



# TASMANIAN ABORIGINAL CENTRE INC.

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## Senate Finance and Public Administration References Committee

### Inquiry on Indigenous Funding in Tasmania

#### Terms of Reference

Commonwealth funding of Indigenous Tasmanians, with particular reference to whether hundreds of millions of dollars in Commonwealth funds over the last decade were unfairly, unjustly, or illegally allocated to, and spent on, only 6,000 Indigenous Tasmanians, rather than almost 26,000.

#### Summary

There is no existing accurate way of knowing how many Aboriginal people reside in Tasmania. Self-identification as a person of Aboriginal origin is asked in the national Census which is a much different question than the cultural identification which makes the Aboriginal community what it is. Even in case of the Census however the figures vary widely between those who identify themselves and the estimate published by the Bureau of Census and Statistics which can be five thousand (5,000) people higher. It is a fallacy to claim Aboriginal funding should be shared between all those who identify themselves because funded Aboriginal services are intended to be supplementary to mainstream services rather than substitutes for them; and not all Aborigines require specific Aboriginal services, some of which are means tested and based on demonstrated need. Aboriginal specific services are provided by a very broad range of service providers including State government, education and training providers, mainstream charitable organisations and Aboriginal organisations. The funding provided to Aboriginal people in Tasmania has always been far less than in all other Australian jurisdictions, and the Tasmanian Government provides almost no funding for Aboriginal services. The TAC provides many services which benefit the whole Aboriginal community collectively and some which enhance the ability of mainstream services to provide effective Aboriginal programs. It provides essential services to Aboriginal individuals and is a significant employer of Aboriginal people. The TAC has no reliable way currently to count the number of Aboriginal people who receive its services but as a statewide service operating from three regional offices we have much greater coverage than most.

There have been three major judicial attempts to deal with questions of Aboriginality in Tasmania and different results occurred on each occasion. Outcomes depend on how evidence is received, on who has the onus of proof and on any mechanisms available to test the family stories put forward. No legislative scheme has yet left it to the Aboriginal community to make the final decision, a right guaranteed in international law. The proliferation of organisations and individuals wrongly claiming to be Aboriginal can be shown to be connected with electoral politics, both Aboriginal and non-Aboriginal.

The TAC provides its services to people who can establish Aboriginality but considers it a misuse of Federal funds to qualify people who merely assert Aboriginality. It would be a breach of our duty to both the Aboriginal community we serve and the governments which fund us if we did otherwise. A few examples are given of how a too easy acceptance of stories can lead to a wrong result.

### **Tasmanian Aboriginal Centre Inc.**

The TAC was formed in the early 1970s having evolved from a statewide community meeting of Aboriginal people in Launceston in 1971 to become incorporated as the Aboriginal Information Service in 1973. Office space was rented with donations particularly from the Australian Union of Students and the issues tackled were primarily the substandard housing in which Aboriginal people from Cape Barren Island were 'resettled' in the assimilation era and the economic and social discrimination faced by so many. The organisation's first funding was a \$40,000 grant for Aboriginal Legal Aid obtained from Senator Gordon Bryant, Minister for Aboriginal Affairs in the Whitlam Government. At last Aboriginal people, including returned servicemen, were represented in court and so did not automatically receive prison sentences for petty offences such as having no visible means of support (vagrancy) or for being drunk and incapable.

The TAC gradually added more funded programs as new needs emerged and new funding opportunities presented themselves. Major expansions included the Hobart Aboriginal Children's Centre, the statewide Aboriginal Health Service, the palawa kani language program, and the Indigenous Protected Areas and Working on Country land management programs. Most programs are delivered statewide from offices in Hobart, Launceston and Burnie.

### **TAC and service numbers**

TAC is not required to report on the number of individuals who receive services and it is only very recently that systems are starting to be established to keep count of that number. Depending on the funding source we have been required to report on 'episodes of care' for clinical health care; occasions of service; number of transports; legal cases opened and closed; number of groups and similar. Total number of distinct individuals has not been required.

