WHITE LAW, BLAK ARBITERS, GREY LEGAL SUBJECTS: DEEP COLONISATION'S ROLE AND IMPACT IN DEFINING ABORIGINALITY AT LAW

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I INTRODUCTION

Legal Aboriginality is a contemporary catalyst point for the relationship between settler law and Aboriginal persons. Through constructing a legal Aboriginal personhood, Australian settler colonial legal systems make major contributions to understanding their foundations relative to the Indigenous peoples they constructed these foundations upon. The current model, comprising three tiers of self-identification, community-identification and descent, is an attempt to capture a legal Aboriginality that closely mirrors Aboriginal self-understanding. Although occasionally outwardly determined by the courts, this definition of Aboriginality increasingly turns inward as a model for determining the membership of Aboriginal statutory bodies,[1] Aboriginal Lands Councils ('ALC') and Aboriginal Corporations ('AC'), those same bodies also conferring Confirmations of Aboriginality for administrative purposes.

Demarcating Aboriginality has been a load-bearing task of legislators and courts throughout all phases of law's intervention upon the Aboriginal person[2] – be these purposes administrative, paternalistic or assimilation-bounded. Even as Aboriginal people resist or shape settler colonial law, through land rights, nation-building and other decolonial legal projects, Aboriginality's legal demarcation determines the confines within which we can do so.

Although the three-tier test was never intended to become a universal model for Aboriginality, only its legal manifestation,[3] its integration into policy and the self-constitution of Aboriginal organisations and services has led it to authoritatively address questions of authenticity, dis/connection and a fragmented

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1 A separate body of principles identify Torres Strait Islander peoples; these will not be considered due to the methodological, ethical and conceptual constraints and standpoint of the author.

2 Kate Foord, 'Frontier Theory: Displacement and Disavowal in the Writing of White Nations' in Aileen Moreton-Robinson (ed), *Whitening Race: Essays in Social and Cultural Criticism* (Aboriginal Studies Press, 2004) 133.

3 Robert French, 'Aboriginal Identity - The Legal Dimension' (2011) 15(1) *Australian Indigenous Law Review* 18; Department of Aboriginal Affairs, 'Report on a Review of the Administration of the Working Definition of Aboriginal and Torres Strait Islanders' (1981).

Aboriginal collective identity. Where the three-tier test is so readily transformed by settler conceptualisations and law, there should be concern that its entrenchment in Aboriginal self-constitution and identity bears a risk of wounding the core of Aboriginal epistemologies of the self, in addition to shaping an expedient Aboriginal legal subject.

It follows that in order to better understand the complexities between Aboriginal peoples and Australian law, the analytical lens must return to these foundational yet knotted questions - who does the law call an 'Aboriginal person'? How is a legal Aboriginal personhood constructed, articulated, applied? This article will address those questions, but in order to understand the full complexity of legal Aboriginality, it must ask and address more.

Who do Aboriginal organisations name as an Aboriginal person? Within a context of self-constitution, the quasi-administrative work of arbitrating and documenting Aboriginality increasingly falls on ALCs, ACs and other Aboriginal statutory bodies, who rationalise and apply the same legal tests of Aboriginality as courts.[4] An undertow of invisible and internal precedent of legal Aboriginality has found itself the mediator between community and isolation, service provision and deprivation, identity and the fragmentation of self. It has gone largely unobserved by the courts, settler jurisprudence and literature, and is yet the most central and often, the only contact Aboriginal persons make with legal Aboriginality. This raises the crucial question this article seeks to address – how is Aboriginality defined at this embedded level, and by whom, if not us?

This article maps and analyses these two legal Aboriginalities – the first, a body of applied, but under-articulated, principle loosely bounded by context, purpose and three tiers of inquiry – the second, a body of principle that is as yet untraced,[5] but which strains between the blak arbitration of Australian law in order to racialise those before it. This article takes the approach of analysing these legal Aboriginalities by their processes and implications, rather than their outcomes and principles, in contrast to the existing literature. It does so with the intent of enacting a Critical Indigenous Research Methodology.[6]

Firstly, it maps Aboriginality in the courts by analysing trends in reasoning on the three-tier test, across doctrinal contexts and accounting for the implications of legal Aboriginality within neutrally-positioned features of the law. In doing so, this article goes beyond judicial statements of the common law principles inherent in legal Aboriginality, which attest the decentralisation of lineage and race in favour of social and cultural factors.

