FROM MUSEUM TO LIVING CULTURAL LANDSCAPE: GOVERNING TASMANIA'S WILDERNESS WORLD HERITAGE

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I THE ISSUE

At Melaleuca, in the remote southwest of the Tasmanian Wilderness World Heritage Area ('TWWHA'), visitors may encounter the Needwonnee Aboriginal Walk. Established in 2011 by the Tasmanian Parks and Wildlife Service in consultation with the Tasmanian Aboriginal Land and Sea Council, the Walk is an interpretive nature trail over 1.2 kilometres that educates visitors about the lives of this ancient Aboriginal culture and their environs. Most of the interpretive installations are ephemeral, fashioned from organic materials in the local landscape, and include huts, tools, baskets, shell necklaces and a paperbark canoe. The area today is unoccupied except for the few intrepid tourists seeking an iconic 'wilderness' experience. Despite the good intentions behind creation of the Needwonnee Aboriginal Walk, it conveys the impression of a past or extinct culture now memorialised in an outdoors museum, without any voice and no longer heard. Yet many Aboriginal representatives in Tasmania see the TWWHA as 'belonging to a much larger living cultural landscape and seascape' that should be managed jointly with Aboriginal communities.[1]

The evolving governance of the TWWHA, which now recognises that Tasmania's southwest region is a living cultural landscape rather than a museum, evokes a broader policy issue about how nature conservation often also involves decisions about the place of people. This issue sometimes gets framed negatively and rigidly around the 'parks versus people' dichotomy,[2] as though effective conservation depends on excluding the human presence. Not only is the notion of 'pristine wilderness', a nature without people, untrue for nearly all of the biosphere, this troubling narrative can undermine caring for country whose human inhabitants have evolved bespoke environmental knowledge and

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1 Tilman Jaeger and Christophe Sand, 'Reactive Monitoring Mission to the Tasmanian Wilderness, Australia, 23–29 November 2015: Mission Report' (International Council on Monuments and Sites and International Union for Conservation of Nature, 2016) 24, 29.

2 Ben A Minteer and Thaddeus R Miller, 'The New Conservation Debate: Ethical Foundations, Strategic Trade-offs, and Policy Opportunities' (2011) 144 *Biological Conservation* 945.

husbandry skills, as well as wrongly bleach from history the legal claims of such people. Of course, these observations are hardly insightful, especially in Australia whose environments have been socialised through some 50 000 years of Aboriginal occupation. More difficult to understand, as we tackle in our article, is how can Indigenous participation in environmental governance occur where such people were subject to genocide and whose survivors have struggled against the dominant culture's pernicious ideology of biological or cultural 'extinction'.

Our article has three aims. Firstly, we explain in an historical context how the new management plan for the TWWHA arose; this is an important enquiry given the traumatic history of Aboriginal Tasmanians since the European invasion and the formidable legal and political obstacles to recognition of their participation in environmental governance. The second aim of our article is to explain why a different approach was taken in Tasmania in this regard compared to lodestar precedents in mainland Australia. Thirdly, we evaluate the content of the new TWWHA plan as a potential game-changer. Methodologically, it is of course difficult to predict the long-term impact of the TWWHA initiative, but our evaluation of key elements of the plan, and associated policy and legal reforms for Aboriginal Tasmanians, give confidence that they herald a significant improvement over previous governance arrangements.

Our enquiry considers these issues in light of broader legal precedents and discourses about nature conservation and Indigenous participation. Australia has some well-developed institutional models for Indigenous co-management in caring for country, such as for the Kakadu and Uluru national parks, and more recently via the Indigenous Protected Areas and Indigenous Land Use Agreements ('ILUAs') negotiated under the *Native Title Act 1993* (Cth).[3] Even more ambitious models are the comprehensive land claims settlements in Canada that often include self-government or shared governance regimes for natural resources.[4] But these models are premised on recognition of native title claims or at least acknowledgement of continuing Indigenous culture in such areas. Such assumptions have been problematic for Tasmania: no native title has ever been recognised in Tasmania and official acknowledgement of continuing Indigenous culture has been sporadic and limited until recent years. The assumption that some might have that these mainland models can be legally 'transplanted' to Tasmania or other contexts ignores that their preconditions for application may be missing.

While the increasing globalisation of legal norms, which encompasses legal standards for Indigenous peoples, has fuelled increasing interest in legal transplants and the convergence or harmonisation of legal standards across different societies, we must remain vigilant to the risks of transferring laws across cultural boundaries. Although history shows that some legal transplants

3 For an overview of these and other initiatives, see: Department of the Environment, *Indigenous Australians Caring for Country* (24 November 2015) <https://www.environment.gov.au/indigenous/index.html>.

4 Christopher Alcantara, *Negotiating the Deal: Comprehensive Land Claims Agreements in Canada* (University of Toronto Press, 2013).

can flourish in foreign terrain, the great pioneer of comparative law theory, Otto Kahn-Freund, observed that there are 'degrees of transferability' that hinge on political, cultural and institutional factors, such as the degree to which transplanted laws accord with the hegemonic ideology in the receiving country, their compatibility with host country power structures, and their level of support from influential special interest groups.[5] Furthermore, other legal-sociological writings observe that since laws are cultural expressions that reflect societal needs or contexts, they may not engender the same behaviours when transplanted in different societies.[6] In other words, the 'law' is more than just formal legislative and judicial doctrines, as below the surface it lives through complex socio-institutional systems from the culture of bureaucracies to local community mores, as legal pluralism scholarship has successfully shown.[7]

These considerations are especially germane to Tasmania, a geographically and demographically small, sub-national jurisdiction with a long history of external legal and political influence but whose sui generis circumstances make unmodified, imported governance models particularly risky. Notably, Tasmania has never had a successful native title claim; its *Aboriginal Heritage Act 1975* (Tas) had, until 2017, defined 1876 as the 'cut-off' for what would be considered Aboriginal heritage[8] (1876 denoting the death of Trucanini, the supposed 'last' Aboriginal Tasmanian);[9] and Tasmania has the relatively largest conservation estate of any Australian State that historically evolved without serious recognition of its Aboriginal presence. This legacy is amplified by other constraining attributes of Tasmania including its historic relatively poor socio-economic status on such indicators as educational attainment, employment, economic growth and health,[10] which tend to fall hardest on its Aboriginal communities as discussed later in this article. The challenges for Aboriginal participation in environmental governance in Tasmania thus have some distinctive qualities that require special attention in mapping future governance strategies. These cautionary words are not intended to imply scepticism about global, pan-Indigenous legal standards, as exemplified by the *United Nations Declaration on the Rights of Indigenous Peoples 2007* ('*UNDRIP*')[11] that has helped leverage positive change for many Indigenous peoples.[12] But global or

5 Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1, 6, 8.

6 See Susan Silbey, 'Making a Place for a Cultural Analysis of Law' (1992) 17 *Law and Social Inquiry* 41; Rene Provost (ed), *Culture in the Domains of Law* (Cambridge University Press, 2017).

7 See generally Emmanuel Melissaris, *Ubiquitous Law: Legal Theory and the Space for Legal Pluralism* (Routledge 2016).

8 See generally Department of Premier and Cabinet (Tas), 'Data on Social Inclusion and Exclusion in Tasmania' (Report, 2006) app 1.

9 The 2017 amendments also changed the name of the Act, formerly known as the *Aboriginal Relics Act 1975* (Tas): see *Aboriginal Relics Amendment Act 2017* (Tas).

10 Julianne Schultz and Natasha Cica (eds), 'Tasmania - The Tipping Point' [2013] (Autumn) *Griffith Review* 39.

11 GA Res. 61/295, UNGAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).

12 See, eg, Walter Echo-Hawk, *In the Light of Justice: The Rise of Human Rights in Native America and the UN Declaration on the Rights of Indigenous Peoples* (Fulcrum Publishing, 2013).

national standards cannot alone substitute for being scrupulously attentive to local contexts, barriers and opportunities.

This article's case study of the TWWHA management regime is thus embedded in two underlying propositions:

1. Environmental governance must be tailored to Tasmania's unique history and current context rather than rely simply on imported legal transplants or general global standards, regardless of their apparent success elsewhere; and
2. Environmental governance must be linked to a broader strategy of 're-setting the relationship' between Aboriginal and non-Aboriginal peoples in Tasmania, because joint management of its conservation estate or any other site-based governance would be insufficient and probably ineffective if the wider legal and socio-cultural context of Tasmanian Aboriginal peoples remains unresolved.

The TWWHA governance provides a methodologically robust case study for this enquiry because of: (1) its geographical significance, comprising nearly 25 per cent of Tasmania's land mass; (2) the centrality of the TWWHA to ongoing debates in Tasmania, and Australia more broadly, about 'wilderness' conservation; (3) the absence of any realistic prospects of a successful native claim to any part of the TWWHA; and (4) the development of a new management plan for the TWWHA in 2016 that heralds a fundamental shift not only in Aboriginal participation in environmental governance but also the broader reconciliation agenda between Aboriginal people and others in Tasmania.

The body of this article considers these issues in six further parts. The next part evaluates the discourses about nature conservation governance, from its historical antecedents to contemporary context, which form a necessary backdrop for understanding our case study. Part III focuses on the joint management model for Indigenous partnerships in protected areas governance in Australia, as this model has influenced the path taken in Tasmania. Parts IV, V and VI focus on Tasmania itself, beginning with the impact of the violent colonial legacy (part IV), recent moves to 'reset the relationship' (part V) and the development of a new joint management regime for the TWWHA (part VI). The article concludes in part VII with brief advice about the broader significance of the Tasmanian case study. The extensive coverage of the background to this subject, in parts III and IV, is necessary in order to properly understand the wider governance and policy context to the TWWHA country.

II DISCOURSES OF PROTECTED AREAS GOVERNANCE

Nature conservation worldwide commonly occurs through formally designated protected areas known as national parks, conservation reserves or other terminology depending on the legal status and allowable activities. Generically, explains Dudley, a protected area is a 'clearly defined

geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values'.[13] First established in 1872 at Yellowstone in the United States ('US'), the park model has since flourished, with by 2014 some 209 000 protected areas covering 32 million km^2 in 193 countries, thereby ostensibly conserving 15.4 per cent of the world's landmass, as well as 3.4 per cent of the oceans.[14]

Despite their popularity, protected areas create temporal and spatial enclaves that are potentially problematic both for nature conservation and human communities. The enclave model assumes that environmental sanctuaries can be set aside in designated spaces within which all conservation goals are met while freeing the remaining, and much larger areas, for economic development and human settlement.[15] Not only, however, are 'enclaves' often insufficient to meet environmental protection goals when a more comprehensive, landscape-scale approach is necessary, the protected areas also have socio-economic ramifications. Parks have displaced millions of people. Yellowstone itself, which set the model of the 'wilderness' enclave, was 'for thousands of years ... where Indians hunted, fished, gathered plants, quarried obsidian, and used the thermal waters for religious and medicinal purposes'.[16] It and other US parks to follow were created in tandem with government policies for the dispossession of Native Americans off country and into reserves.[17] Similar patterns emerged in Africa, where the national park model was extended by the European colonies to create recreational 'game reserves'.[18] The extinguishment of their Indigenous history was further nuanced by the overlay of mapping and topographical naming, a pattern also observed in Tasmania where the Aboriginal names of TWWHA country, such as *needwonnee, liaweenee* and *paralaongatec*,[19] became replaced with the 'Tasmanian Wilderness'.