Nevertheless, TAC can report to the Senate Inquiry on some statistics which give a fair idea of the range of Aboriginal people who choose our services;

Advice and minor legal assistance 2015:	3609
Legal aid case matters 2015:	1768
Family violence matters 2015	217
Total number legal aid clients:	6442
Total number health clinic clients:	5300
Episodes of aged care 2015:	2660
Episodes of health care 2015:	53884
Children in long day care 2015: daily	29
Client contacts in parent engagement program:	1602
Client contacts in maternal & child health:	945
Early learning program client contacts:	667

We have also provided cultural awareness and cultural safety training to around 3,000 people.

It must be noted that TAC services are available to all Aboriginal people and our membership is all Aboriginal people in Tasmania except those who resign membership, of whom there has only ever been two people.

### **TAC and Aboriginal employment**

The TAC has an enviable record of improving the education training and employment of Aboriginal people in Tasmania. Our Registered Training Organisation has produced:

- Aboriginal Primary Health Care Certificate III: 9 awards
- Aboriginal Primary Health Care Certificate IV: 20 awards
- Diploma of Conservation and Land Management (specialising in Indigenous Land Management): 7

- Accreditation in Peer Support for Breastfeeding: 7
- Attainment certificates for competence in supporting the Aboriginal community to respond to family and domestic violence: 14 people

In addition, we have partnered with Work and Training Limited to support literacy, language and numeracy development for our staff and community members. We have also supported our staff to obtain qualifications from other training providers and have many staff who have now achieved significant attainment including:

- Diploma of Community Services (Alcohol, other drugs & mental health)
- Certificate IV in Youth Work
- Certificate III in Children's Services
- Diploma of Early Childhood Education & Care
- Certificate IV in Bookkeeping and in Accounting
- Vocational Graduate Certificate in Advising on Chronic Disease Self-Management
- Certificate IV in Training and Assessment
- Diploma of Professional Practice Management
- Diploma and Advanced Diploma of Management
- Graduate of Australian Institute of Company Directors
- Masters of Business Administration

Workers from our Burnie office have won the Tasmanian Aboriginal Trainee of the Year for two consecutive years.

#### Number of Aboriginal people in Tasmania

Recent statistics for number of self-identified Aborigines in Tasmania

Census Year	Aboriginal population	% Change
1971	671	
1976	2,942	338%
1981	2,688	-9%
1986	6,716	150%
1991	8,882	32%
1996	13,873	56%
2001	15,773	14%
2006	16,383	4%
2011	24,165	48%

Australian Bureau of Census and Statistics  
Aboriginal people in Tasmania 1971-2013

It is to be noted that these statistics, generally quoted as the Aboriginal and Torres Strait Islander population of Tasmania, is the estimate of the Bureau of Census and Statistics rather than the actual number of people who identified themselves as such on census night. The actual number of such people in 2011, for instance, was around 19,000 and not the 24,165 estimated by the Bureau. The estimate is said to be required because of the traditional undercount of Aboriginal people. In Tasmania it may be argued that the reverse is the case and that the higher estimated number is a misrepresentation of the true number of Aboriginal people in the State.

Given that Premier Hodgman has claimed that Aboriginal services have been delivered to only 6,000 Aboriginal people in Tasmania, the discrepancy between the actual number and estimated number of Aboriginal people – 5,000 people – is significant indeed.

The remarkable increase in the Census figures defies the usual explanations of higher birth rates and similar factors. Analysing the national trend, a recent Bureau explanation has been that a significant proportion of the unexplained increase in numbers must be due to increased self identification rather than any actual expansion of the Aboriginal communities nationally.