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4 Scott Gorringe, Joe Ross and Cressida Fforde, '"Will the Real Aborigine Please Stand Up": Strategies for Breaking the Stereotypes and Changing the Conversation' (Australian Institute of Aboriginal and Torres Strait Islander Studies, Research Discussion Paper No 28, 2011); Alison Whittaker, 'The Border Made of Mirrors: Indigenous Queerness, Deep Colonisation and (De)fining Indigenousness in Settler Law: Life Stories and Essays by First Nations People of Australia' in Dino Hodge (ed), *Colouring the Rainbow: Blak Queer and Trans Perspectives* (Wakefield Press, 2015).

5 John McCorquodale, 'Aboriginal Identity: Legislative, Judicial and Administrative Definitions' (1997) 2 *Australian Aboriginal Studies* 24.

6 Karen Martin and Booran Mirraboopa, 'Ways of Knowing, Being and Doing: A Theoretical Framework and Methods for Indigenous and Indigenist Re-search' (2003) 27(76) *Journal of Australian Studies* 203.

Secondly, this analysis extends towards an explicitly preliminary analysis of how three-tier Aboriginality is determined by ALCs and ACs. This article maps trends in the reasoning and consequences of Aboriginality as decided at this embedded community level, using reports of this community decision-making in disputed cases that appear before courts and tribunals. Two such case studies, *Sheldon v Weir (No 3)*[7] and *Patmore v Independent Indigenous Advisory Committee*,[8] trace the impact that Australian legal conceptions of Aboriginality have had on Aboriginality as determined by community bodies, and explore the role that ALCs and ACs play in defining Aboriginality.

Finally, it delves into the relationships of influence, resistance and complicity between legal and operational Aboriginality in shaping the Aboriginal legal subject. This article does so to find an explanatory role within legal Aboriginality for deep colonisation – the notion that decolonising institutions can naturalise the anachronisms they were constructed to address,[9] and implicitly give internal power to that which was previously external, and resisted.[10]

II FACTORS SHAPING AND DEFINING THE ABORIGINAL LEGAL SUBJECT

Aboriginality is conceptually elusive. Aboriginal nations are not bound together by substantive racial or cultural commonality or consensus on our terms of membership. Rather, Aboriginal peoples are conceptually bounded by a shared experience of, and resistance to, colonisation.[11] Defining Aboriginality is therefore not merely defining a racialised legal subject, but a legal subject with a subaltern and yet foundational relationship to settler law. Indeed, Aboriginal groups have strongly opposed legal racialisation,[12] which conceptually predicated and tacitly linked to the assimilationist violence to which we are and were subject.[13] Nevertheless, Australian settler law and policy are fixated on defining and implementing this racialisation.[14]

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7 [2010] FamCA 1138 (8 December 2010).

8 [2002] AATA 962 (18 October 2002).

9 Deborah Bird-Rose, 'Land Rights and Deep Colonising: The Erasure of Women' (1996) 3(85) *Aboriginal Law Bulletin* 6.

10 Patsy Cameron and Linn Miller, 'Reclaiming History for Aboriginal Governance: Tasmanian Stories' in Sarah Maddison and Morgan Brigg (eds), *Unsettling the Settler State: Creativity and Resistance in Indigenous Settler-State Governance* (Federation Press, 2011) 212.

11 Gawaian Bodkin-Andrews et al, 'Aboriginal Identity, Worldviews, Research and the Story of the Burra'gorang' in Cheryl Kickett-Tucker et al (eds), *Mia Mia Aboriginal Community Development: Sustaining Cultural Security - Vision, Analysis and Practice* (Cambridge University Press, 2015) 19; Yin Paradies, 'Beyond Black and White: Essentialism, Hybridity and Indigeneity' (2006) 42 *Journal of Sociology* 355.

12 Gordon Chalmers, 'Indigenous as "Not-Indigenous" as "Us"? A Dissident Insider's Views on Pushing the Bounds for What Constitutes "Our Mob"' (2014) 17(2) *Australian Indigenous Law Review* 47.