A further impetus for protected areas in North America, Australia and other parts of the 'New World' was, in Runte's estimation,[20] a 'cultural anxiety' to compete against European heritage. Natural monuments, such as the Grand Canyon or Uluṟu, became the proxy for built heritage to symbolise new distinctive national identities. Protected areas were also seen as a profitable way to stimulate regional economies. Banff National Park, Canada's first protected area created in 1877, served to stimulate tourism through partnerships with

13 Nigel Dudley (ed), *Guidelines for Applying Protected Area Management Categories* (IUCN, 2008) 8–9.
14 Graeme Worboys, 'Concept, Purpose and Challenges' in G Worboys et al (eds), *Protected Area Governance and Management* (Australian National University Press, 2015) 9, 21.
15 Joseph Sax, 'The New Age of Environmental Restoration' (2001) 41 *Washburn Law Journal* 1.
16 United States National Park Service, *Yellowstone: Historic Tribes* (14 June 2016) <www.nps.gov/yell/learn/historyculture/historic-tribes.htm>.
17 Mark D Spence, *Dispossessing the Wilderness: Indian Removal and the Making of the National Parks* (Oxford University Press, 1999).
18 Charles Geisler, 'A New Kind of Trouble: Evictions in Eden' (2003) 55 *International Social Science Journal* 69.
19 Norman JB Plomley, *A Word-list of the Tasmanian Aboriginal Languages* (Government of Tasmania, 1976).
20 Alfred Runte, 'The National Park Idea: Origins and Paradox of the American Experience' (1977) 21 *Journal of Forest History* 64, 65.

railroad companies.[21] Australia's first, imaginatively named The National Park (and later renamed Royal National Park for monarchical celebrations), was established in 1879, south of Sydney.[22] It was primarily devoted to recreation and the 'acclimatisation of exotic fish and mammals' within the park boundaries that would remind visitors of the countryside of mother England.[23] These machinations of colonialism and commerce can sometimes still influence the discourses of nature conservation today under the guise of eco-tourist experiences.

Protected area histories also emanate, suggests Colchester,[24] from certain Western religious and philosophical traditions that separated humankind from nature, and associated nature with unruly and demonic forces that had to be tamed and made legible through human dominion. Christianity not only articulated the dualism of humankind and nature, but also inculcated the belief that it is God's will 'that man exploit nature for his proper ends'.[25] This rubric of human-nature dualism has festered through Western culture for centuries, although with some evolution towards a more benign view of nature. The literature and arts of the Romantic era of the 18th and 19th centuries fostered new aesthetic tropes about nature.[26] The 'picturesque' iconography evoked gorgeous panoramas such as majestic snow-capped mountains, while the 'sublime' exalted nature's wildest, untamed tendencies such as stormy seas or deep canyons. But both shared a representation of nature generally without people. These contrived aesthetics would later inform the representation of protected areas as 'untouched' or 'pristine' including in Tasmania's TWWHA country, such as how a recent Qantas travel magazine lauds one of the island's eco-destinations as 'Australia's most pristine wilderness'.[27]

In the 20th century, the first international standards for nature conservation emerged which would lead to increasing harmonisation of protected areas governance across different countries. Setting the tone, the Society for the Preservation of the Wild Fauna of the Empire, established in 1903, advocated protection of Africa's large game species primarily to protect European sporting and recreational interests, albeit often by displacing local communities.[28] Through treaties such as the *Convention Relative to the Preservation of Fauna*

21 Leslie Bella, *Parks for Profit* (Harvest House, 1987).

22 Carolyn Pettigrew and Mark Lyons, 'Royal National Park: A History' in W Goldstein (ed), *Australia's 100 Years of National Parks* (National Parks and Wildlife Service, 1979) 15.

23 Brett Stubbs, 'National Parks and Forest Conservation' in J Dargavel (ed), *Australia and New Zealand Forest Histories: Short Overviews* (Australian Forest History Society, 2005) 33, 34.

24 Marcus Colchester, 'Salvaging Nature: Indigenous Peoples and Protected Areas' in K Bertrand Ghimire and MP Pimbert (eds), *Social Change and Conservation* (Earthscan, 1997) 97.

25 Lynne White, 'The Historical Roots of Our Ecological Crisis' in RS Gottlieb (ed), *This Sacred Earth* (Routledge, 2004) 192, 197.

26 Carmen Casaliggi and Porscha Fermanis, *Romanticism: A Literary and Cultural History* (Routledge, 2012) 119–20.

27 Linda Jaivin, *Discover Australia's Most Pristine Wilderness at Cradle Mountain* (31 August 2017) Qantas Travel Insider <http://travelinsider.qantas.com.au/australia/tasmania/discover-australia-s-most-pristine-wilderness-at-cradle-mountain>.

28 See generally John MacKenzie, *The Empire of Nature: Hunting, Conservation and British Imperialism* (Manchester University Press, 1988).

and Flora in the Natural State,[29] conservation became increasingly tied to an environmental internationalism in which asserted global concerns of protecting biodiversity became a pretext for dispossession of communities. The tactics of invalidating local people's knowledge and overlaying conservation as a priority resulted in a 'fences and fines' mindset for protected areas.[30]

The contemporary global discourse on conservation and national parks is heavily informed by the work of the International Union for Conservation of Nature ('IUCN'), which in recent years has helped to shift the discourse in a positive direction for Indigenous peoples.[31] Much of its work is articulated through six specialist commissions, one of which is the World Commission on Protected Areas ('WCPA') that has shaped the influential *Guidelines for Applying Protected Area Management Categories* ('*Guidelines*').[32] They differentiate protected areas into six categories, from strict conservation reserves to landscapes managed for sustainable use and cultural values in addition to biodiversity protection. The *Guidelines* also acknowledge not merely the legitimacy of Indigenous heritage and subsistence use but that such peoples sometimes should participate in governance of protected areas via shared management or community control.[33] Through the pioneering work of its former Inter-Commission Task Force on Indigenous Peoples,[34] and now its current Specialist Group on Indigenous Peoples, Customary and Environmental Laws and Human Rights,[35] the IUCN has demonstrated increasing sensitivity to the seminal roles of Indigenous peoples in managing land and seascapes.

Related shifts in the discourses of protected areas governance are evident in other contexts too, as governments increasingly recognise the Indigenous history of protected areas, accommodate more activities beyond biodiversity conservation, and integrate park governance into broader landscape management under the aegis of the philosophy of sustainable development.[36] *The Convention on Biological Diversity*, the principal global treaty of its genre, takes this approach and specifically obliges states to: 'respect, preserve and maintain

29 Signed 8 November 1933, 27 UNTS 871, art 4.1 obliged parties to remove 'all white or native settlements in national parks with a view to ensuring that as little disturbance as possible is occasioned to the natural fauna and flora'.

30 Grazia Borrini-Feyerabend, *Beyond Fences: Seeking Social Sustainability in Conservation*, vol 2 (IUCN, 1997); Marcus Colchester, 'Review: Conservation Policy and Indigenous Peoples' (2004) 7 *Environmental Science and Policy* 145.

31 See generally IUCN (2018) <https://www.iucn.org>.

32 Dudley, above n 13.

33 Ibid 26–7.

34 Inter-Commission Task Force on Indigenous Peoples, *Indigenous Peoples and Sustainability: Cases and Action* (IUCN, 1997).

35 See *IUCN* 'Specialist Group on Indigenous Peoples, Customary & Environmental Laws & Human Rights' (2018) <https://www.iucn.org/commissions/commission-environmental-economic-and-social-policy/our-work/specialist-group-indigenous-peoples-customary-environmental-laws-human-rights-spiceh>.

36 See generally Michael I Jeffery, Jeremy Firestone and Karen Bubna-Litic (eds), *Biodiversity, Conservation, Law and Livelihoods* (Cambridge University Press, 2008); Benjamin J Richardson, 'The Ties that Bind: Indigenous Peoples and Environmental Governance' (Research Report No 26, Osgoode Hall Law School, York University, 2008) <http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1197&context=clpe>.

knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles for the conservation and sustainable use of biological diversity' and to share the benefits of permitted uses of such people's knowledge for these purposes.[37] But still, making this duty 'subject to … national legislation' and 'as far as possible and appropriate', creates room for states' perfunctory or unscrupulous conduct.[38] Among the numerous regional treaties, the *Convention on Conservation of Nature in the South Pacific* promotes protected areas as its primary tool but allows (though not obliges) state parties to 'make appropriate provision for customary use of areas and species in accordance with traditional cultural practices'.[39]

Some treaties of older vintage have been revamped to reflect the shifting discourses of nature conservation away from the humankind versus nature rubric. The *World Heritage Convention*,[40] which encourages states to nominate areas under their jurisdiction for inclusion in a global list of the most outstanding natural and cultural wonders, has since 1992 included explicit criteria for listing 'cultural landscapes' that show a 'long and intimate relationship between peoples and the natural environment'.[41] Cultural landscapes may include sacred natural sites, archaeological remains, rock art and rural and subsistence economies long embedded in nature. As the administering World Heritage Centre explains, such landscapes 'often reflect specific techniques of sustainable land-use, considering the characteristics and limits of the natural environment they are established in, and a specific spiritual relation to nature'.[42] Among the approximately 90 cultural landscapes currently listed under the Convention are New Zealand's Tongariro National Park (of cultural significance to Māori), Mongolia's Orkhon Valley (a grassland used for centuries by nomadic pastoralists) and China's Lushan National Park (a dramatic landscape that inspired Chinese artists' unique aesthetic representations of nature). Although included in the World Heritage List before adoption of the 'cultural landscape' criteria, the cultural values of the TWWHA, as recognised in its listing, include its Aboriginal sites such as cave paintings and cultural deposits dating back some 35 000 years.[43]

Recognition of Indigenous cultural values in protected areas however is not the same as rights to participate in their governance. Such recognition has come from other global instruments dedicated to Indigenous rights. The International Labour Organization ('ILO') has been in the vanguard of promoting Indigenous