What is clear from the ABS chart is the dramatic increase in the number of self-identifying Aborigines in Tasmania associated with the introduction and growth of the voter-based national organisations, firstly the National Aboriginal Conference and later the Regional Councils of the Aboriginal and Torres Strait Islander Commission (ATSIC). The need for a voter base resulted in organising for voter numbers, for finding as many Aborigines and related others as possible to swell the voting numbers, and then deal-making to garner votes for the salaried positions of Regional Council Chair and Commissioner of ATSIC as well as funds distribution to local areas.

This development is evidenced by the incorporation date of several organisations as shown below:

**Organisations incorporated under CATSI Act associated with elections**

<b>Incorporation year</b>	<b>Organisation name</b>
1982	Tasmanian Aboriginal Corporation of Oriental Martial Arts; renamed Indigenous Tasmanians Aboriginal Corporation (ITAC)
1988	Karadi Aboriginal Women's Corporation
1992 July	Six Rivers Aboriginal Corporation
1992 July	South East Tasmanian Aboriginal Corporation (SETAC)
1994 March	West Coast Aboriginal Corporation
1994 March	Circular Head Aboriginal Corporation
1994 June	Elders Council Aboriginal Corporation
1995	Tasmanian of Aboriginal Descent Association

The elections for the National Aboriginal Conference took place in 1982 and the ATSIC elections were in 1990 and thereafter. The increases of 150% and 56% are also correlated with those elections. Despite the lack of procedures for challenging the incorporation of groups under the CATSI Act, once incorporated an organisation becomes an "Aboriginal organisation" for all legal purposes and there is no further challenge available.

**Definition of 'Aboriginal'**

The legal definition of an Aboriginal person in Australian law has been well established since the decision of the High Court of Australia in the 'Franklin Dams Case'. It requires Aboriginal ancestry, self-identification and communal recognition. It is not correct to say that the "definition" has varied between States and the Commonwealth as there is only one definition that applies in Australian law. There is, of course, no necessary correlation between the definition in Australian law and the definitions that apply in those areas governed by a specific Aboriginal law.

The process of applying that Australia-wide definition will vary inevitably in different parts of the country and for different purposes. The self-identification required in the national Census need not and should not apply in the provision of individual services nor to people's cultural identification as an Aboriginal person.

**Basis of Funding for Aboriginal Services**

Commonwealth funding for Aboriginal services has traditionally been based on need rather than on population numbers. Some funding, for instance Abstudy payments and Aboriginal legal aid, are also subject to means testing. It would therefore be strange indeed if every Aboriginal person in Tasmania were to be the direct beneficiary of Aboriginal specific funding.

Some Aboriginal specific programs, such as home ownership and businesses funded by Indigenous Business Australia, are more likely to benefit those Aboriginal people and others who have not traditionally been the beneficiaries of the type of social programs offered by the TAC. Unfortunately the figures published by Indigenous Business Australia do not show the local government areas nor the post codes of those who benefit. Nor do they align with individual's cultural connections with the Aboriginal community.

It is widely known, however, that some high profile individuals not usually identified with the Aboriginal community have benefitted from individual benefits offered nationally. Current Member of the Legislative Council for Huon, Robert Armstrong, and former Marrawah publican and now Chair of the Circular Head Aboriginal Corporation, Peter Benson, received business loans established for Aboriginal people. Indeed, it is not uncommon to find receipt of such loans being used as support for the argument that the beneficiary is an Aboriginal person despite there being no requirement to produce evidence of Aboriginal ancestry in order to qualify.

#### **'Proving Indigenous' in the Australian legal system**

There have been three major attempts by the Australian legal system to deal with contested issues of Aboriginality in Tasmania.

The first of these was *Shaw and James v Wolf and Ors* decided by Judge Merkel of the Federal Court of Australia in 1998. In this case the applicants had the almost impossible task of proving that the disputed people were not Aboriginal rather than the disputed people having to prove that they were Aboriginal. As it eventuated, the court was satisfied that the applicants had established that two of the eleven people challenged were not Aboriginal people entitled to stand for election to the ATSIC Regional Council. One of those disqualified people, Lance Sage aka Lance Le Sage, remains the contact person for his 'Aboriginal organisation', Aboriginal Corporation Tasmania registered with ORIC.

