks and not from being ministerially pointed so Wurundjeri Corporation  
 40 has complete autonomy as to who it puts forward and the minister signs off on  
 that. And another thing - sorry, Birrarung at the minute. Another thing that was  
 quite helpful is the corporation had words with the then Planning Minister to  
 ensure the Birrarung Council sat separately from the Water Corporation, from  
 Melbourne Water. Originally was going to be embedded within that framework so  
 45 it would not have had that independent role. So I think it really depends on the  
 governance arrangements and what individual nations and Traditional Owners  
 would like for their waterways. But in my experience with both the (indistinct)

and Wurundjeri and also with MLDRIN, there is an interest in seeing living entities progress legally, yes.

5 **MS McLEOD SC:** Just staying on that theme that you have just raised, is there a recognition at the Commonwealth and State level, just focusing on Victoria at the moment, although of course Murray-Darling crosses three other States, is there a recognition of the vital contributions of First Nations peoples make to those board and governance arrangements? Do you have any comment about their participation?

10 **MS JOBLING:** I - I would say that First Nations being appointed into colonial settler constructs, and they're appointed by Ministers, more or less, so we have many really talented people in those spaces that are building careers, which is, you know, a great contribution towards implementing decision making and what have  
15 you that has not necessarily resulted in - has not resulted in increasing water ownership in the State of Victoria. We have an additional board member who will be First Nations appointed to the Murray-Darling Basin authority board courtesy of the Restoring Our Rivers amendment. Again, they are appointed by a  
20 government process, not from a Traditional Owner or collective nation-based process, so First Peoples methodologies for electing their leaders into positions are not necessarily upheld in that space, and the Birrarung Council is pretty much the only thing I can think of that captures that.

25 **MS McLEOD SC:** Are there qualification requirements to be appointed to these boards in terms of cultural authority or hydrology, aquaculture, engineering, any environmental, ecological qualifications?

30 **MS JOBLING:** With the appointment of the Murray-Darling Basin authority, it is for someone who is a First Nations person from the Basin who has good knowledge of Indigenous issues. So that is an example of where that is a requirement. There are other boards that don't require any particular Indigenous knowledge or skills, the CALP Act -

35 **MS McLEOD SC:** To clarify - sorry.

**DR O'BRYAN:** Currently in the CALP Act or the Water Act, there is no requirement for Indigenous knowledge to be one of the bases for appointment.

40 **MS McLEOD SC:** Yes. So I was just going to ask, is that a criteria that only applied to the Indigenous appointment or is that a requirement for all appointees to those boards?

45 **MR MOONEY:** For the MDBA board, it is one of the desirable or one of the required skill sets on that - that is the basis on which they would appoint what has been one but soon to be two First Nations board members to the Murray-Darling Basin Authority.



**MS McLEOD SC:** All right, Katie.

**DR O'BRYAN:** That was all I was going to say there is no specific requirement in the Victorian legislation.

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**COMMISSIONER LOVETT:** Can we just be mindful when we are talking about acronyms when people are tuning and listening to this particular topic. I think there was a word (indistinct) before. So just clarifying when you're talking about CALP Act, a lot of mob don't know.

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**DR O'BRYAN:** Catchment and Land Protection Act.

**MS McLEOD SC:** Coming back to sovereignty of waterways and river catchments and subsoil or groundwater, can I invite each of you to reflect on this notion that sovereignty was not ceded and the three-stage dispossession, assuming we only have got three, at least the three-stage dispossession that's been remarked upon by Erin. What does it mean to today's position and your negotiations with government around sovereign claims to water of First Nations peoples?

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**MR MOONEY:** Happy to start. Please, Karmen, go ahead.

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**MS JOBLING:** If that was recognised, we would not be in the situation that the State and Federal Government are in now. It is not an historical concept. This is not something that happened 200 years ago or 100 years ago. It happened yesterday, it happens today, it will happen into the future until we have legal instruments that are acknowledging First Peoples' first rights. And every day the water framework in the State of Victoria and in other jurisdictions does not change to acknowledge that, it is an ongoing dispossession.

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**MR MOONEY:** And it is probably fair to say that as the water market matures as there are new entrants into the water market and the price of water increases in Victoria, the opportunities for First Nations to realise their substantive rights to water ownership are more and more difficult to obtain - to attain, because as Erin mentioned before, it is increasingly difficult to enter the water market. What that looks like now, the Victorian Government has made a very clear statement that it does not support reallocation through the water market. In practice, that means purchasing water entitlements from willing sellers to recover for the environment or for First Nations ownership. So one of the only mechanisms available within the northern part of Victoria in the Murray-Darling Basin where all systems are fully allocated, where all water is owned by someone, one of the only mechanisms to have an allocation to recognise First Nations sovereign rights is purchasing water from willing sellers. The Victorian Government has taken a very strong position against that mechanism both in terms of recovering water for environmental purposes, but they've also specified in the Water is Life policy document that whilst they may - I think they talk about a framework for supporting that kind of reallocation, they have specifically stated in that document that there would not be a program of direct reinvestment in water allocation. So

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the historic - the historic injustice that continues to be perpetuated for us in negotiations with the government comes back to the fact that these systems are fully allocated and the only way to effect a way to address that dispossession is through entry into the water market.

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**MS McLEOD SC:** I want to ask you following on from that, Erin and Katie, some questions around the final report Cultural Water for Cultural Economies and the elements that you talk about in that report, elements that point to sovereignty. What is meant by self-determination in that context - in that context, what is meant by free informed consent, those sort of issues. Are you happy to speak to that paper and the issues you raise there around sovereignty?

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**DR O'DONNELL:** So what I will say about the Cultural Water for Cultural Economies report is that this is a report which is technically authored by me and by Katie and by another researcher Lee Godden. This is a report that was undertaken in full partnership with MLDRIN and in reliance on the participation and expertise and ongoing leadership of Traditional Owners from 20 different Traditional Owner organisations. So this is not a report that we did on our own and this is not a report we could have done on our own.

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So in acknowledging that then, whether we think about this question of sovereignty, what became very clear during this report, and it was also articulated in the National Cultural Flows Research Project, which was that water rights are very, very separate from water sovereignty. So water sovereignty exists at a foundational level. When we say that Country has never been ceded, that is what we are talking about. There was the foundations on which the settler state has built its water laws are rotten. So when we then link it into this concept of water rights, what we are really talking about in that instance is, well, how can we start to make some change within a settler state system, so there is significant resistance from some Traditional Owners to the idea of receiving water rights on two grounds: one, that they don't want this to be seen as an acceptance of an illegitimate water law framework or any kind of ceding of their sovereignty. So there is that element. And then the other is that the water rights themselves are extractive in nature, so that also led to some very difficult conversations around how Traditional Owners can hold those water rights without becoming, in the words, of Aunty Denise Lovett, "black colonisers" so it is very uncomfortable.

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**MS McLEOD SC:** Can you just explain that extractive meaning removing water from the water body?