37 Signed 5 June 1992, 31 ILM 818, (entered into force 29 December 1993) art 8(j).
38 Ibid.
39 Signed 12 June 1976, 41 ATS, art VI.
40 *Convention Concerning the Protection of World Cultural and Natural Heritage*, signed 16 November 1972, 11 ILM 1358 (entered into force 17 December 1975).
41 United National Educational, Scientific and Cultural Organization, *Cultural Landscapes* (2018) <http://whc.unesco.org/en/culturallandscape>.
42 Ibid.
43 Tasmania Parks and Wildlife Service, *World Heritage Values: Aboriginal Heritage* (22 December 2017) <http://www.parks.tas.gov.au/index.aspx?base=26355>.

rights. Its first treaty for such purposes was adopted in 1957,[44] which 'gave indigenous peoples a foothold in the international system through the conceptual and institutional medium of human rights'.[45] Eventually rejected for its assimilationist philosophy, the 1957 treaty was superseded by the ILO's *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* 1989.[46] Twenty-two states have ratified it as of January 2018, but not Australia. It contains extensive obligations on states to promote Indigenous participation in or control of environmental governance in their traditional territories.[47] Even more important is the *UNDRIP*, adopted in 2007 and supported by Australia since 2009.[48] The *UNDRIP* combines general normative goals on self-determination with specific rights inter alia to land, cultural heritage, environmental protection and economic development, as well as procedural rights for consultation, compensation and self-government. Indigenous co- or self-governance of protected areas is conceivable within the *UNDRIP*.[49] Several of its provisions also affirm the principle of 'free prior and informed consent',[50] a norm that has morphed into a foundational procedural standard for Indigenous peoples.[51] But implementation of *UNDRIP* has been as difficult as its protracted evolution over two decades, with many governments including Australia yet to fulfil expectations.[52]

Indigenous peoples have also taken the initiative in articulating their own normative manifestos and participating in global dialogues. Their proclamations include the *Kari-Oca Declaration*[53] adopted at the Indigenous tribes' parallel forum to the 1992 Earth Summit, and the *Declaration of Indigenous Peoples on Climate Change*, adopted by Indigenous delegates at the Conference of the Parties of the Framework Convention on Climate Change in 2000.[54] The creation of the United Nations ('UN') Permanent Forum on Indigenous Issues in 2000 has also given Indigenous peoples a discursive space to agitate for change in the UN system. Furthermore, through global coalitions such as the Inuit Circumpolar

44 *Convention (No. 107) Concerning the Protection and Integration of Indigenous and other Tribal and Semi-tribal Populations in Independent Countries*, signed 26 June 1957, 328 UNTS 247 (entered into force 2 June 1959).

45 S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2004) 56.

46 (1989) 28 ILM 1382.

47 See, eg, ibid arts 7.4, 15.1.

48 GA Res. 61/295, UNGAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007). For in-depth analysis see Mauro Barelli, *Seeking Justice in International Law: The Significance and Implications of the UN Declaration on the Rights of Indigenous Peoples* (Routledge, 2016).

49 See, eg, *UNDRIP* GA Res. 61/295, UNGAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) 2, 29.

50 Ibid arts 11, 19, 28.

51 SJ Rombouts, *Having a Say: Indigenous Peoples, International Law and Free, Prior and Informed Consent* (Wolf Legal Publishers, 2014).

52 Roxanne Ornelas, 'Implementing the Policy of the UN Declaration on the Rights of Indigenous Peoples' (2014) 5(1) *International Indigenous Policy Journal* 1.

53 Reproduced in M Terena, 'The Kari-Oca Conference in Rio' in L van de Fliert (ed), *Indigenous Peoples and International Organisations* (Spokesman, 1994) 181.

54 See Amazon Watch, *Declaration of Indigenous Peoples on Climate Change* (12 November 2000) <http://amazonwatch.org/news/2000/1112-declaration-of-indigenous-peoples-on-climate-change>.

Council and the International Alliance of Indigenous and Tribal Peoples of the Tropical Forests, Indigenous peoples have forged a distinctive transnational presence for development of meta-norms.

Overall, the foregoing developments have established several key norms of potential relevance to Indigenous participation in protected areas governance: (1) the principle of free prior and informed consent for activities on Indigenous territory; (2) an integrated approach to land use that blends environmental conservation with social and economic development to empower Indigenous communities; (3) Indigenous self-governance or co-governance of natural resources; and (4) linking the foregoing to a broader agenda about reconciliation and Indigenous self-determination.

While the global revolution in Indigenous rights has undoubtedly brought many benefits,[55] the convergence of legal standards and strategies should not imply that a uniform approach is always desirable. It may problematically create unrealistic expectations or lead to the transplantation of legal models that are unsuitable for specific communities. Once we move from the rhetoric about Indigenous 'self-determination', 'reconciliation', 'free, prior and informed consent' and other meta-norms to specific governance contexts, the need for accommodating local histories and contexts arises. Even within individual countries, such as Australia, considerable variation can be necessary in legal models and strategies for Indigenous participation in protected areas governance and other domains. As the Tasmanian case study that follows will show, a one-size-fits all model is inappropriate for protected areas governance.

III JOINT MANAGEMENT OF PROTECTED AREAS

The foregoing shifts in the discourses of nature conservation have spawned in recent decades diverse legal regimes for Indigenous participation in protected areas governance, including purely Indigenous-controlled regimes and areas jointly managed by state and Indigenous representatives.[56] In Australia, this trend is now often described through the terminology of 'caring for country',[57] and leading thinkers in this field such Dermot Smyth, Donna Craig, Maureen Tehan and Lee Gooden among others[58] have helped to deepen our understanding of the optimal institutional models.

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55 Sheryl Lightfoot, *Global Indigenous Politics: A Subtle Revolution* (Routledge, 2016).

56 For an overview of some of the current thinking see Stan Stevens (ed), *Indigenous Peoples, National Parks, and Protected Areas: A New Paradigm Linking Conservation, Culture and Rights* (University of Arizona Press, 2014).

57 See Jon Altman, *People on Country: Vital Landscapes, Indigenous Futures* (Federation Press, 2012).

58 See Dermot Smyth and Graeme Ward (eds), 'Protecting Country: Indigenous Governance and Management of Protected Areas in Australia' (Report, Australian Institute of Aboriginal and Torres Strait Islander Studies ('AIATSIS') 2009); Garth Nettheim, Gary Meyers and Donna Craig, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights* (AIATSIS, 2002); Lee Godden and Maureen Tehan (eds), *Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures* (Routledge, 2010).

Because under Australian property law, including native title, the landholder's ownership does not necessarily confer the right to determine land use, which is a matter governed by environmental regulation and other public controls, Indigenous peoples often must acquire additional management rights to care for their country. One mechanism is the Indigenous Protected Area ('IPA'), which presently constitute a massive 44 per cent of the national reserve system with 65 million hectares in 72 separate IPAs.[59] An IPA is 'governed by the continued responsibilities of [Indigenous] peoples … [and] managed for cultural biodiversity and conservation, permitting customary sustainable resource use and sharing of benefits'.[60] The first IPA, declared in South Australia in 1998 and known as the Nantawarrina IPA, became the model for others.[61] The IPAs can help protect Indigenous peoples' rights to care for country, although reliance on Commonwealth funding may result in management practices being closely tied to federal government priorities. While IPAs have evidently been quite successful in empowering Indigenous caring for country across much of Australia,[62] an IPA is typically linked to recognition of native title or land rights regained under other statutory schemes. Eight IPAs have been established in Tasmania in relation to territories returned via the *Aboriginal Land Act 1995* (Tas). However, in regard to the TWWHA country, which is predominantly Crown land, the IPA model would not be transferable at present.

Another means of empowering Indigenous caring for country is the ILUA. Such agreements, which are negotiated under the auspices of the *Native Title Act 1993* (Cth) for native title holders or claimants, can 'address the management of national parks and can outline a park's joint management and the exercise of native title rights on the park', explains the New South Wales Office of Environment and Heritage.[63] One such example, in NSW, is the ILUA negotiated in 2001 that led to the establishment of the Arakwal National Park near Byron Bay. This ILUA was the first of its kind in Australia, and led to creation of joint management of the park and specific provisions for protecting Indigenous cultural heritage, allowing traditional ceremonies, and rights to gather material

59 Department of Environment and Energy (Cth), *Indigenous Protected Areas* (2018) <http://www.environment.gov.au/land/indigenous-protected-areas>. See also Department of Environment and Energy (Cth), *Collaborative Australian Protected Area Database* (2018), <http://www.environment.gov.au/land/nrs/science/capad>.

60 Ro Hill et al, 'Our Country Our Way: Guidelines for Australian Indigenous Protected Area Management Plans' (Report, Commonwealth Scientific Industrial Research Organisation, Ecosystem Sciences, Australian Government Department of Sustainability, Water, Environment, Population and Communities, 2011) 1.

61 Samantha Muller, 'Towards Decolonisation of Australia's Protected Area Management: The Nantawarrina Indigenous Protected Area Experience' (2003) 41 *Australian Geographical Studies* 29.

62 Steve Szabo and Dermot Smyth, 'Indigenous Protected Areas in Australia: Incorporating Indigenous Owned Land into Australia's National System of Protected Areas' in H Jaireth and D Smyth (eds), *Innovative Governance – Indigenous Peoples, Local Communities and Protected Areas* (Ar Books, 2003).

63 New South Wales Office of Environment and Heritage, *Indigenous Land Use Agreements* (27 February 2011) <www.environment.nsw.gov.au/jointmanagement/indigenouslanduseagreement.htm>.

for traditional medicines and customs, and fishing and hunting.[64] Numerous other ILUAs have since been negotiated across much of Australia to facilitate Indigenous connections to country in national parks and sometimes to participate in park governance.[65] But because native title is not part of the legal landscape of Tasmania, with no successful claims and none pending, the ILUA model has not been introduced to Tasmania and conceivably never will.

Australia also has considerable experience with the joint or co-management model, which has recently been extended to the TWWHA and thus dominates the ensuing discussion. Joint management may be tied to official recognition of Indigenous land ownership or informal acknowledgement of an Indigenous connection to country. In theory, joint management enables 'power-sharing'[66] built on a 'process of dialogue'[67] to manage use and conservation of natural resources.[68] In practice, it might conversely embed colonising structures in which the sharing of power with local resource users is largely symbolic and tokenistic.[69] Pinkerton suggests that joint management is 'misnamed' unless it is about the 'how, when, where, how much, and by whom' rights of peoples to participate in key decision-making.[70] Noble suggests that creation of formal governance structures rather than informal Memorandums of Understanding ('MOUs') are 'important prerequisites' for successful joint management.[71] And the model can fail when governance arrangements lack the flexibility to adjust to mutable circumstances such as shifting social expectations or new environmental threats.[72]

The history of joint management in Australia dates from the early 1970s when Aboriginal land rights became politically salient in the wake of the *Milirrpum*[73] case and the subsequent Woodward Royal Commission appointed by the Whitlam government that resulted in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). A considerable portion of the Woodward Commission's 1974 report was dedicated to 'reconciling Aboriginal interests

64 New South Wales Office of Environment and Heritage, *Arakwal Indigenous Land Use Agreements* (11 August 2014) <http://www.environment.nsw.gov.au/jointmanagement/arakwal.htm>.