The impossible task faced by the applicants in *Shaw v Wolf* was to disprove the Aboriginality of people who were not part of the Aboriginal community. Evidence had to be produced to the Court in the absence of even a statement from the respondents about their family background. The task was complicated by the involvement of people from within the Aboriginal community who were part of the ATSIC Regional Councils with the respondents.

Legal principles about the standard of proof in civil cases was also crucial in deciding the outcome of this case. The usual civil standard is "on the balance of probabilities" rather than the criminal standard of beyond reasonable doubt; but in cases of particular gravity a higher civil standard, the 'Briginshaw test', can be applied. In this case, the judge applied that higher test to the gravity of the outcome for the defendants rather than for the applicants and the Aboriginal community as a whole.

The Administrative Appeals Tribunal decision in *Patmore and Others v Independent Indigenous Advisory Committee* was the second major decision, decided in 2002. The Administrative Appeals Tribunal – not a court but containing one Federal Court judge – had 15 days to decide applications from 55 people who considered they had been wrongly excluded. In that case the AAT was called upon to substitute their own opinion for that of a Tasmanian Aboriginal body set up to advise the Tasmanian Electoral Commissioner.

There was nothing to require the AAT to ignore totally the views of the original decision-makers, especially when operating in an area of which they so clearly lacked knowledge. The AAT also seemed to throw all legal caution to the wind by their use of terms such as "it is really quite obvious...", "there can be no doubt of the [assumed] fact"; and so on. The use of non-sequiturs when considering the official records of Births, Deaths and Marriages was quite amazing.

"It is only comparatively recently that pride in Aboriginal descent has become prominent. Accordingly, demonstrating Aboriginal descent can be difficult."

The connection between pride and proof does not stand up to any test.

The Smithton group was represented by the Heald and Lambert families who described their ancestor Pearl Blake as "a fairly big lady, fairly dark-skinned, very broad nose and thick jaw expression" and a grandmother had told a father that a great, great grandmother was Margaret

Cunningham and that she was an aboriginal.” A Margaret Cunningham was found in the Archives records described as a servant but the AAT relies on those records not showing her race or where she came from. Their evidence of family history was ‘uncontradicted.’ This overlooks there being no mechanism by which that story could be contested. The accounts continued of fathers and grandfathers being commercial muttonbirders, of dark appearance, of footballers and of Bass Strait islanders staying with them when they weren’t allowed in hotels. The Heald and Lambert families are also prominent in the Circular Head Aboriginal Corporation.

The Hite family from the north-west coast presents an interesting example of founders of a large group of people now claiming Aboriginality. Samuel Hite and Mary-Ann Pendrill are also the claimed Aboriginal ancestors of Senator Jacqui Lambie. The records showed white ancestry so the AAT went in search of other explanations for ancestral ‘dark skin.’ An explanation came by way of a brother Thomas Hite who is said to have taken an Aboriginal woman and then given the girl offspring to brother Samuel and Mary Ann. There is no evidence of the existence of any Thomas Hite or any other brother. The Hite/Ayletts are closely associated with Circular Head Aboriginal Corporation. The Heald, Quilliam, Radford group found an Aboriginal ancestor in one Charlotte Moodie claiming a tradition of mutton birding and using herbal ointments, and association with CHAC.

A major reason for rejecting the outcome of the AAT decision is the lack of questioning of the stories put forward. There was no opportunity to test their stories by questioning; no opportunity to produce documents showing alternative evidence; no opportunity to hear the reasons for the decisions of the Aboriginal panel who made the original decision that those involved were not Aboriginal. Rushed and untested decision-making on the eve of an ATSIC election was not a good foundation on which to rest the undermining of the Aboriginal community’s knowledge of itself.