13 See *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld).

14 Australian Bureau of Statistics, 'Year Book Australia, 1980: The Aboriginal and Torres Strait Islander Population of Australia - Census Counts, Concepts and Questions in the 20th Century' (Statistics No 1301.0, 22 November 2012).

A Defining Aboriginality in Australia

In Australia, no fewer than 67 models have defined Aboriginality.[15] McCorquodale identified these approaches as anthropometric; territorial; affiliation; genetic; subjective; and exclusionary.[16] Although, by its own articulation, the present three-tier model is considered subjective, in character, it contains anachronistic principles from many of these categories. This article will analyse what it contains and how it came to contain it.

This three-tier model defines an Aboriginal person as someone:

- who identifies as an Aboriginal person;
- who is accepted as an Aboriginal person by their community; and
- who is descended from an Aboriginal person.[17]

A number of flexible and conditional principles binding legal Aboriginality are located in the relationship between these tiers.

The model emerges in three distinct forms:

1. explicitly codified in statute;[18]
2. base statutory definitions, onto which the three-tier model may be projected;[19] or
3. common law definitions.[20]

Conceived as a working definition in 1981 by an Aboriginal consultative group in the *Report on a Review of the Administration of the Working Definition of Aboriginal and Torres Strait Islander* ('*Report*'),[21] the three-tier model was gradually integrated into some isolated pockets of regulation, statute and policy. It was then introduced into common law as a constitutional and administrative definition of Aboriginality in *Commonwealth v Tasmania*.[22] Aboriginality tends to be scantly defined when represented in the majority of statutory instruments, referring to 'descendants of Aboriginal persons' or 'members of the Aboriginal

15 John Gardiner-Garden, 'Defining Aboriginality in Australia' (Current Issues Brief No 10, 2002–03, Social Policy Group, Parliament of Australia, 3 February 2003).

16 John McCorquodale, 'The Legal Classification of Race in Australia' (1986) 10 *Aboriginal History* 7.

17 *Commonwealth v Tasmania* (1983) 158 CLR 1; *Aboriginal Land Rights Act 1983* s 4 (NSW).

18 See *Aboriginal Land Rights Act 1983* (NSW) s 4 (definition of 'Aboriginal person'); *Fisheries Management Act 1994* (NSW) s 4 (definition of 'Aboriginal person'); *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 5(1)-(2); *Adoption Act 2000* (NSW) s 4.

19 See *Family Law Act 1975* (Cth) s 4 (definition of 'Aboriginal child'); *Racial Discrimination Act 1975* (Cth) s 3(1) (definition of 'Aboriginal'); *Human Rights Commission Act 1986* (Cth) s 3(1) (definition of 'Aboriginal person'); *Indigenous Education (Targeted Assistance) Act 1989* (Cth) s 4 (definition of 'Indigenous person'); *Indigenous Education (Supplementary Assistance) Act 1989* (Cth) s 3 (definition of 'Aboriginal'); *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) s 4 (definition of 'Aboriginal person'); *Native Title Act 1993* (Cth) s 253 (definition of 'Aboriginal peoples'); *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) s 7 (definition of 'Aboriginal person').

20 See *Commonwealth v Tasmania* (1983) 158 CLR 1; *A-G (Cth) v Queensland* (1990) 94 ALR 515; *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

21 Department of Aboriginal Affairs, 'Report on a Review of the Administration of the Working Definition of Aboriginal and Torres Strait Islanders' (1981).

22 (1983) 158 CLR 1.

race'.[23] These bare definitions continue to be agitated before courts by virtue of their ambiguity in the context of the three-tier test, and references to 'race' and 'descent'.

At common law, the three-tier model did not emerge from any new conceptualisation of race as necessitated by the constitution or self-constitution policy, but by national shifts in ordinary understanding of Aboriginality and their prevalence in statutory interpretation.[24] That is to say, that the three-tier model owes its prevalence to a shift in its vernacular use by ordinary, institutionally white Australians. This itself was not an innovative technique of defining Aboriginality, indeed, it was the same approach taken in 1923 in *Muramats v Commonwealth Electoral Officer (WA)*,[25] which defined Aboriginal persons as 'of the stock that inhabited the land at the time that Europeans came to it.'[26]

These concessions have led to the development of the present three-tier model, but the procedural frameworks empowering this discursive shift have also substantively contributed to judicial derogation in winding these definitions back to their roots in race.