65 Toni Bauman, Claire Stacey and Gabrielle Lauder, 'Joint Management of Protected Areas in Australia: Native Title and Other Pathways Towards a Community of Practice' (Workshop Report, AIATSIS, 2012) 6–22.

66 Robert Pomeroy and Fikret Berkes, 'Two to Tango: The Role of Government in Fisheries Co-management' (1997) 21 *Marine Policy* 465, 466.

67 Grazia Borrini-Feyerabend et al (eds), *Indigenous and Local Communities and Protected Areas: Towards Equity and Enhanced Conservation* (IUCN, 2004) 36.

68 David Natcher, Susan Davis and Clifford Hickey, 'Co-Management: Managing Relationships, Not Resources' (2005) 64 *Human Organization* 240.

69 Alfonso Castro and Erik Neilsen, 'Indigenous People and Co-management Implications for Conflict Management' (2001) 4 *Environmental Science and Policy* 229.

70 Evelyn Pinkerton, 'Towards Specificity in Complexity: Understanding Co-management from a Social Science Perspective' in D C Wilson, J R Nielsen and P Degnbol (eds), *The Fisheries Co-management Experience* (Kluwer, 2003) 61.

71 Bram Noble, 'Institutional Criteria for Co-management' (2000) 24 *Marine Policy* 69, 69.

72 Claudia Pahl-Wostl, 'A Conceptual Framework for Analysing Adaptive Capacity and Multi-level Learning Processes in Resource Governance Regimes' (2009) 19 *Global Environmental Change* 354.

73 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

with conservation', where 'joint management' was identified as an option.[74] It is worth quoting the Woodward Commission's findings on this point as they have shaped the evolution of protected areas co-management in Australia:

> It is difficult to make precise suggestions as to how joint management can be best achieved … [but] the principles to be observed are, firstly, that there should be a group of Aborigines working together in any such Board. They are entitled to the confidence of numbers. Secondly, they must not be able to be out-voted by conservation interests without having their point of view considered by an independent adjudicator – either on the Board our outside it. Thirdly, it must not be expected that Aborigines should provide, on their lands, all the conservation areas necessary to placate the conscience of the wider community. Fourthly, attempts should be made, so far as possible, to reconcile Aboriginal needs and the best interests on conservation by compromise within a given area, even though the results may not be in accordance with best conservation planning. Finally, Aboriginal interests should only be overruled where the case for conservation is a strong one.[75]

Coinciding with the Woodward report and the first tranche of statutory land rights was the growing national environmental movement that sought expansion of protected areas and stricter environmental controls on resource development.[76] While the movement's lead organisations such as the Wilderness Society and the Australian Conservation Foundation could be sympathetic to Aboriginal interests, they could also sometimes promote a conservation agenda associated with an unpeopled 'wilderness', as evident in the campaign to save Tasmania's Franklin River from a hydropower scheme.[77] This trend contributed to the dominant model of nature conservation in Australia in the 1970s and 1980s that largely marginalised Indigenous peoples' connections to country while prioritising the authority of 'expert' Western resource managers and scientists.[78]

The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) began to challenge that model by enabling the creation of joint management regimes for parks in the Northern Territory ('NT'). The Gurig National Park, now known as Garig Gunak Barlu National Park, was established in 1981 as a trade-off: in exchange for not proceeding with a court claim, the NT Government agreed to title transfer so long as a national park was established.[79] The settlement allowed full Aboriginal ownership and proclamation of the protected area under NT

74 Aboriginal Land Rights Commission, *Second Report of the Aboriginal Land Rights Commission* (Government Printer, 1974) 95.

75 Ibid 97.

76 Drew Hutton and Libby Connors, *History of the Australian Environment Movement* (Cambridge University Press, 1999) 125–35.

77 Aynsley Kellow, 'The Dispute Over the Franklin River and South West Wilderness Area in Tasmania, Australia' (1989) 29 *Natural Resources Journal* 129. While environmentalists' Franklin River campaign relied on Aboriginal cultural heritage discovered in the areas planned to be flooded by the dam, the assumption was that this was ancient heritage and that environmentalists could speak on behalf of Aboriginal Tasmanians: John Slee, 'Aboriginal Relics Law Behind Dam Challenge' *Sydney Morning Herald* (21 February 1983) 3.

78 Emma Lee, 'Protected Areas, Country and Value: The Nature–Culture Tyranny of the IUCN's Protected Area Guidelines for Indigenous Australians' (2015) 48 *Antipode* 355.

79 Dermot Smyth, 'Joint Management of National Parks' in R Baker, J Davies and E Young (eds), *Working on Country: Contemporary Indigenous Management of Australia's Land and Coastal Regions* (Oxford University Press, 2001) 75.

legislation, a board of management chaired by a traditional owner and day-to-day operations held by the NT Parks and Wildlife Service.[80] The joint management established for Kakadu National Park, proclaimed in 1979, is an amalgamation of traditional owner lands and government public estates jointly managed as if full title is vested with Indigenous peoples.[81] Unlike Garig, however, the Kakadu regime was tied to the right of the Commonwealth to immediately leaseback the estate under a 99-year term.[82] For Uluru Kata-Tjuta National Park, the hand-back of country to the Anangu people had the same strings attached as Kakadu, notably the immediate 99-year lease conditions, but the board of management was in place at time of proclamation, rather than later as with Kakadu, which helped improve Indigenous influence over the development of the park's governance.[83]

The joint management model has since flourished across much of Australia, via diverse tenurial arrangements including leasebacks or transfer of ownership, and governance regimes modulated through ILUAs, MOUs and other partnerships. These regimes typically cover cultural resource management; hunting, fishing and gathering rights; Indigenous living areas and ceremonial sites; and economic opportunities for Indigenous businesses. New South Wales has been particularly active here, with 24 national parks jointly managed as of January 2018.[84] Conversely, prior to the 2016 TWWHA management plan, Tasmania had no formal joint management arrangements, with Aboriginal participation confined to some representation on the advisory councils for national parks and involvement in maintenance of specific cultural sites within parks. Joint management is now widely endorsed, although some models have been critically received.[85] Some of the NT examples could be viewed as 'arrangements of convenience or coercion', explains Smyth, because of their linkage to the leaseback arrangements.[86] With Kakadu and Uluru, the traditional owners also chose to collaborate with the federal government given their unfavourable experiences with the alternate NT managing authority.[87] The emphasis on biodiversity conservation and eco-tourism rather than cultural values in some joint management regimes is also problematic for some.[88]

The practice of joint management, as with some other initiatives in Australia to promote collaborative and community approaches to environmental

80 Toni Bauman and Dermot Smyth, *Indigenous Partnerships in Protected Area Management in Australia: Three Case Studies* (AIATSIS, 2007).

81 Toni Bauman, Chris Haynes and Gabrielle Lauder, *Pathways to the Co-management of Protected Areas and Native Title in Australia* (Aboriginal Studies Press, 2013).

82 Smyth, above n 79.

83 Bauman, Haynes and Lauder, above n 81.

84 New South Wales Office of Environment and Heritage, *Existing Joint Management Agreements* (10 March 2017) <http://www.environment.nsw.gov.au/jointmanagement/jointmanagedparks.htm>.

85 Helen Ross et al, 'Co-management and Indigenous Protected Areas in Australia: Achievements and Ways Forward' (2009) 16 *Australasian Journal of Environmental Management* 242.

86 Smyth, above n 79, 76.

87 Chris Haynes, *Defined by Contradiction: The Social Construction of Joint Management in Kakadu National Park* (PhD Thesis, Charles Darwin University, 2009) 64.

88 David Lawrence, 'Managing Parks / Managing Country: Joint Management of Aboriginal-owned Protected Areas in Australia' (Research Paper No 2, Parliamentary Research Service, 1996/7) 1.

governance, has stirred national debate about the relationships between the green and Aboriginal agendas and the capacity of law to leverage meaningful change. A recent synthesis of these 'unstable relations' by Eve Vincent and Timothy Neale concludes that 'it is untenable for environmentalists to proceed as if Aboriginal actors are either naturally conservationist in their orientation, or if they are not, that their cultural difference has been somehow corrupted or diluted'.[89] Marcia Langton has excoriated the 'green left' for stereotyping Indigenous livelihoods around the economically impoverished 'notable savage' trope.[90] Joint management type governance has itself incurred criticisms; anthropologist Eloise Face cautions that such community-based regimes can entangle contradictory agendas that result in emphasising bureaucratic oversight over Indigenous cultural knowledge.[91] Similarly Seán Kerins' critique of the 'caring for country' discourse highlights how it has been reshaped by officialdom to inhibit Indigenous self-determination.[92] Such insights into legal and policy measures in Indigenous affairs give caution in assuming that even well-intended reforms can have predictable and benign effects.

This is not the place however to enter into a deep analysis of Australia's joint management or other environmental governance regimes relating to Indigenous peoples. The foregoing remarks serve to provide a necessary backdrop to understand the options available to Tasmania, where a customised rather than imported approach was necessary given its history and present circumstances.

IV ABORIGINAL TASMANIANS' COLONIAL LEGACIES

To understand why Tasmania chose a different approach to joint management we must detour into a bit of its history. At the turn of the 19th century, the colonising rhetoric of absorbing Aboriginal populations into the British Empire through legal proclamations to claim peoples as 'subjects',[93] followed by further manoeuvres to deny the same peoples equitable treatment due, in part, to their lack of 'moral or religious Tye [sic]',[94] was felt more strongly in Tasmania than anywhere in Australia. This legislative abyss gave the colonists de jure or de facto protection against virtually any tribulations they perpetrated on Aboriginal

89 Eve Vincent and Timothy Neale, 'Unstable Relations: A Critical Appraisal of Indigeneity and Environmentalism in Contemporary Australia' (2017) 28 *Australian Journal of Anthropology* 301, 322.

90 Marcia Langton, *The Quiet Revolution: Indigenous Peoples and the Resources Boom* (ABC Books, 2013).

91 Eloise Fache, 'Caring for Country, a Form of Bureaucratic Participation: Conservation, Development, and Neoliberalism in Indigenous Australia' (2014) 24 *Anthropological Forum: A Journal of Social Anthropology and Comparative Sociology* 267.