**DR O'DONNELL:** These rights are use rights for the water. So the Water Act sets up water as a resource to be used by human beings. It pays no attention to the inherent rights of water. It imposes some minimal limits and protections around ecosystem health, but those are very minimal and certainly haven't prevented the decline in ecosystem health that we have observed. The use rights - there are multiple different kinds, one of which is called a section 51 licence. And at section 51 of the Water Act 1989, and this is often termed a take and use licence, and so

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that is what it is designed to enable is for people to pump the water out of a river or aquifer and use it on land somewhere else.

5 So some Traditional Owner groups have been successful, though I will note it is taken them an inordinate time and effort to get the state to grant them some section 51 licences they have chosen to leave that water in stream for now. So it is performing a function in stream, so it is caring for Country within stream, and that is very important. They are also investigating opportunities to use that water for almost any number of purposes on land, provided that they can work through that in a way that is consistent with their own laws and obligations to Country. So that is underway, but fundamentally these rights are about extraction, and so that is what has been sitting uncomfortably, both with Traditional Owners and I think it has been a challenge for the settler state in allocating these licences, knowing that Traditional Owners plan on leaving them in stream. There's - yeah, there are some challenges around that.

**MS McLEOD SC:** So key principles you set out in that report include sovereignty, as you have described it, self-determination that water will be held in perpetuity by each individual nation to be used for any purpose as determined by each nation, setting their own priorities. Free, prior and informed consent and partnership, so that Traditional Owners and First Nations are rightholders and partners not stakeholders.

**DR O'DONNELL:** Yep. That reflects their status as political entities and I think this is - this is something that I've seen shift in the Victorian context or, I should say, begin to shift. But it is - the reason why Traditional Owners are very clear they are never stakeholders, because any engagement they are undertaking with the settler state is a political engagement. They are rights holders, they are exerting and asserting their rights in that forum. So they are not merely another community group or representative organisation or minority group that government or government agencies need to take into account.

**MS McLEOD SC:** Katie, is there anything that you wanted to add to that?

**DR O'BRYAN:** No, I think Erin has captured it really well.

**MS McLEOD SC:** We might pause now and go to some slides that you have prepared to help those following and the Commissioners understand how water is governed in this State. So I'm not sure who would like to step us through these slides or if you would both like to.

**DR O'DONNELL:** Yeah, I think we will take it in turns. We might move on to the next slide. So this is an Acknowledgment of Country. I like to include with this acknowledgment these lines from Ambelin Kwaymullina, a Palyku woman's poem, Living on Stolen Land. And she says:

"You are on Indigenous lands swimming in Indigenous waters and looking up at Indigenous skies."

5 And one thing we hear very consistently that is reflected in both the Cultural Water for Cultural Economies report and the statements from Traditional Owners in Water is Life is that all water is Aboriginal water. We will go over to the next slide. This is a statement that we have been talking about a lot today which is aqua nullius, and this idea that it is an erroneous assumption that water belonged to no one when the British invaded, and that this enabled the British to then assert their own authority over the governance of water. This is a false assumption. We know 10 this from the Mabo case. We know this as well because Aboriginal people have never ceded sovereignty, and the idea of aqua nullius was founded in that belief that their sovereignty did not exist. I will speak to section 7, I think, a bit later. Do you want to move on to the next slide or do you want me to cover it now?

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**DR O'BRYAN:** Up to you.

**DR O'DONNELL:** What I will say before I move on, then, this is obviously an historic decision and historic assumption by the British. You can see it being given 20 force and effect in contemporary water law in section 7 part 1 of the Victorian Water Act 1989. So that part of the Act - let me just -

**MS McLEOD SC:** We can bring that up on the screen.

25 **DR O'DONNELL:** If you can bring that up on the screen, that would be lovely. So section 7 part 1 says:

"The Crown has the right to the use, flow and control of all water in a waterway and all groundwater".

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And that is the contemporary expression of aqua nullius. This is not mere history; this is the very foundation on which the settler state legislation is built today.

**MS McLEOD SC:** Subsection (2) says:

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"The right of the Crown to the use, flow and control of all water is not diminished by various things including rights conferred to other people".

40 Right. That's section 7. We can take that down again, thank you. Back to the slides.

**DR O'DONNELL:** I think if we move to the next slide, that would be great.

45 **DR O'BRYAN:** Okay. I think this is me. Turning now to the United Nations Declaration on the rights of Indigenous people and references to water, there are essentially only two direct references to water. You will find those in articles 25 and 32. And article 25 is basically about maintaining relationships and upholding

responsibilities to Country including water for future generations. Article 32 is about - that brings in the concept of free, prior and informed consent for Indigenous peoples before approving projects affecting their lands, territories and other resources, and then it is actually subsection (2) which specifically refers to mineral water or other resources, and I think of what this makes clear is water is in fact, even in UNDRIP, is being seen as a resource, which is - it is a very Western Euro-centric view of water, and I think that's been evident from what is been said already today. Australia does support UNDRIP. It gave its support in April 2009, I believe. But it is very much lacking in implementation, certainly in our domestic law.

**MS McLEOD SC:** Just so those following who don't understand international law and its application in domestic context, does that mean that it is not given the force of law in Australia?

**DR O'BRYAN:** That's right, yes. That's - I was going to say, certainly Victorian water law or Victoria should be looking towards UNDRIP as a base minimum for how it should recognise Traditional Owner rights in legislation; it certainly doesn't at the moment.

**MS McLEOD SC:** Is it the view of the panellists that UNDRIP in respect of water, at least, should be implemented in domestic law?

**DR O'DONNELL:** Absolutely.

**MR MOONEY:** And we note that recent amendments to the water - Commonwealth Water Act required the Commonwealth to consider the United Nations Declaration on the Rights of Indigenous People in the upcoming review of the Commonwealth Water Act in 2027.

**DR O'DONNELL:** It is a really important foundation. And the fact it is been in international law since 2007 and we still haven't found ways to translate that into effect in Australia is appalling.

**MS McLEOD SC:** Just as a matter of curiosity, is UNDRIP or other international human rights instruments said to be the foundation for Commonwealth jurisdiction?

**DR O'DONNELL:** Can't speak to that one.

**MR MOONEY:** There's been a recent inquiry into the implementation of UNDRIP in the Commonwealth Parliament, and I believe there have been some really valuable findings from that inquiry that go to that matter as to whether the Commonwealth has authority to implement aspects of the declaration.

**MS McLEOD SC:** Next slide.

**DR O'BRYAN:** So just to give a very, you know, brief overview of the law in Victoria, obviously we've got - these are the two main Acts, the Water Act of 1989 and the Catchment and Land Protection Act which you heard referred to before as the CALP Act. So there's - I should start out by saying that prior to 2010, there  
 5 was absolutely nothing in the Water Act or Catchment and Land Protection Act about Traditional Owner water rights. Then in 2010, the Victorian Government enacted the Traditional Owner Settlement Act and, by virtue of that Act, we ended up with section 8A in the Water Act. And under that section, Traditional Owner groups with an agreement made under the Traditional Owner Settlement Act, they  
 10 can access and use water for personal, domestic and non-commercial communal needs from water sources to which there is public access in the area of their Settlement Act agreement.