Nevertheless, this was the era of self-determination, and this was the Aboriginality that would navigate its contours.

B Defining Indigeneity Comparatively

Comparative approaches to demarcating Indigenous groups and individuals diverge. Canada's First Nations are governed by the *Indian Act*,[27] imposing blood quantum, marriage, parentage and registration requirements on Aboriginal persons seeking documentation and reservation residency.[28] In the United States, self-constitution varies across nations – from the 'one-drop' rule to blood quantum.[29] In New Zealand, Maori electoral enrolment is predicated on being both Maori and descended of Maori.[30] The latter criterion deliberately excludes persons otherwise included in kin structures without descent.[31]

What these approaches share is a focus on descent. However, definitions that trace the contextual perimeter of race without defining race itself are possible, and a popular source of epistemic revitalisation.[32]

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23 *Family Law Act 1975* (Cth) s 4 (definition of 'Aboriginal child'); *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) s 4 (definition of 'Aboriginal person').

24 *Commonwealth v Tasmania* (1983) 158 CLR 1; Frank Brennan, 'Aboriginal Self-Determination: The "New Partnership" of the 1990s' (1992) 17(2) *Alternative Law Journal* 53.

25 (1923) 32 CLR 500.

26 Ibid 507.

27 *Indian Act*, RSC 1985, c I-5.

28 Bonita Lawrence, 'Gender, Race, and the Regulation of Native Identity in Canada in the United States: An Overview' (2003) 18(2) *Hypatia* 3.

29 Margo Brownell, 'Who is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law' (2001) 34 *University of Michigan Journal of Law Reform* 275.

30 *Electoral Act 1993* (NZ) s 3 (definition of 'Maori').

31 New Zealand Electoral Commission, *Registering for the Maori Electoral Roll* (1 September 2015) Te Kawanatanga o Aotearoa <https://www.govt.nz/browse/engaging-with-government/enrol-and-vote-in-an-election/register-for-the-maori-electoral-roll/>.

32 Irene Watson, 'Nungas in the Nineties' in Greta Bird, Gary Martin and Jennifer Nielsen (eds), *Majah: Indigenous Peoples and the Law* (Federation Press, 1995) 1; Timo Makkonen, 'Indigenous Peoples' in

Key international definitions reject individualist approaches to defining groups or Indigenous individuals, emphasising Indigenous rights to self-constitute.[33] The UN Permanent Forum on Indigenous Issues has not yet adopted a model defining Indigeneity.[34] Interim definitions position Indigenous peoples by: 1) their subaltern status in (post)colonial society on ancestral lands, 2) continuity with pre-invasion and pre-colonial societies, and 3) existence as peoples with 'own cultural patterns, social institutions and legal systems'.[35]

Because this definition focuses on Indigenous 'peoples', not 'persons', this interim definition permits the conceptual space for peoples to develop their own protocols of self-constitution.[36] Further, this model makes explicit what settler states minimise[37] – First Peoples' subjugation by, and resistance to, colonialism. What may be lacking in an individualistic demarcating model is that Aboriginality is clumsily defined as a racial group,[38] when its statutory context as a criterion for legal and policy redress reflects its premise on a position of settler state colonisation. Formally articulating Aboriginality either as peoples or by purpose and context is gaining intellectual momentum. While the former approach enjoys grassroots support, the threat inherent in the latter approach is framing Aboriginality as deficit-loaded, 'a poor proxy for people with [legislatively-addressed] needs.'[39]

Settler legal systems' reluctance to conceptualise themselves as colonising actors both necessitates the demarcation of an explicitly positional Aboriginality, and loads it with political disincentive.[40] Defining communities by colonial impact is also insufficient for self-constitution, which is concerned with independently demarcating a social and cultural nexus of Aboriginality on its own terms for the sake of membership,[41] rather than responsiveness to Australian law. Equally, there is conceptual resistance to pan-Aboriginality among Indigenous intellectuals beyond the expression of a common experience of colonisation.[42]

Timo Makkonen (ed), *Identity, Difference and Otherness: The Concepts of People, Indigenous People and Minority in International Law* (Helsinki University Press, 2000) 110; Brian Pfefferle, 'The Indefensibility of Post-Colonial Aboriginal Rights' (2007) 70 *Saskatchewan Law Review* 393.