92 Seán Kerins, 'Caring for Country to Working on Country' in Jon Altman and Seán Kerins (eds), *People on Country: Vital Landscapes Indigenous Futures* (Federation Press, 2012) 26.

93 Frank M Bladen, *Historical Records of New South Wales: Bligh and Macquarie, 1809, 1810, 1811* (Lansdown Slattery & Co., 1901) vol 7, 135.

94 Judge-Advocate Atkins, 'Opinion on the Treatment of Natives 20 July 1805' in *Historical Records of Australia. Series 1, Governors' Despatches to and from England* (Library Committee of the Commonwealth Parliament, 1914–25) vol 5, 502.

Tasmanians. As colonisation focused on acquisition of territory and resources,[95] Aboriginal Tasmanians defending their country against the invading tide were subjected to extreme government-backed violence.[96] The 1828 declaration of martial law[97] and the 1830 bounties for capture of Aboriginal adults and children,[98] was complemented by legal measures to 'restrict the intercourse between the White and Coloured Inhabitants of this Colony'.[99] The resulting government-sanctioned or condoned massacres and abductions were of such magnitude that lawyer Raphaël Lempkin, who helped draft the 1948 Genocide Convention, cited the Tasmanian experience in coining his neologism 'genocide'.[100]

By the mid-1830s, the remnant Aboriginal populations of the 'Black War' were forcibly exiled from the Tasmanian mainland to Flinders Island in the Bass Strait,[101] thereby severing the continuity of ties to land and seas that are deemed under the *Native Title Act 1993* (Cth) as necessary for any successful claim. Furthermore, the death of Trucanini in 1876 became both the roots of myth and the state government panacea to the 'Aboriginal problem': no surviving Tasmanian Aboriginal peoples meant that the authorities would not be accountable for future claims for justice. A brutal chapter under Australian colonisation was thus apparently closed.

Fast forward to the 1970s and the rumblings of Aboriginal recognition began to stir with the establishment of the Tasmanian Aboriginal Centre devoted to reclaiming land, seeking social justice and asserting Indigenous survival under genocide.[102] From this period until the early 2010s, the Tasmanian government wrestled uneasily with how to address a supposedly extinct population or what Taylor refers to as a 'slippage' in the distinction between genocide and extermination.[103] For example, while the *Aboriginal Heritage Act 1975* (Tas), until amended in October 2017, cast Trucanini's death in 1876 as the point in which no further claims to heritage by contemporary populations could be made, the year following enactment of the legislation, in 1976, the government

95 Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8 *Journal of Genocide Research* 387.

96 See generally Nicholas Clements, *The Black War: Fear, Sex and Resistance in Tasmania* (University of Queensland Press, 2014).

97 Tom Lawson, *The Last Man: A British Genocide in Tasmania* (I.B. Tauris, 2014) 51.

98 Henry Reynolds, *A History of Tasmania* (Cambridge University Press, 2012) ch 3.

99 George Arthur, 'The Demarcation Proclamation' reproduced in JCH Gill, *The Notes on the Tasmanian "Black War": 1827–1830* (Royal Historical Society of Queensland, 23 May 1968) 518, 519.

100 Ann Curthoys, 'Raphaël Lemkin's "Tasmania": An Introduction' (2005) 39 *Patterns of Prejudice* 162.

101 Lyndall Ryan, *Tasmanian Aborigines: A History Since 1803* (Allen & Unwin, 2012) ch 14.

102 Ibid ch 19.

103 Rebe Taylor, 'Genocide, Extinction and Aboriginal Self-determination in Tasmanian Historiography' (2013) 11 *History Compass* 405.

supported the cremation and casting of Trucanini's ashes[104] in the D'Encastreaux Channel (south-east Tasmania) as a closed and wholly Aboriginal affair.[105]

The manner by which contemporary Aboriginal Tasmanians were held as a low government priority and marginalised is further evinced through the paucity of legislative protections. There are only three pieces of legislation that directly refer to their cultural rights and heritage: the simplified *Native Title (Tasmania) Act 1994* (Tas), which validates past extinguishments of Aboriginal rights and confirms State ownership of all natural resources; the *Aboriginal Lands Act 1995* (Tas), which from a reconciliation agenda allows for limited parcels of land of Indigenous heritage significance to be returned; and the *Aboriginal Heritage Act 1975* (Tas) (although positively amended in 2017), which is geared towards wider public benefit and mediating knowledge of Aboriginal values rather than being a vehicle for exclusive Aboriginal use and heritage management.[106] Other Tasmania legislation focusing on its Aboriginal communities, such as the *Stolen Generations of Aboriginal Children Act 2006* (Tas), which established a fund to enable ex-gratia payments to members of the stolen generation, do not deal with Indigenous heritage and cultural values protection.

On paper additional federal laws also exist to protect heritage, notably the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) and *Environment Protection and Biodiversity Conservation Act 1999* (Cth), but their value in practice has been disheartening for Aboriginal Tasmanians. The latter statute was used to 'protect' the Kutalayna (Jordan River Levee) from a Tasmanian Government road project after it was accepted for national heritage listing in December 2011.[107] But the listing was a belated federal response after litigation to halt the construction failed. With the *Aboriginal Relics Act 1975* (Tas) failing to support the protection of a 40 000 years old site from the Brighton Bypass highway construction (north of Hobart), opponents of the development in 2010 turned to Tasmania's *Historic Cultural Heritage Act 1995* (Tas), designed for European heritage, t*o* be tested as an instrument for Aboriginal site registration.[108] With the failure of this test case, the State and Commonwealth governments disingenuously reframed the impasse as their enlightened opportunity to 'save' the Aboriginal site by building a bridge over it rather than a road through it.[109]

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104 Trucanini's remains were subject to grave-robbing and claimed by the Tasmanian Government, whereby her skeleton was displayed in the Tasmanian Museum and Art Gallery between 1904 and 1947: Lucy Frost, 'Displaying Trugernanna' in M Halligan (ed), *Storykeepers* (Duffy & Snellgrove, 2011) 69.

105 John J Cove, *What the Bones Say: Tasmanian Aborigines, Science and Domination* (Carleton University Press, 1995).

106 Carolyn Tan, 'The Different Concepts and Structures for Heritage Protection and Native Title Laws: The Nature and Pitfalls of Public Heritage and Private Rights' in PF McGrath (ed), *The Right to Protect Sites: Indigenous Cultural Heritage Management in the Era of Native Title* (AIATSIS, 2016) 26.

107 Listed via s 324JL of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

108 *Reynolds v Tasmanian Heritage Council* (2011) 277 ALR 394.

109 Andrew Darby, 'Bridge Too Far in Fight for Cultural Heritage', *Sydney Morning Herald* (online), 10 December 2010 <http://www.smh.com.au/federal-politics/political-opinion/bridge-too-far-in-a-fight-for-cultural-heritage-20101226-1985c.html>.

More progress has been made in returning stolen Aboriginal land, but relative to mainland Australia the results are very meagre. The *Aboriginal Lands Act 1995* (Tas) was devised as a solution to the unlikely occurrence of native title being established in Tasmania; initially 12 parcels of land were transferred to the Aboriginal Land Council of Tasmania, as the responsible custodian, and a further six parcels added in 1999 and 2005.[110] Eight of these land parcels were voluntarily registered as IPAs, with the majority of lands (over 10 500 hectares) being composed of islands in the Bass Strait.[111] The Tasmanian Government envisioned a benchmark of 90 000 hectares for land return in 2000, yet as of early 2018 only 55 617 hectares[112] had been formally transferred. These are paltry returns considering that the Tasmanian land mass comprises about 6.8 million hectares, of which 44 per cent are protected areas.[113] The scope for social justice in the form of further IPAs is thus potentially large.

The federal government's Indigenous Land Corporation ('ILC') has also been a vehicle to fund the acquisition of private property for return to Aboriginal Tasmanians, with 10 properties totalling 19 107 hectares acquired as of January 2018.[114] The single largest parcel acquired with ILC money in Tasmania is the 6878 hectares *trawtha makuminya* country in the Central Highlands, now held by the Aboriginal Land Council and managed for its natural and cultural values.[115] The Tasmanian Land Conservancy ('TLC'), the largest private land conservation agency in Tasmania, also helped fund the purchase of *trawtha makuminya,* whose conservation values are now managed collaboratively with the TLC's adjacent Five Rivers Reserve.[116] While the ILC money aids acquisition of strategic properties, the fund clearly cannot support large-scale return of stolen territory and for some it is also culturally offensive to have to buy back stolen land.

Native title is unlikely ever to be found in Tasmania under the current statutory regime. The first claim, in 1995, was a debacle when a non-Indigenous Tasmanian man, William Hollier, made claims to part of a Bass Strait island based upon his personal tenure and public servant position on the island.[117] Some commentators observed that it was 'impossible to tell whether he was "Aboriginalising" his whiteness or whitening legislation which is specifically Aboriginal'.[118] It appears that Hollier unscrupulously used the ambiguity of the Tasmanian Government's position towards Aboriginal peoples to bolster his own

110 Emma Lee, 'Aboriginal Cultural Heritage Protection in Tasmania: The Failure of Rights, the Restorative Potential of Historical Resilience' in McGrath, above n 106, 315.

111 AIATSIS Native Title Research Unit, 'Native Title Information Handbook: Tasmania' (2014).

112 Department of Premier and Cabinet (Tas), *Annual Report 2010–11* (2011).

113 Department of Environment and Energy (Cth), *Collaborative Australian Protected Area Database*, above n 59.

114 ILC (Cth), *Land Purchased* (2015) <http://www.ilc.gov.au/Home/What-We-Do/Land-Purchased>.

115 Tasmanian Aboriginal Centre, 'Trawtha Makuminya: Healthy Country Plan 2015' (2015).

116 Tasmanian Land Conservancy, *Trawtha makuminya* (2015) <http://tasland.org.au/programs/trawtha-makuminya>.

117 Melanie Alcock, 'Court Fight on Island Title' *The Examiner*, 24 August 1999; *Hollier v Registrar of National Native Title Tribunal* [1998] 82 FCR 186.

118 Ken Gelder and Jane M Jacobs, *Uncanny Australia: Sacredness and Identity in a Postcolonial Nation* (Melbourne University Press, 1998) xv.

position as a 'traditional owner'. Of the genuine Tasmanian claims for native title, only one had been judged to have serious grounds, relating to marine resources. The other three claims were quickly rejected on the basis of deficient and ill-defined evidence.[119] The marine resources case, as litigated in *Dillon v Davies*[120] concerned asserted customary rights to take abalone. But in denying the claim, Justice Underwood believed the 'nature of the custom must be known', and found that the applicant did not provide an adequate anthropological definition of the activity. Insufficient legal preparation seems to have faulted the case rather than any dubious claim.