The only case in which the claims of people to Aboriginal identity could be fully tested was in the Tasmanian Supreme Court case of Watson (In the Matter of the Aboriginal Lands Act 1995 and Mary Anne Watson (No 2) [2001 TASSC 105). In that case the onus was on the appellant Watson to demonstrate that she was an Aboriginal person for the purposes of the Aboriginal Lands Act 1995 which adopts the usual Commonwealth legislative definition.

Ms Watson had ancestors with names widely associated with Aboriginal people on Tasmania’s north west coast, including Baker and Johnson. People in her family line, notably Valda Gee, had won the prestigious David Unaipon award for Aboriginal writers. A family member had been accepted as Aboriginal in the Federal Court. Following the complexities of the written records and the conjectures about how they might have meant something different than appeared on their face, the appellant theorised that during a decade long absence from the copious Tasmanian records, her ancestor could have had a child with an Aboriginal man from the Bass Strait Islands. That was consistent, the appellant contended, with a family story of an ancestor who came from the Islands in an open boat. Chief Justice Cox considered this to be “speculative in the extreme and without any supporting evidence, documentary or otherwise.”

The Chief Justice was also called upon to consider photographs of the appellant’s family members said to have “Aboriginal facial characteristics and pigmentation” and accompanied by statements of undoubted Aboriginal people saying the photos looked like Aboriginal people they knew. These assertions were of a similar kind to that given by a few Aboriginal people in support of their fellow ATSIC counsellors in the Shaw v Wolf case and were very similar to the stories told to the AAT.

However, the Chief Justice also had before him the outcome of an 8 person Aboriginal advisory committee panel the Electoral Commissioner had established to advise him. The Aboriginal panel had been “firmly and unanimously” of the opinion that the appellant had not established herself to be an Aboriginal person. The Chief Justice saw no reason to depart from that view especially given the well known fact that, “Darkness of pigmentation is common to the descendants of many different races and is not, on its own, indicative of Aboriginal descent.”

It was acceptance of that fact that enabled the Stolen Generations Compensation Assessor to require some evidence about dark skin colour that resulted in the disqualification of some applicants who were found to be Jewish, Italian, and of Asian backgrounds.

Marianne Watson had been accepted by the AAT on the grounds of her undoubted community associations. However, when there was an opportunity to properly test the evidence in the Supreme Court under a legislative scheme which required the person claiming Aboriginality to demonstrate that fact, the Court found that Ms Watson was not an Aboriginal person,

#### **Organisations which become registered and funded**

The Circular Head Aboriginal Corporation emerged in Smithton around the time of the Aboriginal community's negotiations with the Liberal State Government for the return of land. Opposition to land return was spear-headed by long term Legislative Councillor Will Fletcher who 'found support' in the local group, almost none of whom had ever been heard of in the Aboriginal community and few of whom lived in the area.

In a 1988 book about the history of Burnie, author Kerry Pink describes the Aboriginal population of Circular Head as being confined to the Furneaux Islanders who visit for mutton birding during the season (Kerry Pink & Annette Ebdon, *Beyond the Ramparts: A Bicentennial History of Circular Head, Tasmania.*) There is no mention of a local Aboriginal community despite Pink's very detailed survey of the area's history. The book was developed as a Bicentennial project in close collaboration with a Committee of Smithton people. There is no mention in the Biographical Index of names now closely associated with the purported Aboriginal community of Circular Head including Aylett, Benson, Heald, Hiatt, Hyatt, or Hite while names such as Enniss and Quilliam are mentioned as being early independent settlers and farmers and not as Aboriginal people.

The situation is the same in the Kerry Pink publication in 2000, *Campsite to City*, where the only mention of Aylett and Hyatt is in a non-Aboriginal context. There is no mention of any other families since claimed to be traditional owners including Wylie to whom the Henry Reynolds inspired regional study by Ian McFarlane publication of 2008 was dedicated.