33 *United Nations Declaration on the Rights of Indigenous Peoples*, GA RES 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) art 33.

34 Steven Newcomb, 'The UN Declaration on the Rights of Indigenous Peoples and the Paradigm of Domination' (2011) 20(3) *Griffith Law Review* 578, 578.

35 See Jose Martinez-Cobo, Special Rapporteur on the Rights of Indigenous People, *Study of the Problem of Discrimination Against Indigenous Populations*, UN Doc 1981E/CN.4/Sub.2/476 (30 July 1981) 37.

36 Sadruddin Aga Khan and Hassan bin Talal, *Indigenous Peoples: A Global Quest for Justice: A Report for the Indpendent Commission on Humanitarian Issues* (Zed Books, 1987).

37 Foord, above n 2; Chalmers, above n 12; Paradies, above n 11.

38 Chalmers, above n 12; Paradies, above n 11.

39 Gardiner-Garden, above n 15, 2.

40 Newcomb, above n 34; Diane Smith, 'Researching Australian Indigenous Governance: A Methodological and Conceptual Framework' (Working Paper No 2, Centre for Aboriginal Economic Policy Research, Australian National University, 2005); Cameron and Miller, above n 10.

41 Diane Smith, 'Researching Australian Indigenous Governance: A Methodological and Conceptual Framework' (Working Paper No 2, Centre for Aboriginal Economic Policy Research, Australian National University, 2005); Cameron and Miller, above n 10.

42 Michelle Harris, Bronwyn Carlson and Evan Poata-Smith, 'Indigenous Identities and the Politics of Authenticity' in Michelle Harris, Martin Nakata and Bronwyn Carlson (eds), *The Politics of Identity:*

Membership for a number of Indigenous groups is not a construction of race, but a series of processes offering something beyond policing race's peripheries.[43] Equally crucially, the courts are driven by a chimerical impulse in defining 'a 19th century misconception called race … that is not there'.[44]

Clearly, Aboriginalities constructed by the law have a distinctive frame of reference to actual Aboriginal identities, so divergent to be entirely separate – the latter, real,[45] the former, a fiction the law cannibalises.

C Deep Colonisation – Fleshing the White Skeleton Blak

Legal Aboriginality is contingent in a colonial context where legal systems were weighted on minimising the prevalence of Indigenous populations in order to legitimate their jurisdictional roots.[46] Aboriginal relationships with law are logically manipulated to fit existing common law structures. Courts are 'not free to adopt rules that accord with contemporary notions of justice … if their adoption would fracture the skeleton of principle which gives the body of our law its … internal consistency.'[47]

Reluctance to fracture common law skeletons can be observed in settler law's attempts to demarcate legal Aboriginality itself. This includes shaping legal Aboriginalities until they better flesh a definable, biological subject, even as the three-tier test was first introduced into the common law:

> While social Darwinism is not endorsed … in Tasmanian Dams, the assumptions central to that worldview – that races exist, that they have shared characteristics … remain.[48]

Nor can Aboriginality disentangle itself from its socio-political context. As Land has remarked, the manipulation of the legal flesh of Aboriginality 'entrench[es] the very conditions … it ascribed as natural to the Aboriginal race.'[49] Contemporary approaches toward Indigenous self-determination under settler colonialism unveil and thereby negate the power of technically-conceived legal attempts to set the confines of Aboriginal governance.[50] In response, the whiteness

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Emerging Indigeneity (UTS ePress, 2013) 1; Chalmers, above n 12; Gorringe, Ross and Fforde, above n 4.

43 Chalmers, above n 12.

44 Loretta de Plevitz and Larry Croft, 'Aboriginality Under the Microscope: The Biological Descent Test in Australian Law' (2003) 3(1) *Queensland University of Technology Law and Justice Journal* 105, 119.