And in fact, those section 8A rights there, they are very similar to the rights the  
 15 Traditional Owners would have anyway under section 8 as members of the public which are, as has been referred to earlier, domestic and stock purposes.

**MS McLEOD SC:** So - sorry, Commissioner.

20 **COMMISSIONER LOVETT:** What is the benefit, then?

**DR O'BRYAN:** Very little, I would suggest.

**DR O'DONNELL:** The lack of benefit can be observed by the fact that none of  
 25 the Traditional Owners who have those legal rights are using them.

**COMMISSIONER LOVETT:** Thanks.

**MS McLEOD SC:** So not only are the Traditional Owners who have those rights  
 30 not using them, but those who do not have the benefit of that recognition and registration have no avenue under the Water Act.

**DR O'BRYAN:** Limited to those with the Traditional Owner Settlement Act  
 35 agreement, yes.

**MS McLEOD SC:** Coming back to 8A which refers to the rights of domestic use by reason of occupation, that is taken, as I am understand it in practice, not to include First Nations peoples.

40 **DR O'DONNELL:** Unless they have those rights that are recognised under the Traditional Owner Settlement Act, yeah.

**MS McLEOD SC:** Independently. Thank you. So we are up to the next slide.

45 **DR O'BRYAN:** Well, there's - was going to say there are a few more aspects of it. There have been further amendments that was the 2010 amendment which introduced the very first expression of Traditional Owner rights to water. There

were amendments made in 2019 and the sorts of categories they fall into are up there on that slide for you. But there are four main ones there is the recognition of cultural values and uses of waterways; you find that in the purposes section. There is representation on various consultative committees. They are appointed by the  
 5 minister. They're ad hoc committees for specific purposes, for instance, to set - to establish sustainable water strategies. But, for example, the sustainable water strategies, they're done every 10 years, so there is quite limited role there. There has to be a minimum of one person on those consultative committees. It also brought in notification of specified Aboriginal parties. And specified Aboriginal  
 10 parties are either Native Title holders, Traditional Owner governance entities which is under the - a group with a Traditional Owner Settlement Act agreement, or it is a group which has been recognised under the Aboriginal Heritage Act as a representative Aboriginal party.

15 So basically what that means is its limited to only those Traditional Owner groups who have had formal legal recognition. And of course there are a number of - a number of Traditional Owner groups around Victoria that don't yet have that recognition, so that is another limiting factor there. The other one I just wanted to mention briefly is this last point: we have got this idea of consideration of  
 20 opportunities to provide for Aboriginal cultural values and uses of waterways. That is something that applies to the Victorian Environmental Water Holder, Water Corporations and sustainable water strategies. But if you unpack that, it is actually very aspirational, that phrase; it just says, "consider opportunities to provide for". It doesn't require that Aboriginal cultural values and uses be  
 25 provided for, merely that consideration be given to opportunities, so -

**COMMISSIONER HUNTER:** They can't be held to that consideration anybody, it is a consideration, right?

30 **DR O'DONNELL:** It is very easy to meet that standard I guess is the challenge. If you tried to challenge a decision maker in those circumstances all they would need to do is yes, we did in fact consider it and we decided not to.

**COMMISSIONER HUNTER:** Yes, okay.

35 **MS McLEOD SC:** What does it mean in practical terms in the water entitlements held by First Nations people in Victoria?

**DR O'BRYAN:** I would suggest not very much at all.

40 **MS McLEOD SC:** We come to some figures in a couple of slides on, so can we turn to the next slide.

45 **DR O'BRYAN:** Okay, so now dealing with the Native Title Act and Traditional Owner Settlement Act, very limited water rights under both. In terms of management rights under the Native Title Act, the main section is section 24HA. And this provides only for notification and an opportunity to comment on

activities that might impact on a group's Native Title rights and interests. The important thing to note there is that even if that is not complied with, even if those notifications are not complied with, that still will not affect the validity of the Act. In terms of take and use rights, this depends on each individual determination.

5 And in Victoria they are basically limited to personal, domestic and non-commercial communal needs.

We also have the Traditional Owner Settlement Act, and in the Traditional Owner Settlement Act, it is very clear that water is treated as a resource, and it requires a natural resource agreement which is ancillary to an overarching Recognition and Settlement Agreement. And under a Natural Resource Agreement, water can only be used for traditional purposes, which in summary is defined as being for personal, domestic and non-commercial communal needs, so quite limited. There were some amendments made to the Traditional Owner Settlement Act in 2013 to allow for commercial use of certain resources. They were things like flora and fauna produce, forest produce, but water was specifically not included in that amendment.

20 **COMMISSIONER HUNTER:** Sorry, can I ask what it means by traditional purposes?

25 **DR O'BRYAN:** Essentially, that is - the definition is the - what I think I mentioned before non-commercial communal personal domestic and non-commercial and communal needs.

30 **COMMISSIONER LOVETT:** In colonial context. Traditional in a colonial context; is that what you mean?

35 **COMMISSIONER HUNTER:** I was not sure, thanks.

40 **MR MOONEY:** Sometimes refers to customary activities, conducting ceremony, things like that.

45 **COMMISSIONER HUNTER:** How often would that happen?

**MR MOONEY:** Yes. So it is very limited to a colonial construct of what the State thought First Nations would want to be able to use water for, I suppose.

50 **DR O'DONNELL:** They are also not rights that you can prevent other people from usurping. For instance, if you have a section 51 licence, right, then the State will take that into account when allocating anybody else's water rights. So your water right becomes inasmuch as there will be flow in the river, it is a defensible right whereas a section 8A right under Traditional Owner - under the Water Act based on a Traditional Owner Settlement Act agreement is not defensible. So if there is no water in the system then there is no water for Traditional Owner's uses of any kind, and they've got no ability to challenge the way that the State has



allocated that water to other users purely because there is not enough left over for them.

5 **COMMISSIONER LOVETT:** I am not seeing or hearing anything in the Act at all about any recognition of self-determination. So there is "recognition", the word, or "consider" values, but nothing about self-determination, inherent rights or anything like that.

10 **DR O'DONNELL:** No.

**MS McLEOD SC:** Just to answer your question, Commissioner Hunter, traditional purposes is defined in the Act, the TOS Act, section 79, in relation to a Traditional Owner group as defined means:

15 "For the purpose of providing for any personal or domestic needs of the Traditional Owner group or any non-commercial communal needs with the Traditional Owner group".

20 **DR O'BRYAN:** That's - otherwise - I might touch very briefly on the fact there was a First Principles Review of the Traditional Owner Settlement Act. I think the report came out at the end of 2021, or maybe early 2022; I couldn't quite work that out - which was looking into how to improve the Traditional Owner Settlement Act. It did acknowledge that the Traditional Owner Settlement Act is not sufficient in terms of water rights, but the review also - also acknowledged that it didn't  
25 actually - the review didn't actually consider water rights in any - in any detail. So there was a recommendation to have that looked at in further detail down the track, so to speak.