The large swathes of Crown lands designated as protected area have provided little comfort for Aboriginal Tasmanians. The *National Parks and Reserves Management Act 2002* (Tas) declares under its objectives that joint management with Aboriginal Tasmanians is to be encouraged,[121] yet the mechanisms to do so, up until 2016, were non-existent and no joint management arrangement had been instituted. The TWWHA country is a particularly poignant reminder, where in the first State of the TWWHA report filed as part of Australia's reporting obligations under the *World Heritage Convention*, the managing authority, the Tasmanian Parks and Wildlife Service, gave itself the lowest rating of two-and-half stars for managing the area's cultural Outstanding Universal Values ('OUVs'), while the highest rating of four out of five stars was awarded for the natural OUVs.[122] The neglect of the cultural OUVs was also evident in its limited budget, shared between the Australian and Tasmanian governments, where in 2012 less than one per cent of the total TWWHA budget ($40 000) was committed out of an annual $7 million management fund.[123]

Overall then, until about 2015, federal and State government engagement with Aboriginal Tasmanians was limited to vague and restrictive statutes, unfulfilled land return promises, an absence of any native title, and no meaningful opportunities in protected area management except in mostly small pockets under Indigenous ownership managed as IPAs. The transplanting of policies and regulations developed by government agencies rather than Aboriginal communities failed to provide the means to develop future economies and continue cultural practices based upon security of land title or self-government. A catalyst for major change was required to revitalise the stagnant governance milieu for Aboriginal Tasmanians.

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119 Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), *Native Title Information Handbook: Tasmania* (AIATSIS, 2016) 6; and as discussed in the proceedings of the Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, 3 October 1996, at http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:committees%2Fcommjnt%2Frcomd961003a_jnt.out%2F0003.

120 [1998] TASSC 60.

121 Sch 1, 2(e), 3(h).

122 Tasmanian Parks and Wildlife Service, 'State of the Tasmanian Wilderness World Heritage Area – An Evaluation of Management Effectiveness' (Report No 1, Summary Report, Department of Tourism Parks Heritage and the Arts (Tas), 2004).

123 Australian Government, 'State Party Report on the State of Conservation of the Tasmanian Wilderness World Heritage Area (Australia) Property ID 181bis: in Response to World Heritage Committee Decision WHC 32 COM 7B.41' (Report, 2012).

V TASMANIA: RESETTING THE RELATIONSHIP

Two events occurred in 2014 to precipitate such a catalyst for change: the TWWHA country plan of management had expired and a fresh plan was required, while the Liberal Party won their first Tasmanian election in 16 years. The change of government allowed for fresh avenues for Aboriginal Tasmanians to appeal for support to participate in protected area management and governance, at the same time that the TWWHA could provide the vehicle to demonstrate connections to country, cultural practices and plans for regional development opportunities.

While the previous plan of management for the TWWHA outlined modes for conservation of the cultural OUVs, the lack of funding and the managing authority's focus on natural values meant that Aboriginal Tasmanians were generally marginalised from its governance. The risk of these problems being carried over to the new plan of management was high, given the legislature's record of limited interest in Indigenous cultural heritage and the tensions over how a government should acknowledge a population previously deemed to be extinct. Therefore, a new approach was required to create a plan of management that was cognisant of the traumatic and particular circumstances of Tasmania's colonisation.

In Australia, Indigenous affairs are sometimes viewed as 'wicked problems',[124] where colonisation has spawned legacies of such magnitude that in seeking resolution in one domain can create ancillary, multiple and complex problems in others.[125] Thus, any new approach to creating an updated plan of management for TWWHA risked opening other problems; for example, in how to apply 40-year-old heritage legislation that had (until very recently) purposely excluded contemporary heritage, or redress for social justice failures in seeking security over land title and sea rights. Recognition of a population's continuance, as cultural custodians of country, is required to make joint management of protected areas a successful and stable proposition. Furthermore, continuance requires that Aboriginal Tasmanians and the government collaborate to reset their relationship across a broader array of social and economic issues rather than to simply improve Indigenous participation in the silo of national park governance. The heart of the matter, then, were two core issues: a means of recognising Aboriginal Tasmanian continuing connections to TWWHA country and a whole-of-government approach to combat the wicked problem of reintroducing an exiled people back into a protected area landscape.

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124 Horst Rittel and Melvin Webber, 'Dilemmas in a General Theory of Planning' (1973) 4 *Policy Sciences* 155.

125 Australian Public Service Commission, *Tackling Wicked Problems: A Public Policy Perspective*, *Contemporary Government Challenges* (Australian Government, 2007); Richard Buchanan, 'Wicked Problems in Design Thinking' (1992) 8(2) *Design Issues* 5.

With such considerations in mind, the Tasmanian Department of Premier and Cabinet initiated in 2016 a holistic policy to 'reset the relationship' with the following key elements:[126]

- Aligning definitions of Aboriginality to accord with the Commonwealth's policy and implement new arrangements that are more socially inclusive;
- Promoting Aboriginal Tasmanian history in the school curriculum;
- delivering constitutional law recognition of Aboriginal Tasmanians as Tasmania's First Peoples;
- Closing the disadvantage gaps between Aboriginal Tasmanians and non-Indigenous Tasmanians, including more focus on family violence, economic development and employment opportunities;
- Amending the *Aboriginal Relics Act 1975* (Tas) (now called the *Aboriginal Heritage Act* (Tas)) to inter alia cover post-1876 Indigenous heritage; and
- exploring joint management arrangements in protected areas and reviewing the current land return model.

Substantial progress in achieving these goals has already occurred. As discussed in the next section, the revised plan of management for TWWHA country was formally adopted in December 2016 with a new framework to jointly manage the protected area with Aboriginal Tasmanians.[127] In October 2016, the Tasmanian parliament unanimously approved an amendment to the State constitution with inclusion of a preamble that acknowledged Aboriginal Tasmanians as 'Tasmania's First People' and welcomed the cultural and other contributions they make to Tasmania.[128] Further, the *Aboriginal Heritage Act 1975* (Tas) was amended in October 2017 to increase penalties for harm to heritage sites, to remove the offensive 1876 'cut-off' point, and to expunge clauses that allowed ignorance as a defence against damage to cultural heritage.[129]

Addressing the socio-economic disadvantages of Aboriginal Tasmanians has been a more difficult goal for resetting the relationship because of the complexity of both the causes of such hardship and the potential solutions. The State Premier, Will Hodgman, identified 'education, health, and employment' as the key priorities to tackle.[130] Among the challenges, in 2015 the general rate of

126 Department of Premier and Cabinet (Tas), *Resetting the Relationship with the Tasmanian Aboriginal Community* (2017) <http://www.dpac.tas.gov.au/divisions/csr/oaa/resetting_the_relationship>.

127 Department of Primary Industries, Parks, Water and Environment (Tas) ('DPIPWE'), 'TWWHA Management Plan 2016' (2016).

128 *Constitution Amendment (Constitutional Recognition of Aboriginal People) Act 2016* (Tas).

129 *Aboriginal Relics Amendment Act 2017* (Tas).

130 Will Hodgman, 'The Premier's Australia Day Address' (University of Tasmania Sandy Bay Campus, 21 January 2016) <http://www.premier.tas.gov.au/speeches/the_premiers_2016_australia_day_address>.

unemployment in Tasmania hovered around 7 per cent mark,[131] while for Aboriginal Tasmanians in the same year it was 14 per cent.[132]

The 2006 Census found that Aboriginal Tasmanians had a median gross individual income of $323 per week compared to $402 per week for other residents.[133] The Census also recorded that Tasmanian Aboriginal households were much more likely to live in public housing as other households (38 per cent compared to 22 per cent).[134] A 2008 Australian Human Rights Commission report stated that while Tasmania had the lowest rate of child protection notifications in Australia, a caution was issued over the figures due to a lack of recording Indigenous status at the time of notification.[135] The social disadvantages in child protection stem from insouciance to even count Aboriginal Tasmanian identity as a qualification.

Under the reset the relationship strategy, State funding and program development has been augmented to target such inequity. In the State budget of 2017–18, a $250 000 per annum and permanent increase was made to increase the number of Aboriginal Tasmanians in the public service.[136] Another $278 000 of funding was allocated to the Aboriginal Land Council of Tasmania to establish a cultural walk on the east coast of Tasmania, where the venture will be managed by, and employ, Aboriginal Tasmanians.[137] To repair neglect in family health and violence reduction, the government in 2016–17 committed $330 000 over three years to improve the 'quality and accessibility of culturally appropriate services for Aboriginal women and children experiencing family violence', together with three positions set aside for Aboriginal Tasmanians as workers in children and family centres to focus on early year development.[138] An additional $520 000 has also been secured in the recent State budget to improve curriculum resources for schools.[139] These might seem to be small sums, but we must remember the small size of the Tasmanian economy relative to its mainland counterparts. And these are just a few examples of an envisioned long-term greater commitment to address systemic factors that impair the socio-economic status of Aboriginal Tasmanians, for which a separate article is required to do justice to the complexity of this subject.

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131 Australian Bureau of Statistics, *Labour Force Commentary June 2015* (15 May 2017) <http://www.abs.gov.au/ausstats/abs@.nsf/Previousproducts/6202.0Main%20Features2Jun%202015?opendocument&tabname=Summary&prodno=6202.0&issue=Jun%202015&num=&view=>.

132 Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Social Survey, 2014–15* (7 February 2017) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4714.0~2014-15~Main%20Features~Labour%20force%20characteristics~6>.

133 Department of Premier and Cabinet (Tas), *Data on Social Inclusion and Exclusion in Tasmania* (2011) app 1, A1.30.

134 Ibid A1.42.

135 Australian Human Rights Commission, 'A Statistical Overview of Aboriginal and Torres Strait Islander Peoples in Australia: Social Justice Report' (2008).

136 Department of Premier and Cabinet (Tas), *Tasmanian Budget 2017–18: Additional Support for Tasmania's Aboriginal Community* (25 May 2017) <http://www.premier.tas.gov.au/budget_2017/budget_releases/additional_support_for_tasmanias_aboriginal_community>.

137 Ibid.

138 Department of Premier and Cabinet (Tas), *Resetting the Relationship*, above n 126.

139 Department of Premier and Cabinet (Tas), *Tasmanian Budget 2017–18*, above n 136.

VI TWWHA JOINT MANAGEMENT

The reset relationship also prioritised governing the TWWHA country through joint management.[140] For the Aboriginal leaders who advocated this path, TWWHA country is conceived as not a wilderness devoid of peoples and history but rather a home that reflects kinship, reciprocity and ways of knowing. In this guise, the planning for joint management would enable Aboriginal Tasmanians to re-express their connections to country and begin to heal their colonising traumas.