45 Diana Henriss-Anderssen, 'The "Stolen Generation" in Queensland: a Critical Perspective' (2002) 11(2) *Griffith Law Review* 286.

46 Sarah Maddison, 'Indigenous Identity, "Authenticity" and the Structural Violence of Settler Colonialism' (2013) 20(3) *Identities: Global Studies in Culture and Power* 288; Aileen Moreton-Robinson (ed), *Writing Off Indigenous Sovreignty: The Discourse of Security and Patriarchal White Sovreignty* (Allen & Unwin, 2007).

47 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 21.

48 Mark McMillan and Martin Clark, 'Making Sense of Indigeneity, Aboriginality and Identity: Race as a Constitutional Conundrum since 1983' (2015) 24(1) *Griffith Law Review* 1, 106, 124.

49 Clare Land, 'Law and the Construction of "Race": Critical Race Theory and the Aborigines Protection Act 1886' in Penelope Edmonds and Samuel Furphy (eds), *Rethinking Colonial Histories: New and Alternative Approaches* (RMIT Publishing, 2006) 137, 137.

50 Frances Morphy, 'Whose Governance, for Whose Good? The Laynhapuy Homelands Association and the Neo-assimilationist Turn in Indigenous Policy' in Janet Hunt et al (eds), *Contested Governance: Culture, Power and Institutions in Indigenous Australia* (ANU ePress, 2008) 113.

that founds settler colonialism in Australia must racialise Aboriginal subjects with greater subtlety. Whiteness here refers to an institutionalised legal discourse that reflects and enforces white understandings and interests in settler colonial law,[51] including by treating white persons as both neutral and 'native' to the Australian settler state.[52]

McCorquodale, in his mapping of legal Aboriginality until 1986,[53] observed that the considerable majority of cases concerning Aboriginality were instigated by white or government actors.[54] This indicates a salient interest taken by white and government parties in legal Aboriginality – one that empowered intervention upon the Aboriginal legal subject in a policy context of elimination and assimilation.

The three-tier model as a feature of the self-determination era cannot rely on this same externally-posed contestation, although its mandate to empower intervention upon the Aboriginal peoples lingered through paternalist pockets of law. In contrast with McCorquodale's findings regarding earlier models,[55] the cases caught within the operational scope of this article[56] concerning the three-tier test (n=13) were by a majority (n=9) agitated by Aboriginal applicants contesting another's Aboriginality. Although only a preliminary figure, any shift towards the internal contestation of Aboriginality suggests that the three-tier model relies on policing of Aboriginality from within. That a limited model is so often agitated by Aboriginal peoples against ourselves and subject to such litigation in courts is an indicator of an implicating process warranting further investigation.

The thread that links these internal and external contingencies to create an expedient Aboriginal legal subject is deep colonisation. Deep colonisation was termed by Deborah Bird-Rose as: 'colonising practices … embedded within decolonising institutions which may conceal, naturalise, or marginalise continuing colonising practices.' [57] These colonising practices manifest in instruments constructed to reverse the consequences of colonisation, reinforcing the consequences they would otherwise mitigate, all the while incentivising their adoption by Indigenous persons seeking racialised legal redress or relief.[58]

It is the contention of this article that there is a deep colonising link between the three-tier model and Aboriginal institutions as its primary arbiters. The consequence of turning Aboriginality upon itself to investigate itself through legal constructs disguised as decolonial methodologies is a lateral audit of Aboriginality

51 Maddison, above n 46; Moreton-Robinson above n 46.

52 Aileen Moreton-Robinson, 'The House That Jack Built: Britishness and White Possession' (2005) 1 *Australian Critical Race and Whiteness Studies Association Journal* 1.