30 **MS McLEOD SC:** Is that something to your awareness is happening or has support generally, that specific review?

35 **MS JOBLING:** Probably the Traditional Owner Corporations is better placed to answer that question, I would say, because the First Principles Review committee was comprised with corporations and their staff, and that is the Act which applies to them.

**MS McLEOD SC:** But in terms of government willingness or an indication that they will want a review or -

40 **MS JOBLING:** I would say given there has been limited progress on it to date, it is not getting a lot of traction, but you'd need to test that with the TOS.

45 **MS McLEOD SC:** You also mentioned that in 2013, water was not listed. Do you know the reasons why water was not listed? Was it not thought of or -

**DR O'BRYAN:** I don't really know, but I can assume that it would have been raised and for that - you know, and not included, because there were other things

that were not included as well. There was a limited number of commercial rights. I think it was a slowly let's start with these ones.

**MS McLEOD SC:** We might ask another about that. All right, the next slide.

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**DR O'DONNELL:** Okay. So this is back to me. This slide really speaks to the ongoing impacts of this exclusion. So across the Murray-Darling Basin, Aboriginal corporations own less than 0.2 per cent of all water rights on issue. In the State of Victoria as of 2022, 0.18 per cent of water rights on issue were held by  
10 Traditional Owner organisations. So the impacts of aqua nullius are continuing today. I think it was in 2022, a report by the consulting group AFA found that the water entitlements on issue in the Murray-Darling Basin were worth \$35 billion, and that is just the water. That is not the concomitant use of the water to support other uses.

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So the multiple waves of dispossession, the ongoing dispossession, the ongoing exclusion of Aboriginal people and their interests from water, has resulted in significant economic loss. I think it would be very valuable for the State to actually document that loss and what that means. So that's what this slide is really  
20 pointing to say this is not an historical artefact; this is an ongoing problem. So we will move to the next slide, please. This diagram comes from the national cultural flows research program. This was a way of outlining pathways to address aqua nullius. You can see in here the three pathways that are picked up in the Cultural Water for Cultural Economies report and, to a certain extent, within the Water is  
25 Life government policy document and response.

At the beginning, or at the sort of central point there, is the idea of water rights. As I mentioned before, water rights exist within the settler state system so they are settler state constructs. They can be transferred to Traditional Owners and several  
30 Traditional Owner groups have certainly done so and this is an opportunity to gain power, to gain the opportunities to use water for cultural purposes in whatever way they see fit, but it is still very much within the settler state system. It is also as a result one of the easiest options for the settler state. Its entirely within their capabilities right now to find and to support and to fund the water rights returns to  
35 Traditional Owners.

The second circle there is about influence in water landscapes. And so this is a recognition that it is about the authority to make decisions about how water is used and how waterscapes are known and cared for more broadly. And so again this is  
40 about saying Traditional Owners need to be able to exercise their authority within that space. This presents more of a challenge in some ways to the settler state because this is about power sharing. At the third circle is the idea of transforming foundations. And this is where treaty comes into the equation, because we are talking about the kind of significant changes to the very foundations of the  
45 relationship between the settler state and Indigenous peoples when it comes to water.

So there's many elements that can still sit within there. It doesn't necessarily have to be solely treaty. There are other forms of agreement making. But it is saying it can't be constrained by the settler state system in that way. A couple of things about this diagram. All three of these can be pursued at the same time. So you can return water to Traditional Owners whilst negotiating a treaty that might actually foundationally reassess aqua nullius, for instance. You can return water rights whilst also appointing Traditional Owners to boards of water authorities or other mechanisms that enable them to exert authority in the way that waterscapes are managed. So all of these things can happen at the same time. It certainly doesn't have to be sequential. And individual Traditional Owners groups may also choose to participate in one or more of these circles. For some, they are only interested in transforming the foundations and nothing else has meaning until they've had that conversation. Others, as I have said, are actively pursuing water rights. If we move to the next slide.

15 **COMMISSIONER NORTH:** Can I just ask you before you move on, in the transformation circle, what is reported there is a series of processes, of course Yoorrook is part of the potential transformation.

20 **DR O'DONNELL:** Yes.

**COMMISSIONER NORTH:** If you were to provide us with a series of actual transformative actions, what would they be?

25 **DR O'DONNELL:** So I think - yeah.

**COMMISSIONER NORTH:** I mean it is one thing to say, "let us sit down and talk." But what about? Where does it get to?

30 **DR O'DONNELL:** Yeah. I think I'm struggling to answer that precisely because I can't speak for Traditional Owners, so the specific actions will need to come from nations and probably also the First Peoples' Assembly. What I think we can point to coming out of the nation statements in Water is Life very clearly that Traditional Owners are highlighting, is foundationally an acknowledgment and addressing aqua nullius. So Water is Life is currently the only government document that I know of in Australia that acknowledges that aqua nullius is a thing. It does not address aqua nullius at all and it doesn't acknowledge the problem - the major problem it presents for the settlement of water law in Australia. It has taken the very first step. I think the transformative things that we need are actually addressing aqua nullius, acknowledging that it does present this foundational problem and developing strategies to address that.

40 **COMMISSIONER NORTH:** What are they? We can acknowledge and we can have frameworks, but what are they saying here? Do you say that there should be, you know, a - I don't know, a return of water to Indigenous people?

**COMMISSIONER LOVETT:** We appreciate you are not Aboriginal, right, so I think we have got to be able to move past that, to be able to think - you have been engaging with mob for a very long period of time. This is a blanket rule for the whole panel. We are asking for you to give your thoughts. We understand you are  
5 trying to be sensitive to our people as well. But, you know, yes, be transparent with your answer probably.

**MS McLEOD SC:** It would help to refer to Caring for Country or Water is Life. Please do so.  
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**DR O'DONNELL:** I think specifically, and again I think this is now speaking from my perspective and as a researcher, to - yeah. You're talking about contested sovereignties, so this is the really hard thing. What it comes down to is all water is Aboriginal water. And so what I'd be looking to see from the settler state is a  
15 genuine acknowledgment of that. What does that mean? How do they make peace with that idea? How do they re-embed that idea? If we look at section 7 of the Water Act, for instance, the Crown should not have the authority, the sole authority, when it comes to issuing water rights and making decisions over the way that water is managed because of those contested sovereignties. So addressing  
20 aqua nullius would mean - for me, one of the things it could mean is that the Crown and Traditional Owners might share that authority potentially Traditional Owners might hold it solely and then work with the Crown in order to give effect to it. So there are some really foundational level reforms that you could look at. I think there are - there are ways of progressing those reforms that don't necessarily  
25 mean an immediate upheaval of the way that, you know, water will continue to come out of taps, there will be practical processes to enable that to still happen. But this is what "sovereignty never ceded" means is that all water is Aboriginal water, and the Crown certainly does not have sole authority. So that - to me, that is how you can address aqua nullius is to tackle that provision and then the flow on  
30 effects that it gives rise to.