The TWWHA has an Aboriginal history of at least 35 000 years, but its more recent European history as a domain for nature conservation dates back to only the early twentieth century.[141] In 1916 Mount Field National Park was established as Tasmania's first national park, followed soon after in 1921 with designation of the Cradle Mountain National Park, both now incorporated into the TWWHA. Over the following decades other areas were added to the network of parks through the region, although some areas were also lost, most notably with the drowning of Lake Pedder for a hydropower scheme in 1972. Action to develop a more holistic approach to conservation of the southwest region, and stop further resource development, grew with pressure from the South West Tasmanian Action Committee established in in 1974, and the Tasmanian Wilderness Society, formed in 1976. With State and Commonwealth support, the region was nominated to the World Heritage List in 1981 and formally inscribed on the list in December 1982. The nomination acknowledged the region's Aboriginal cultural values, such as its 'significant Aboriginal archaeological sites', in the proposed justification for World Heritage status.[142] The TWWHA meets three of the seven cultural criteria for World Heritage status due to its Aboriginal heritage. In 1989 the TWWHA was expanded to encompass around 1.4 million hectares – almost a fifth of Tasmania's landmass, and further smaller additions occurred in 2010, 2012 and 2013. The federal government under Tony Abbott also sought, unsuccessfully, to trim the TWWHA of about 74 000 hectares in 2014.

With listing achieved came international responsibilities on Australia to manage and conserve the TWWHA, a task largely undertaken at the State level through the Tasmanian Parks and Wildlife Service via a bilateral agreement with the Commonwealth. The involvement of Aboriginal Tasmanians in TWWHA management dates back to 1995, when the Aboriginal community was formally vested with the title and exclusive management responsibility for three cave sites in the TWWHA country (Ballawinne, Kuti Kina and Wargata Mina), pursuant to

140 See, eg, Emma Lee, 'Talking Point: Wilderness Plan Benchmark to Renew Relations', *Mercury* (online), 8 January 2016 <http://www.themercury.com.au/news/opinion/talking-point-wilderness-plan-benchmark-to-renew-relations/news-story/b6b316bce3756d2d064760cf36d82110>.

141 Tasmanian National Parks Association, 'Creating Today's Tasmanian Wilderness World Heritage Area – A Brief History of its Reservation' (Report, 2017) <http://tnpa.org.au/wp-content/uploads/2017/08/History-of-reservation-of-TWWHA.pdf>.

142 Tasmanian Government and Australian Heritage Commission, 'Nomination of the Western Tasmania Wilderness National Parks by the Commonwealth Government for Inclusion in the World Heritage List' (Commonwealth Government, 1981) 14.

the *Aboriginal Land Act 1995* (Tas). However, the caves sites were officially excised from the TWWHA boundaries, so while they geographically reside within TWWHA country they legally are outside its management regime.

Before the 1999 plan, the TWWHA management plan primarily noted the presence of archaeological values of Aboriginal heritage rather than envisioned any Aboriginal participation in their management.[143] The 1999 TWWHA management plan, the immediate predecessor to the current regime, gave much greater acknowledgement, as a formal management goal, of actual Aboriginal community 'partnership' in management of Indigenous cultural values.[144] The 1999 plan envisioned that in discrete sites of high importance to Aboriginal peoples, such as traditional burial sites, 'operational management responsibilities of the Aboriginal community will be maximised', while in other areas where Aboriginal cultural values are of limited importance there would be 'minimal involvement' of the Aboriginal community and, thirdly, where such cultural values are of equal importance to other values a 'co-management' model would apply.[145] Other notable elements of the 1999 plan were a promise to develop a policy on Aboriginal use of plants, animals and materials from the TWWHA country, and to improve employment of Aboriginal persons such as in park ranger roles.[146]

But the 1999 plan substantially failed to fulfil these promises, with limited funding and a management culture focused on other priorities. No Indigenous peoples were employed during the life of the 1999 plan to manage TWWHA country, whether as on-the-ground park rangers or office-based planning officers. The budget of $40 000 out of $7 million allocated to manage all cultural OUVs was inadequate even to employ one ranger. The Needwonnee Walk, discussed at the opening of our article, required external funding: the $385 000 costs were covered by a Commonwealth jobs fund and still resulted in no full-time positions for Aboriginal Tasmanians.[147] Furthermore, the inscribed cultural OUVs were never assessed for how they benefit Aboriginal Tasmanians, and it was not even known how many individual sites of Aboriginal heritage existed in TWWHA country. Belatedly, in May 2015, the Commonwealth delivered a one-off $575 000 payment in order to document the cultural values.[148] The World Heritage Centre had requested a 'synthesis report of all available information on cultural sites within the property',[149] and in 2016 a programme to detail the cultural OUVs was instigated by Tasmanian authorities. This Assessment of

143 See generally Department of Parks, Wildlife and Heritage (Tas), 'Tasmanian Wilderness World Heritage Area: Management Plan 1992' (1992).

144 Tasmania Parks and Wildlife Service, 'Tasmanian Wilderness World Heritage Area Management Plan 1999' (1999) 97.

145 Ibid 101.

146 Ibid 102.

147 Tasmanian Parks and Wildlife Service, 'Needwonnee Aboriginal Walk, Melaleuca: Evaluation Report 2013' (DPIPWE, 2013).

148 Greg Hunt and Michael Groom, '$10 Million to Support Tasmanian Wilderness World Heritage Values' (Joint Media Release, 27 May 2015) <http://www.environment.gov.au/minister/hunt/2015/mr20150527.html>.

149 World Heritage Centre, *Tasmanian Wilderness* (2018) <http://whc.unesco.org/en/soc/3442>.

Aboriginal Cultural Values Project has thus far compiled one report on the archaeological values, delivered in March 2017,[150] and more detailed plans for the management of cultural values was published in late 2017.[151] Of the 10 proposed packages of work to implement the latter plan, two include training of Aboriginal peoples in managing TWWHA country cultural values.[152]

In 2014 a small government team with an Aboriginal Liaison Officer based in the Department of Primary Industries, Parks, Water and Environment ('DPIPWE') commenced drafting a new plan of management for TWWHA country. Besides addressing the inadequacies of the 1999 plan, the team had to ensure that the new plan would cover the recent boundary extensions to the TWWHA, which were added without consultation with Aboriginal Tasmanians and only addressed the natural rather than cultural OUVs, thereby confirming the hierarchal privilege of non-Indigenous wilderness values.[153] Such values have become more politically influential in Tasmania since the 1982 successful campaign to stop the Franklin Dam, with the Greens holding the balance of power in the Tasmanian legislature in some periods since.[154] With the reduced visibility of its Indigenous peoples owing to extinction myths and ill-conceived laws and policies, some green conservationists believed they could fill the void and speak on behalf of Aboriginal Tasmanian cultural values. For instance, in 2015 the then Australian Greens leader Christine Milne was criticised by the Tasmanian Aboriginal Centre for trying to dictate what the priorities of Aboriginal Tasmanians should be in regard to handing back of traditional lands and management of cultural sites in the Tarkine region.[155]

Therefore, in order for the Aboriginal Tasmanian voice not to get lost, misinterpreted or displaced by the wilderness conservation agenda, the strategy of advocating for Aboriginal rights sought to use the language of family violence prevention and reduction, such as using terminology of 'cultural safety' and 'family engagement', and to reassert TWWHA caring for country methodologies. In other words, access to the TWWHA country is about healing Aboriginal families. TWWHA country is to be understood as not a distant place, something 'over there' and conserved for intrinsic environmental values,[156] but a home and the means to make families and communities healthy, functional and able to reset abusive governance relationships. Thereby, TWWHA country would no longer

150 Aboriginal Heritage Tasmania, 'Tasmanian Wilderness World Heritage Area (TWWHA): A Literature Review and Synthesis Report' (DPIPWE, March 2017).

151 DPIPWE, 'Detailed Plan for a Comprehensive Cultural Assessment of the Tasmanian Wilderness World Heritage Area (TWWHA)' (November 2017).

152 Ibid 9–10.

153 Australian Government, 'Tasmanian Wilderness World Heritage Area (Australia) Property ID 181bis: Proposal for a Minor Boundary Modification for Submission to the World Heritage Committee' (Report, 2013).

154 Greg Buckman, *Tasmanian Wilderness Battles: A History* (Allen & Unwin, 2008).

155 Michael Atkin, 'Greens Attack Tasmanian Aboriginal Group's Offer to Drop Court Action for Land Hand-backs', *ABC News* (online), 27 January 2015 <http://www.abc.net.au/news/2015-01-27/row-erupts-over-aboringal-land-hand-back-bargaining/6050102>.

156 Emma Lee, 'Talking Point: Aboriginal Inclusion in World Heritage Management Good Move', *Mercury* (online), April 11 2016 <http://www.themercury.com.au/news/opinion/talking-point-aboriginal-inclusion-in-world-heritage-management-good-move/news-story/e8419dfbef4ed014e572492bc45f9ba9>.

be a governed to confirm a wilderness view of Indigenous peoples as noble, ecological savages but rather to be a place for a lively Aboriginal Tasmanian society recovering its cultural practices, building new economic opportunities and participating in governance forums. In this manner, the processes by which Aboriginal Tasmanians negotiated joint management would contribute to a long-range strategy of building socially inclusive dialogue, and respectful and collaborative relationships.[157]

Unlike the former management plan's professionalised conservation of wilderness values, the new plan emphasises Indigenous cultural continuance. The sentiment is captured in its opening foreword by Rocky Sainty, chair of the Aboriginal Heritage Council: '[t]he [TWWHA] Management Plan acknowledges that tangible and intangible Aboriginal heritage is not only the Aboriginal landscapes, sites and artefacts left by generations past, but it will also continue to be created by our people in the present and future'.[158] The plan identifies examples of this continuing, living knowledge of the region's cultural values,[159] the need for 'resourcing' protection of Aboriginal cultural values 'to the same extent as natural values' and establishing a 'genuine management role for Aboriginal people'.[160] The 2016 plan also envisions that TWWHA country could become a place for diverse Aboriginal Tasmanian families to partake in new social and economic opportunities, as 'the full socio-economic potential of the TWWHA for Tasmanian Aboriginal people has yet to be realised; opportunities in management, tourism and research are all key areas where material benefit may be gained in the context of contemporary connection to Country'.[161]

In regard to the joint governance arrangements, the 2016 plan coincided with the creation of a 'cultural management group' within DPIPWE to:

> establish links between the natural and cultural heritage aspects of Aboriginal interests, provide advice on matters pertaining to Aboriginal cultural values in the TWWHA, and oversee project and policy development while working closely with Aboriginal people and organisations.[162]

New staff positions are being created to support this role, comprising 'a senior manager supported by an Aboriginal engagement officer and an Aboriginal heritage specialist'.[163] Drafting of a new stand-alone 'Community Engagement Agreement' by the cultural management group will enable Aboriginal Tasmanians to conduct cultural activities in TWWHA country and be involved in their management.[164] In recognising that the TWWHA is a 'cultural landscape', the 2016 plan also contemplates applying some traditional Indigenous environmental practices such as 'reintroduction of fire' to promote

157 See further on such decision-making methods: Roianne West et al, 'Through a Critical Lens: Indigenist Research and the Dadirri Method' (2012) 22 *Qualitative Health Research* 1582.
158 Tasmanian Government et al, 'Tasmanian Wilderness World Heritage Area (TWWHA) Management Plan 2016' (2016) iii.
159 Ibid 39.
160 Ibid 8.
161 Ibid 50.
162 Ibid 96.
163 Ibid.
164 Ibid 161.

healthy country.[165] Opportunities for Aboriginal participation in new economic opportunities, particularly the tourism sector, will be articulated via a supplementary Tourism Master Plan.[166] While these and some other details of the joint management regime are only envisioned rather than codified in the 2016 plan, as they require further enunciation through Aboriginal and government representatives, the 2016 plan is a statutory instrument adopted under the *National Parks and Reserves Management Act 2002* (Tas) that creates legal expectations.