53 McCorquodale, 'The Legal Classification of Race in Australia', above n 16.

54 McCorquodale, 'Aboriginal Identity: Legislative, Judicial and Administrative Definitions', above n 5.

55 Ibid.

56 See discussion at Part E below.

57 Bird-Rose, above n 9, 6.

58 Elena Marchetti, 'The Deep Colonizing Practices of the Australian Royal Commission into Aboriginal Deaths in Custody' (2006) 33(3) *Journal of Law and Society* 451; John Bradley and Kathryn Seton, 'Self-Determination or "Deep Colonising": Land Claims, Colonial Authority and Indigenous Representation' in Barbara Hocking (ed), *Unfinished Constitutional Business? Rethinking Indigenous Self-Determination* (Aboriginal Studies Press, 2005).

on the terms of whiteness. This is the double-bind of Aboriginal communities – self-constitution on white legal principle.[59]

These implications are partly drawn from embedding decolonising institutions in settler procedural and evidentiary frameworks, and will be explored further in Part III. Settler epistemologies are the core of Western legal systems;[60] on their ontological terms, of evidence, proof, application and definition, Indigenous concepts imported into settler law are manipulated.[61] Davis states that these manipulating practices in decolonising institutions must not be regarded as 'essentially benign' or 'negligible side effects'.[62] Rather, these self-perpetuating impacts and causes reside at the centre of the law, including populist visions of law's neutrality; distortion of customary law; adversarial approaches to disputes, and, the inflexible doctrine of precedent in lower level courts where these disputes are brought.[63]

Deep colonisation has cultural, social and epistemic effects that shift communities and support compliance with settler institutions as if they were our own. Pinning down Indigenous identities with unyielding indicia inhibits the acknowledgement of an independently-emerging Indigeneity,[64] and further, creates a legally- and socially-expedient model to be imposed upon Aboriginal persons.

D Operational Complexities – Divergent Principles and Corporate Arbiters

Operational construction of the Aboriginal legal subject refers to the determination of Aboriginality of a specific person by 'third parties or organisations enjoying recognition as bodies authorised to issue certificates which would be recognised for approved … purposes'.[65]

Despite its limited consideration by courts, Aboriginal legal identity is frequently brought before ALCs and ACs. From minutes procured from one ALC in a metropolitan area,[66] a large ALC can expect to deliberate on around five Confirmations of Aboriginality per meeting. With 119 ALCs of varying size in NSW alone,[67] meetings held no less than three times a year,[68] and with other ACs

59 Michael Dodson, 'The End in the Beginning: Re(de)finding Aboriginality' (1994) 1 *Australian Aboriginal Studies* 2; Alexander Reilly, 'A Constitutional Framework for Indigenous Governance' (2006) 28(3) *Sydney Law Review* 403.

60 Barbara Flagg, '"Was Blind, but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent' (1993) 91 *Michigan Law Review* 953.

61 Katherine Biber, 'Fact-Finding, Proof and Indigenous Knowledge' (2010) 35 *Alternative Law Journal* 208.

62 Megan Davis, 'The Challenges of Indigenous Women in Liberal Democracies' (2007) 7(1) *Indigenous Law Bulletin* 20, 22.

63 Ibid 21.

64 Michelle Harris, 'Emergent Indigenous Identitites: Rejecting the Need for Purity' in Michelle Harris, Martin Nakata and Bronwyn Carlson (eds), *The Politics of Identity: Emerging Indigeneity* (UTS ePress, 2013) 10.

65 McCorquodale, 'Aboriginal Identity: Legislative, Judicial and Administrative Definitions', above n 5, 33.

66 Tharwal Local Aboriginal Land Council, 'Members' Meeting Minutes' (Copy with author, 2013).

67 NSW Aboriginal Land Council, *Lands Councils: An Overview* <http://www.alc.org.au/land-councils/overview.aspx>.

68 *Aboriginal Land Rights Act 1983* (NSW) s 52H.

making similar deliberations on a similar basis,[69] Confirmation is plainly a widespread and embedded deliberative process. Despite this, a lack of appellate rights from ALCs and ACs and documentation of their decision-making mean that it is poorly understood in principle and in impact.

The *Aboriginal Lands Rights Act*[70] was amongst the first legislative instruments to codify the three-tier test,[71] and created the first non-state party to determine it.[72] The self-determining character of the ALC and later, the AC,[73] charged these institutions with determining Aboriginality in the day-to-day – through the provision of Confirmations of Aboriginality, rather than through ministerial or government certification.