**MS McLEOD SC:** Before I invite other panellists whether there is something they want to draw out of these documents, to let Commissioners know, we have substantive submissions, Caring for Country, we have a substantive document  
35 produced, Water for Life, we have Cultural Water For Cultural Economies, a number of resources available that throw up actions, whether that is around ownership, licensing, return - water returns around protections of cultural and heritage sites and the - near waterways there is a vast range of things, so I am not expecting you to be comprehensive in your answer, but if there is something you  
40 would like to highlight, please do so.

**MS JOBLING:** I agree with Erin wholeheartedly. I would also say that Water is Life has some good aspirations in it, but it doesn't - again, doesn't go to the heart of addressing that issue whatsoever. You know, we have an action in there that  
45 was supposed to be delivered between 2022 and 2023. So even when it is a very easy win for the Government, which is the 1.36 gigalitres committed to the north

of the State, it has not been delivered, it is not in Traditional Owners' hands, and that work does need to be progressed.

5 **MS McLEOD SC:** Just explain that 1.366 gigalitres came from where?

**MS JOBLING:** That 1.36 gigalitres, I guess it was returned from an infrastructure, an efficiency upgrade in the north.

10 **MS McLEOD SC:** These were seen as savings.

**MS JOBLING:** Additional savings.

**MR MOONEY:** Yes. Savings.

15 **DR O'DONNELL:** I think it is important just to give the context for this one. We were going to cover it a little bit later, but I think to contextualise what you were talking about here, this was 1.36 gigalitres which was two-thirds of a second round of additional savings that came from a project that was committed to in 2007 as  
20 part of the Victorian Government's next stage water plan in which 75 gigalitres were going to be recovered for the environment, for Melbourne and for irrigators. They were each going to get 75 gigalitres as a result of the efficiency savers. Zero was going to Traditional Owners. In the intervening period, Victorian Government passed a number of policy statements which indicated that they would consider at  
25 first instance Traditional Owner interests in water that became available for allocation.

In 2021, MLDRIN and I had to hold the Government to account on that, because they found the first round of additional savings was two gigalitres which they  
30 gifted promptly to irrigators in full. So the 1.36 has come out of a process which first initially completely ignored the interest of First Nations, then completely ignored the government's own policy, it was only after significant action in the press, really, from MLDRIN and others that the second round of savings was then found and shared in part with Traditional Owners.

35 **MR MOONEY:** Is it correct, Erin, that the final extra 2 gigalitres was initially - two-thirds of it was initially earmarked for the view - the Victorian Environmental Water Holder and for Melbourne retailers?

40 **DR O'DONNELL:** Yes.

**MR MOONEY:** But they chose to gift that -

**DR O'DONNELL:** The press release implied that they chose to gift that to  
45 Traditional Owners.

**COMMISSIONER NORTH:** Could I just pursue for a minute this - I'd be interested if any on the panel would be able to enlighten me on Water is Life and

any, firstly, actions within the document - actions, not forming committees, not, you know. I think they, as I remember it, they have outcomes projected for the three years and then five years. But as I read it, they are all - almost all - or almost all, as I say, if you have got some enlightenment it would be great to hear but they

5 all talk in terms of sitting down and talking about something, there is almost - sitting down and talking about maybe Aboriginal people on more boards, or - but there's nothing that I could see that you could set out as a hard achievement. That's in the document itself. And the second question is, well, we are already up to the three-year mark, what is the score card, man?

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**MR MOONEY:** I guess one positive action that I am aware of that has been progressing is the - I believe it's under targeted outcome 3, localised pilot environmental projects. I do know the Victorian Environmental Water Holder is working with Traditional Owner groups to provide guidelines and support them to

15 submit seasonal water proposals.

**COMMISSIONER NORTH:** This is a pilot to produce guidelines?

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**MR MOONEY:** With the intention of allowing them to be able submit their own watering proposals rather than having to submit them to catchment management authorities. So that is an admirable procedural improvement. But I should stress it is within the frame of - it is within the frame of process. It doesn't provide any substantive water right or water ownership to those nations. It just allows them to have more self-determination in that process of identifying where environmental

25 water which is still held by the State should be used. That is one I am aware of. Others probably have -

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**COMMISSIONER HUNTER:** I wonder if, Tony, that comes with resources for First Peoples to do that work, is it?

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**MR MOONEY:** I believe there is some, yes.

**MS McLEOD SC:** I will jump back to -

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**COMMISSIONER NORTH:** My follow-up question is this is a pilot to produce guidelines to enable Indigenous people to do something. My question is, aren't they able to do it now? I mean, don't they have the expertise without doing a pilot to produce guidelines? And if that's so, it gives me a very distinct feeling that this is, you know, bureaucracy added to bureaucracy in order - well, I don't know it has the intention of delaying, but it certainly has the effect of delaying what would seem to be quite a simple operation. Am I missing something, because I don't

40 know - I don't want to put my foot in it without knowing that actually there is a proper basis for suggesting that this is sort of over-elaborate bureaucratising.

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**MR MOONEY:** I guess just to add to that point, my understanding is that to get to the point where the State would accept that Traditional Owners would be able to make their own seasonal watering proposals, that in itself was quite a

bureaucratic wrangle. So the mechanism previously was that all seasonal watering proposal would be prepared by catchment management authorities to be submitted to the Victorian Environmental Water Holder, and there was, you know, a degree of reluctance initially in allowing that process to be opened up or considered.

5 Certainly in some cases, there would be Traditional Owner groups that have the capability to do that now. Others may need further support and assistance to do that.

10 **DR O'DONNELL:** And I think a lot of - yeah, the new guidelines and the pilot program is actually largely for the benefit of the government agencies, because they didn't know how to do this. So Traditional Owners are saying, "We're ready. We've got a proposal". Not all Traditional Owners, obviously some groups are more ready than others. But, yeah, this was government trying to figure out how it can do that work. So, yeah, it's - it is a bureaucratic process.

15 **COMMISSIONER LOVETT:** I think there was a question put forward before by Commissioner North about the transform foundations. So I just wanted to give everyone an opportunity to go back to that because we lightly touched on it around, you know, water sovereignty. Is there any other thoughts and suggestions  
20 that you have been thinking about? Again, you know, full authority to kind, you know, speak, so to speak.

**MS JOBLING:** Well, water entitlements straightaway. That will help. If you have an entitlement you are at the table.

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**MS McLEOD SC:** And the current situation with water entitlement is?

**MS JOBLING:** 0.07.

30 **MR MOONEY:** 0.18.

**MS McLEOD SC:** And are they on the table at the moment?

35 **MR MOONEY:** Water for Life - and we are speaking with a particular focus around the Murray-Darling Basin where water systems are fully allocated. Water is Life agrees to develop a framework to support Traditional Owners entering the water market when no alternative pathways for water for economic development is available, water they can use for self-determination purposes. But the Victorian  
40 Government is not proposing to establish a direct water entitlement purchase program. So there are very specific barriers to addressing that.

**MS McLEOD SC:** Can I just pause for a moment to note the time. We have gone a little over time and we are on a very interesting topic, but the time is 4.26. Would you like to continue with this topic subject to the panel having it being a  
45 convenience to them to continue? I am seeing some nods. Yep. Thank you. So, yes, you were talking about priority actions, that take it beyond a plan to develop a strategy.