The TWWHA governance is thus shifting from the limited offerings defined by wilderness narratives and restricted to 'competent' Indigenous conservationists,[167] to a more socially inclusive place for Aboriginal communities to participate and co-govern in order to care for country and develop new social and economic opportunities for their members.[168] The new collaborative approach has garnered international support, as evident in the Reactive Monitoring Mission to TWWHA conducted in 2015 by the IUCN and the International Council on Monuments and Sites at the request of the World Heritage Committee. The Mission team reported that the 'quality and level of participation in the process appear high by global standards' and that the joint management arrangements then being developed provide an 'unprecedented opportunity to strengthen the dialogue and cooperation between the Tasmanian Aboriginal Community [sic] and the Tasmanian Government about the TWWHA'.[169] On the other hand, some environmental organisations have expressed unease about some of the new directions, with the Wilderness Society believing that the 2016 plan has 'weakened protections for wilderness character', although its grievance appears to be directed to the risk of increased private commercial development in TWWHA rather than the Aboriginal joint management provisions.[170]

VII CONCLUSION: FUTURE GOVERNANCE OF THE TWWHA

Overall, the new TWWHA plan of management has become the means by which a persecuted and exiled population could return to their country, and renew their cultural and economic future. The opening of TWWHA country to meaningful Indigenous presence and participation is a strategic response to reduce the legacies of violence and prevent further trauma. The alternative of belligerent litigation or protest campaigns to win concessions would have risked

165 Ibid 174.
166 Ibid 125–6.
167 Flora Holt, 'The Catch-22 of Conservation: Indigenous Peoples, Biologists, and Cultural Change' (2005) 33 *Human Ecology* 199.
168 Dan Ross, 'Black Country, White Wilderness: Conservation, Colonialism and Conflict in Tasmania' (2017) 1 *Journal for Undergraduate Ethnography* 1.
169 Jaeger and Sand, above n 1, 10, 34.
170 Wilderness Society, *The Tasmanian Wilderness: Honouring Commitments to Protect Wilderness* (21 June 2017) <https://www.wilderness.org.au/articles/tasmanian-wilderness-honouring-commitments-protect-wilderness>.

further burdens and costs that would ultimately hurt all Tasmanians given its small demographic and geographic scale.

Of course, like so many pioneering laws and policies, the long-term success of the 2016 plan is not assured, and some further details await elaboration and robust implementation. Moreover, disputes in other domains still occasionally flare up, such as the current controversy over the State government's plans to re-open four-wheel drive tracks in an important area for some Aboriginal people in Tasmania's Tarkine region.[171] The history of joint management and many other legal reforms for Indigenous peoples has often not met expectations, as noted earlier in this article. Even the landmark native title reforms have had limitations: the Australian Law Reform Commission's 2015 report reveals the limitations of the 'Mabo-revolution' owing to excessive bureaucratese in native title claims and limited opportunities for economic development on Aboriginal lands.[172] Eve Tuck and Wayne Yang's warning that the 'decolonisation' trope accompanying many reforms for Indigenous peoples has failed to leverage real change in settler colonial societies, such as the United States and Australia, of course behoves us to be wary of reconciliation gestures that get relegated to a 'metaphorical' realm.[173] But the belief of these and other authors that returning land and restoring Indigenous self-governance is the only path to true decolonisation overlooks that homogeneous prescription can itself be oppressive and equally unrealistic. As our article stressed at the outset, social justice strategies for Aboriginal Tasmanians must emanate from a response to Tasmanian circumstances. Tasmania's unique history both limits and creates opportunities that must be worked through.

The TWWHA governance regime is notable for several reasons in this respect: it is an Indigenous-led process of negotiating for families and localised benefits; it is the first time that joint management has ever happened in Tasmania; it is the first time that the state government has recognised Aboriginal Tasmanians as traditional owners; it shifts the debate from genocide to continuance of a living Indigenous culture; and Indigenous participation in the TWWHA is not restricted to settler colonial vision that Indigenous peoples will remain subsistence resource users rather than become business entrepreneurs and economic managers.

The future of the TWWHA management cannot of course be perfectly forecast, but unlike the unfulfilled promises of the 1999 TWWHA plan of management, the 2016 plan is already backed by resources and linked to a broader package of measures to 'reset the relationship' in Tasmania. Furthermore, the legal status of the new TWWHA plan (itself a statutory legal instrument) is strengthened by its role in upholding Australia's international

171 Elise Fantin, 'Bid to Reopen Tarkine Four-wheel Drive Tracks Angers Aboriginal, Green Groups', *ABC News* (online), 9 September 2017 <http://www.abc.net.au/news/2017-09-09/bid-to-reopen-tarkine-to-off-road-vehicles/8888506>.

172 Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report 126 (2015).

173 Eve Tuck and K Wayne Yang, 'Decolonization is Not Metaphor' (2012) 1 *Decolonization: Indigeneity, Education and Society* 1.

obligations under the *World Heritage Convention*, coupled with ever-greater international scrutiny of Australia's stewardship of its World Heritage estate. For instance, former Prime Minister Tony Abbott's attempt in 2014 to delist 74 000 hectares of forests from the TWWHA attracted global criticism and was rejected by the World Heritage governing body.[174] That same body is also placing increasing emphasis on the need to respect the cultural landscape values in World Heritage properties.[175] In other words, TWWHA governance is increasingly under international scrutiny that creates another check (although not an absolute veto) on potentially unfavourable domestic political shifts. Perhaps even more importantly, the TWWHA plan is not an isolated product but rather sits within a broader package of measures to 're-set the relationship' between Aboriginal Tasmanians and the state's non-Indigenous community. These collateral measures, relating to education, employment and constitutional recognition as discussed in the article, are valuable precursors and condition-setting to make the Tasmanian approach to joint management successful.

Crucially, the structure of the TWWHA plan leaves it to Aboriginal Tasmanians to negotiate what they wish to get out of the regime in coming years. The TWWHA plan, in other words, is a mechanism for emergent Aboriginal leadership to translate their communities' desire for self-determination. The plan contains several subsidiary elements to be negotiated, and through those negotiations, both current and future Aboriginal Tasmanians will have an ongoing role in shaping their cultural and economic ambitions in the TWWHA country. In other words, it gives real meaning to Indigenous-led self-determination rather than leaving government officialdom to dictate how the minutiae of park management will be developed. The 2016 TWWHA plan's relevant provisions were secured through the skilful advocacy of local Indigenous leaders rather than the 'generosity' of government policy-makers. No doubt, debates in Tasmania as elsewhere in Australia will continue to evolve as how best to achieve reconciliation and self-determination for Indigenous peoples, and one can anticipate further 'resetting' of relationships in light of the greater experience that will be gained from new laws and policies on TWWHA and other issues.[176] In other words, there is never a point of complete closure but rather an ongoing, living evolution in governance of protected areas and other domains.

In evaluating the history and new direction of TWWHA country planning, our article has devoted generous space to the broader background about discourses of nature conservation and models of protected areas governance. Such discussion is necessary in order to fully understand how Tasmania has taken a somewhat different path to the rest of Australia and to understand how the traditional discourses of wilderness protection harm both Indigenous peoples and potentially even jeopardise biodiversity conservation itself through neglect of caring for country.

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174 'UNESCO Rejects Coalition's Bid to Delist Tasmanian World Heritage Forest', *ABC News* (online), 24 June 2014 <http://www.abc.net.au/news/2014-06-24/unesco-rejects-bid-to-delist-world-heritage-forest/5538946>.

175 Jaeger and Sand, above n 1.

176 See, eg, Michael Mansell, *Treaty and Statehood: Aboriginal Self-determination* (Federation Press, 2016).

In distilling some key lessons from the Tasmanian case study, we suggest:

- Indigenous land ownership, while of course very desirable, is *not* necessarily a prerequisite for building protected areas partnerships.
- On the other hand, joint management must be linked to an acknowledgment of Aboriginal identity and cultural continuity.
- Cultural and natural values must be tied to a holistic management framework rather than partitioned into separate silos.
- An ongoing joint management framework must be pursued, whereby not all elements are determined and codified at once, but evolve through supplementary and incremental negotiations in order not to overburden the process at any one time.
- Adequate government funding must be disbursed for all promised management partnerships, including training and staffing to bolster Aboriginal peoples' engagement.
- Indigenous leadership is vital to enable negotiations to lead to tangible benefits being brokered for Indigenous peoples.
- Joint management must be linked to complementary initiatives to improve the socio-economic status of Aboriginal communities and reduce the legacies of violence and neglect.
- The long-term success of any reform is, of course, never assured and hard to predict, but by linking domestic initiatives to international standards for Indigenous peoples, such as in the *UNDRIP* or the World Heritage Convention, additional legal obstacles are placed on any future domestic government that might be less receptive to accommodating Indigenous peoples' interests.

Our article thus speaks to the need to look beyond legal transplants and generic templates to focus on local history and context in understanding how contemporary Aboriginal communities can participate in protected areas governance and move from a static wilderness conservation model to an active caring for country. The joint management model pioneered in other parts of Australia, predicated on recognition of native title and other assumptions about Indigenous legal and cultural status, could not simply be imported into TWWHA country. Instead, a unique, customised approach was necessary that addressed Tasmania's history and contemporary aspirations. Yet, in telling the story about Tasmania's approach to these issues, our article also has its own 'generic' advice for others, namely about the importance of bespoke strategies that link the revitalisation of caring for country to a wider governance and policy context to 'reset the relationship' and resolve wicked problems. Linking protected areas governance to a broader reconciliation agenda is advice that should resonate with many Indigenous societies worldwide.