In neither the published local histories of Kerry Pink in 1988 or 2002 is there any mention of a "local Aboriginal community" in Circular Head and neither does such a community rate a mention in the major enquiries of the Deaths in Custody nor Stolen Generations. It is a recent invention which has served political purposes to oppose the Aboriginal community's campaigns for the recognition of its rights. In more recent years it has also served as a useful recipient of federal funds withdrawn from the TAC for political purposes; as witness its funding for prisoner support and youth diversion programs despite its tiny catchment area of Circular Head.

When CHAC re-emerged under new leadership and with new membership its main aim was to oppose the Aboriginal community's exclusive ownership of a small parcel of crucially significant land at preminghana (formerly known as Mount Cameron West). From a small membership in 1994 the ORIC record shows a 2015 membership of nearly 1400 people. Although based in the small far north west town of Smithton and providing health related services in that town, it has members as far afield as Cygnet in the south and Rossarden and Orford in the east, as well as in every State in Australia and in New Zealand. It received grants of over \$2 million and forty (40) staff including for youth, employment, drug and prison services despite the only Tasmanian prison being located in Hobart.

Other registered organisations, such as Flinders Island Aboriginal Association, Weetapooona on Bruny Island, and melaythina warrana in the north east operate businesses including farms, shops and tourism businesses although income from those enterprises appears not to be community assets, not appearing in their organisation's publically available financial statements.

After no prior public identification, Senator Jackie Lambie claimed Aboriginal ancestry in 2015. This upset many in the Aboriginal community as the Senator gravely mispronounced the ancestor's name and no previous family connection had ever been heard of within the undisputed descendants. Senator Lambie's family tree shows descent from two English convicts and no other undisputed Aboriginal family names appear in her history. She has previously defamed the TAC and its officers under parliamentary privilege and continues to harass the organisation, including threatening one of its prominent members in public.

#### **Tasmanian Aboriginal Centre funding**

The majority of TAC funding comes from the Commonwealth Government with a tiny proportion only coming from the State Government. In the 2016 financial year, for example, the Tasmanian Government contributed only \$270,000 of a total organisation budget of over \$10 million. No other State or Territory Government in Australia has so much disregard for the contribution made by Aboriginal service providers.

#### **Commonwealth Government Grants to TAC:**

<b>Year</b>	<b>Commonwealth Funding</b>
2005/6	
2006/7	7,601,237
2007/8	8,557,153
2008/9	8,525,954
2009/10	9,657,603
2010/11	10,417,278
2011/12	11,372,298
2012/13	11,667,379
2013/14	10,810,651
2014/15	12,251,748
2015/16	10,617,134
<b>Total Federal Funding</b>	<b>101,478,435</b>

It is clear from the above table that any unfair, unjust or illegal allocation of "hundreds of millions of dollars" lies elsewhere. The TAC allocations have been for specific programs with Commonwealth defined guidelines and with strict financial and performance reporting. The range of services provided with those funds has been outlined earlier in this submission.

The TAC has received unqualified independent and professional audits each year. A special audit by McGrathNicol instituted by the Attorney General's Department in 2015 identified no areas of significant non-compliance with the Funding Agreement, the Legal Policy Directions, nor any of the other numerous departmental requirements and the organisation received a Low Risk Rating on the financial health check. An earlier report by Deloitte in 2010 again commissioned by the Attorney-General's Department, an 'Internal audit of financial controls', concluded that TAC had complied with the financial control requirements of its Legal Services Contract and was in a sound financial position.

We say it is organisations like the Circular Head Group with its majority non-Aboriginal membership and governance who are responsible for ripping off Australian taxpayers and inflicting anguish on the Aboriginal community.

Heather Sculthorpe  
Chief Executive Officer  
7 November 2016