**MR MOONEY:** Yeah. And I think to answer the Commissioner's question, I mean, we deal largely in pragmatic outcomes. I think this - this model has been incredibly useful for us to be able to advocate for the kind of broad change that's  
 5 needed. In reality, a lot of our advocacy is focused around immediate opportunities and addressing immediate gaps that we can see. A recent example is the Restoring Our Rivers Bill in the Commonwealth Parliament. So I think all the things that Erin mentioned before around addressing that fundamental basis of  
 10 water legislation, we would love to be able to work more on that. But we are often putting out fires in a pragmatic sense to advance Traditional Owners' opportunities to get hold of water entitlements for example or have greater procedural rights in making decisions about how water is used.

**MS JOBLING:** To be fair, there is no program of reform currently in Victoria  
 15 around water. We have a policy piece but not a strategy. We've got the north and the south. The north of the state is not going to be able to achieve water justice without significant financial investment. That has to be on the table.

**MS McLEOD SC:** Should the government commence acquisition of water rights  
 20 and entitlements immediately on behalf of First Nations peoples?

**MS JOBLING:** Well, I think it's overdue.

**DR O'DONNELL:** The option there is to fund First Nations directly to do that.  
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**MS McLEOD SC:** So they become the purchaser.

**DR O'DONNELL:** There are a number of different ways that could happen. The  
 30 Victorian Government has known since March 2021, when the Cultural Water for Cultural Economies report came out, there are no clear pathways for surface water rights for Traditional Owners and First Nations in northern Victorian unless they go to the market.

**MS McLEOD SC:** And I think I saw somewhere in the material, the current  
 35 guaranteed water or high-value water is currently 4,500 per megalitre; is that right?

**DR O'DONNELL:** I would expect it to be much more than that. Higher liability  
 40 water in the Murray - the southern Murray-Darling Basin tends to go for 5 or 6,000 per megalitre in a permanent entitlement.

**COMMISSIONER NORTH:** I also remember reading, and I can't pinpoint it  
 45 immediately, that there was a fund, a Commonwealth fund available which hasn't been used. What is the story about that?

**MS JOBLING:** Yes. That is a tortured story that Will has context more.



**MR MOONEY:** Yes. So there's now \$100 million the Victorian Government has allocated for purchasing for water entitlements for First Nations in the Murray-Darling Basin that is the whole basin north right up to southern Queensland. That was committed in 2018. There have been various machinations and sort of to-ing and fro-ing around that. It is at a point where it is certainly moving forward now. There are still questions about how it is going to be delivered and to what extent First Nations have ultimate sort of control of that process, but it is certainly moving forward more rapidly now.

10 **COMMISSIONER LOVETT:** Out of that 40 million, how much hit the ground?

**MR MOONEY:** None has been spent yet. So it actually - it was initially -

15 **COMMISSIONER LOVETT:** 40 million initially now, it is 100 mill. The initial 40 mill none hit the ground.

**MR MOONEY:** We were actually able to have some work done to calculate the lost value or the foregone value of that funding. The 40 million component, it was committed in 2018. I don't have the figures in front of me now, but it was about 50 per cent of the value of that funding was lost in the intervening period just because of the increasing water entitlements.

25 **DR O'DONNELL:** So today, 40 million would buy two-thirds of the water it would have bought in 2018.

**COMMISSIONER NORTH:** So why didn't it move? I mean, we are now six years later?

30 **MR MOONEY:** Frankly, I think it was an ideological unwillingness to support the actual outcome of the policy.

**MS McLEOD SC:** Just on that, you wrote a letter, or MLDRIN wrote a letter, on 26 April 2021 to the state minister, the acting minister Richard Wynne about that 40 million and the commitment made by Federal Water Minister then David Littleproud to giving the \$40 million to support the acquisition of water for culture and economic purposes, and recently, at the time of writing the letter, you say:

40 "You were alarmed to hear in a recent Senate Estimates hearing associated commentary then federal Water Minister Keith Pitt was contemplating redirecting the funds".

**MR MOONEY:** That's correct.

45 **MS McLEOD SC:** And in that letter you demanded certain things around that 40 million, including a commitment it not be repurposed.

**MS JOBLING:** Keith Pitt is on record speaking against Minister Plibersek's decision to accelerate the expenditure of that money when the Labor Government came in.

5 **MR MOONEY:** That's correct. The previous Water Minister referred to - I think referred to that 40 million commitment as a wealth transfer from farmers to First Nations. So under his - under the previous Minister's leadership and under  
10 ministers that preceded him, that program did not advance at all. We actually - that correspondence was related to - we were seeking support from the basin State ministers and the basin State premiers including the then Victorian Premier to  
15 guarantee through the basin ministerial council that that funding would not be lost. Thankfully, it wasn't lost.

**MS McLEOD SC:** Is the 100 million that you were speaking about \$100 million  
15 per year?

**MR MOONEY:** No.

**MS McLEOD SC:** Provided by the Future Drought Fund or is that different?  
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**MR MOONEY:** It is a one-off 100 million for purchasing entitlements.

**MS McLEOD SC:** Is there a contribution under the Commonwealth Future  
25 Drought Fund?

**MR MOONEY:** Not for purchasing future entitlements.

**COMMISSIONER NORTH:** Under the 100 million, what would Victoria be  
30 expecting?

**MR MOONEY:** That comes down to the governance the water entitlement  
purchase and the governance arrangements which are being developed. There  
were some scenarios that were developed to support First Nations make a decision  
35 about what entitlements - what sort of package of entitlements to acquire. Some  
would be in Victoria. How they would be held is still being considered, and they  
may be held in - the Commonwealth department has recently called for  
applications to an interim governance model for that to manage the entitlements  
acquired through that fund. So there would be an interim governance model made  
40 up of two directors, two First Nations directors, and an advisory committee. They  
would in the interim manage the water entitlements. They would initially do the  
purchase then manage it, and the intention is then it would cede to a  
self-determined model once that self-determined model has been determined.

**COMMISSIONER NORTH:** What I am interested in is the present figure is 0.1  
45 per cent that Victorian TOs have access to. Would an entitlement - would a  
proportion of this, whatever it is, and that is a bit of a problem to work out, be a  
significant increase?

**DR O'DONNELL:** I would say no.

**MR MOONEY:** I would not think it would be a significant increase.

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**DR O'DONNELL:** Not in percentage terms. No, it would be possible to double the total amount of water owned by Traditional Owners, but it would still be a very tiny amount.

10 **COMMISSIONER NORTH:** The proportion it would increase would be 100 per cent.

**COMMISSIONER LOVETT:** Less than one per cent?

15 **DR O'DONNELL:** Yeah. So it is 0.18 right now, so you could double it and get to 0.36 and still less than half a per cent.

**COMMISSIONER NORTH:** At least imagine the annual report, "We doubled the water".

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**DR O'DONNELL:** This is also a question which is playing out in terms of setting a water target for the Closing the Gap policy space, because how do you set a target when the increases that you need are so substantial? So, yeah, it is a live conversation.

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**MS McLEOD SC:** Just can we turn to your last slide in this bundle and the Roadmap to Water for Economic Development slide.

**DR O'DONNELL:** This slide -

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**MS McLEOD SC:** Sorry, I was going to jump to the one after.

**DR O'DONNELL:** It's actually worth spending a little bit of time with this one. This goes to your question about the difference between cultural water and some of the other ways. So this was a diagram created by Melissa Kennedy. She's a Tati Tati woman. She was, along with me, part of the writing team on secondment into government to help them produce Water is Life. This diagram was a way of conveying to non-Indigenous people what cultural water and cultural flows actually represented. So there was an assumption by many people that cultural flows were the same as environmental flows, and that they certainly didn't represent things over which Traditional Owners had significant control and so what this diagram says is actually a cultural water paradigm is a holistic way of knowing and understanding and caring for water, and it brings in sovereignty and self-determination, connection to place, responsibilities to Country, emotional and spiritual wellbeing, cultural experiences, and it then intersects with healthy Country, healthy people and cultural economies. And so this was a really powerful way of conveying to non-Indigenous people that there are elements of cultural

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water that overlap or intersect with environmental water. It is not the same because environmental water is defined for settler state science and caring for water, but healthy Country is part of it. Healthy people intersects with the settler state water is provided to household.

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Cultural economies reflects the fact that water was always used to support thriving, prosperous communities. It is not the capitalist extractive economies or models we see playing out in the settler state today. This cultural water paradigm was a way of communicating the ideas that are in the Echuca Declaration.

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**MS McLEOD SC:** Just to close this off, in your slide set and in your submissions, you have set out a Roadmap to Water for Economic Development, and offer various pathways, suggestions for northern and southern Victoria, including a summary at the end of various targeted outcomes and action required. So can I invite you to offer some closing remarks around what is most important, given the questions of the Commissioners around what is next. What is most important and what is foundational or essential to that step, because obviously if we tweak some legislation, that might give you something minor in the meanwhile, but essentially, if you are looking for holistic reform, what is needed.

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**DR O'DONNELL:** So I will say the rest of these slides are a descriptive set of slides to lay out the frameworks that are in place in Victoria at the moment. So they're not necessarily our recommendations. In terms of the big ideas, I think we have talked about one, which is addressing aqua nullius, and section 7 in the Water Act is the key expression of that. During the Water is Life process, Traditional Owners advised the State Government that they needed to see evidence that the settler state water framework is moving closer to Traditional Owner ways of knowing and caring for water. And so one of the big ticket items, I think, then, on that is settler state legislation that enables Traditional Owners to have their living entities formally recognised within settler state law and have that legislation connect into the Water Act.

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So this is targeted outcome number 1 in Water is Life, is the development of this new legislation. We haven't seen anything yet on that, although I understand that there are some Traditional Owner groups who have been receiving briefings, and that is excellent, but it is also 18 months on. This was a well-progressed idea 18 months ago, so it would be really useful to see that out there. The other thing that is crucial, I think, is around water returns.

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40 And so we have talked about northern Victoria and the need to fund water acquisition. But targeted outcome 7 says that the Government is going to act quickly on existing opportunities and, yes, I note the Commissioners' laughter in the corner. I will just very briefly articulate what is in our submission here, which documents four water licences, each of which took over 12 months of sustained advocacy and leadership from each Traditional Owner group in order to get that licence returned. This is unallocated water. It is water that nobody is currently using in the settler state parlance. It is water that will remain in stream. It is

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literally the easiest water to return to Traditional Owners. In every instance it took over 12 months. I am not talking 12 months of just waiting for processes to happen. I am talking regular meetings, frequently monthly meetings between senior Traditional Owner organisation staff and senior staff inside the State Government, or inside the water authority.

So this is not the usual process that a farmer would need to go to in order to get a water licence like this allocated. It is - it's baffling to me. So the first one was finally handed back in 2021 to Gunaikurnai. Again, this was a two-year process. Having done one, we anticipated that the settler state process might speed up a little. The next one was September '22. This was a 2.5 gigalitre water licence to Gunditj Mirring Traditional Owner Aboriginal Corporation, again which took well over 12 months. This process was initiated by Gunditj Mirring at a workshop as part of the Cultural Water for Cultural Economies project in February 2022, so that was a very, very long time between that.

In October 2023, Gunaikurnai again received additional licences but they again took over 12 months, and 12 months of consistent advocacy. Wurundjeri Woi Wurrung have been waiting for the return of a water licence that has been held by the State Government, so they have held it and they have committed to returning it since 2020.

**COMMISSIONER NORTH:** Can I ask you, those four, if you add them all up, what proportion of the .18 per cent do they account for, do you know? Again, a large amount, a miniscule amount, I just want to get some idea of the proportion.

**DR O'DONNELL:** So they are - I think so the .18 per cent does not include the Gunditj Mirring or the two second Gunaikurnai, so it would go up a little bit. It might be up to .2 per cent perhaps, but -

**COMMISSIONER NORTH:** Minor.

**DR O'DONNELL:** Very minor.

**COMMISSIONER NORTH:** The other question is, you said that this is unallocated water, therefore there is really no impediment to handing it over. But is that a - is that observation going to be correct always so that - I mean, is this a particularly good year where the water is available, but what about next year or the one after where - these are permanent entitlements, aren't they?

**DR O'DONNELL:** They are water licences, so they are actually only issued for, I think it is 15 years, although that varies slightly from jurisdiction to jurisdiction. So they are - for they're 15-year licences. There is an assumption they will be rolled over each time, so at the end of your 15 years it is not a free for all. The water authority tends to just re-allocate those. Because they are permanent, the water availability each year within your licence will change so you have got - you've basically got the right to extract water from a stream. If the stream drops

below a certain level, they will put licence holders on restriction and prevent them from accessing it, but the unallocated water, they have already determined what the sustainable diversion limit is for the streams and aquifers, and this water sits within that, so they know that it is sustainable to allocate this water.

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**COMMISSIONER NORTH:** For at least 15 years?

**DR O'DONNELL:** For at least 15 years, yes, and there may - you know, climate change may impose the need to reduce water licences in time. That is something that should affect all water licence holders. I have been told in an informal way that one of the barriers to allocating water to Traditional Owners in this way was because people could see climate change coming and they wanted to reserve that water to maintain existing reliability of supply. That, as far as I know, has not been any kind of formal impediment, but that is clearly in the minds of some people in those - in those roles.

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**COMMISSIONER NORTH:** There is an opportunity, what you are saying there, is for TOs to be involved in the under-utilised; is that what you are saying?

**DR O'DONNELL:** There is two opportunities here. One is unallocated which is primarily in the southern Victoria. This is water that nobody formally owns. There is the under-utilised water which is a different bucket of water entirely. By that, we are meaning the 75 gigalitres that came out of those water savings that we were talking about before. And that is formally owned by the Melbourne Water utilities. It is owned by Greater Western and South-East Water and Yarra Water; they each have 25 gigalitres. There are rules in place that prevent them from accessing and using the water for the purpose of which it was intended which is a drought response measure for Melbourne. It cannot flow down the north-south pipe to Melbourne supplies except under very extreme circumstances which would require, and this is me paraphrasing so it would be worth going and getting this material specifically, but it would require Melbourne to be in the most severe drought it has yet been in and northern Victoria to not be in any drought at all for any of that water to flow under the existing rules. So those water authorities at the moment, the only thing they can do, they had to spend a lot of money to help pay for the recovery of this water. They are recouping the costs and ongoing fees and charges of holding that water by selling their allocation on the market each year. So each year they will get a certain percentage of their 25 gigalitres and sell that to irrigators. So we consider that on under-utilised water because not only were Traditional Owners excluded from the process in the beginning back in 2007, but this water is not perform the function for which all Victorians including all Melbourne people have paid in various ways, so it is not performing that function.

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It's therefore open to the Government in consultation with those water authorities to think about is there another use. That's 75 gigalitres in northern Victoria. That would be - that would be a significant - significant volume for northern Victoria and Traditional Owners?

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**COMMISSIONER NORTH:** How long has it been available?

**DR O'DONNELL:** How long has it been available? I think they started receiving the water in 2017 as a result of the savings but it has steadily increased and their water entitlements, I can't remember exactly when they were formalised, but they certainly have their formal entitlements now.

**MS McLEOD SC:** I was just going to point you under the Water is Life government action plan, the statement is made clearly in terms of water returns:

"The Victorian Government is not proposing to establish a direct water entitlement purchase program".

So they have foreclosed a water entitlement purchase program.

**DR O'DONNELL:** They have, and they have not foreclosed funding Traditional Owners directly, but they have certainly foreclosed anything that resembles what we're seeing by the Commonwealth, for instance.

**MS JOBLING:** I might just add in during the Central and Gippsland Region Sustainable Water Strategy, that included 16 water industry organisations, and they created the water sector statement of commitment that included Melbourne Water and its three sort of subgroups that it gives its water entitlements too. And some of those commitments were specific to the geographic footprint of that Gippsland strategy. However, there are other statements there that are not specific to that region. But they are broader:

"Acknowledging the legacy of past decisions, and we as the water sector members are committed to transforming current systems and building a new future, based on restorative justice, official ownership and self-determination. They specifically outline a commitment to rights. We support the rights of all Aboriginal peoples as outlined in UNDRIP. And advocacy, we will advocate in partnership with Traditional Owners and other to address the gap in social, economic and health inequalities experienced by many Aboriginal Victorians through returning water and decision making to them."

The 75 gigalitres of water which is otherwise not going to be available for any mobs in the north is going to be really a good opportunity if this could be actioned.

**MS McLEOD SC:** Just observing the time, are there any other questions from Commissioners or any other final comments that the panellists would like to make? We haven't covered aquifers, we haven't covered sea water, sea Country, but we have your submissions.

**MR MOONEY:** I would like to briefly read from one of the submissions from the Water is Life document - we have permission from the Tati Tati nation - to read out a short message, I suppose, from their submission which really, I suppose, go

to some of the Commissioners' questions around sovereignty. I will read briefly from this statement:

5 "We are Tati Tati. This is our Country. We demand to be the water owners. We demand to be the water authority. We do not want to come under anyone else's authority. We require dedicated and long-term funding to be reestablished as the water authority for our Country. We require dedicated and long-term funding to reestablish cultural water economies. We require allocations of water with no fees and no charges. We require cultural flows annually. We call for the government to relinquish control. We call for the power of sovereign Nations to be reinstated. We demand our stolen rights to be restored."

15 **MS McLEOD SC:** Thank you, Will, and for the Commissioners' benefit that is at page 231 of the Water is Life document.

20 **DR O'DONNELL:** The other thing worth noting, Water is Life exists. It is not a perfect document by any stretch of the imagination. The most powerful are the nation statements from Traditional Owners. So one of the things that the settler state has been able to say in the past is that it doesn't know - doesn't know what Traditional Owners want. They can no longer say that. When it comes to the settler state commitments, what we are lacking in that space is transparency. There is no indication, as Karmen and Will have previously commented, that this is being implemented or that it is being implemented in anything resembling a timely fashion, so there doesn't seem to be any kind of public reporting on what Water is Life implementation looks like so without that how do you hold government to account, how do you measure progress, how do Traditional Owners continue to have good faith in the actions of government?

30 So I think that transparency, that commitment to ongoing accountability and reporting is also a statement from government that it is taking it seriously, and that it is genuinely prioritising the work, even the bare minimum it itself has committed to.

35 **COMMISSIONER NORTH:** I am a little concerned that we haven't dealt with sea claims, sea issues. I'm just wondering - it probably only concerns Erin and Katie. How long do you assess it would be necessary to spend on that issue if we did it on another occasion?

40 **MS McLEOD SC:** We are going to take the Water Minister to those things and the various research articles that are relevant on that topic, Commissioner, so -

**COMMISSIONER NORTH:** It is a different perspective, though.

45 **DR O'DONNELL:** I think - I mean, if you wanted to spend time, it would be worth hearing from Traditional Owners that are developing sea Country plans, and



so that is Gunaikurnai and Gunditj Mirring, so that would certainly be worth hearing from them. Otherwise I think it is -

5 **COMMISSIONER NORTH:** It means if the two of you were to address it, is that within your area of expertise?

**DR O'DONNELL:** I think we would invite one of the other authors from the submission to join us in that.

10 **MS McLEOD SC:** Who would that be? Would that that be -

**DR O'DONNELL:** That is Kate Jama.

15 **COMMISSIONER NORTH:** Thanks for that.

**MS McLEOD SC:** So if there are no other questions, it remains to thank the panel for their attendance and note that we didn't get to all of the matters that we wanted to raise today. Nevertheless, we have your submissions and note of your work, and to thank you for your participation and the important issues that you have flagged for us today.

**COMMISSIONER NORTH:** Thank you. Thank you very much.

25 **CHAIR:** Thank you, Counsel, and thank you very much, panel.

**MS McLEOD SC:** There is one task I need to attend to, so if the panel are happy to stay sitting while we do that. And to note that Ms Cafarella needs to leave at any minute so she might bolt in the middle of this. The intention is to tender some bundles of documents. Chair, there are 13 documents on a tender list produced from the first panel, and that was obviously the first week, a list of nine documents from the Surveyor-General today and 11 documents today. I will just check that that picks up correspondence that we referred to MLDRIN correspondence, not only the letter of 26 April 2021, but two letters that are dated 2017 as well.

35 **CHAIR:** Entered into the record, thank you.

**MS McLEOD SC:** That concludes today's hearing, thank you, Chair.

40 **CHAIR:** Thank you. Adjourn until tomorrow morning. Thank you.

**COMMISSIONER NORTH:** Thank you.

**<THE HEARING ADJOURNED AT 4.55 PM**