These bodies inhabit an ambiguous legal space contingent on the roles assigned to them under their respective Acts. For instance, the majority of ALCs and ACs adjudicate Confirmations of Aboriginality not through a governing board with potential corporate accountability, but through a meeting of its membership, who then adjudicate an individual's Aboriginality.[74] These decisions are challengeable after the fact only in terms of their validity as a meeting of members.[75] Despite performing a function with an administrative flavour,[76] because these decisions are not performed by an administrative body,[77] there are no avenues of redress for an individual whose application has been rejected.[78]

Certainly the development of the operational reality outside of the legal lens warrants further intellectual attention. The Aboriginal Education Consultative Group's ('AECG') 2011 reports on Aboriginality highlight the centricity of ALCs and ACs in their communities;[79] the ability of ALCs to deliberate upon Aboriginality was found to impact all elements of Aboriginal life.[80] Community consultations exposed a sense of 'fraud' in the decision-making process – not that too few were able to receive identification, but too many were 'opportunistically' 'inundating' the application process.[81]

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69 Cindy Berwick, 'Membership and Identity: Culture Not Colour' (Speech delivered at the National Indigenous Legal Conference, Melbourne, Victoria, 4 September 2015).

70 *Aboriginal Land Rights Act 1983* (NSW).

71 Sarah Maddison, *Black Politics: Inside the Complexity of Aboriginal Political Culture* (Allen & Unwin, 2009); Cameron and Miller, above n 10; Gardiner-Garden, above n 15.

72 Maddison, *Black Politics: Inside the Complexity of Aboriginal Political Culture*, above n 71; Linda Pearson, 'Aboriginal Land Rights Legislation in New South Wales' (1993) 10 *Environmental and Planning Law Journal* 398.

73 *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).

74 Whittaker, above n 4.

75 *Aboriginal Land Rights Act 1983* (NSW) sch 3; *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) ch 5.

76 *Administrative Appeals Tribunal Act 1975* (Cth) s 3; *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3(2).

77 *Administrative Appeals Tribunal Act 1975* (Cth) s 47(2); *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3(1); *Aboriginal Land Rights Act 1983* (NSW) ss 181K, 207.

78 Elections are the exception, see *Gibbs v Capewell* (1995) 128 ALR 577.

79 NSW Aboriginal Education Consultative Group Incorporated, *Aboriginality and Identity - Perspectives, Practices and Policies* (Bob Morgan Consultancy, 2011).

80 Ibid.

81 Ibid 26.

Bodkin-Andrews et al criticised this premise: 'clear research examining the extent of fraudulent claims is largely non-existent … the authenticity debate may be argued to be an imposed form of lateral violence.'[82] Certainly, these dialogues on opportunistic inundation bear a troubling similarity to colonial narratives on Aboriginal welfare and lifeways, and, without dismissing that fraud in this process occurs, claims about its prevalence by virtue of claims from inauthentic 'opportunists' appear to be subtly-imposed, internally-staked imaginings of these narratives.

These tensions continue to play out in community adjudications of legal Aboriginality. Aboriginal organisations apply the three-tier model through the meaning they take from the law and the facts before them.[83] It is in this gap between what the law states and how it is applied, that insight is provided into how Aboriginal bodies might utilise their own procedure and practice to tighten legal Aboriginality in response to the supposed encroachment of inauthentic 'welfare-opportunists'.

Prior autoethnographic analysis suggests that these statutory bodies contest the factual Aboriginality of individual applicants, while comparatively rarely disputing the three-tier legal principles from which the decision-makers operate.[84] Even organisations committed to self-determination, like the National Congress for Australia's First Peoples, adopt the three-tier model to secure their membership.[85] Accordingly:

> [T]he coloniser's epistemologies have become a part of us … we ironically now see our very own decolonisation within frameworks of understanding that reinforce colonial discourses.[86]

This position of the self-determining, non-administrative, non-appealable Aboriginal group arbiter is essential to the deep colonising of Aboriginal self-constitution. Both the development and application of the three-tier model necessitate the performance of self-determination and disguise their white frames of reference where the model is most commonly enforced – by Aboriginal persons.

E Methodology, Inclusion and Scope

The following case mapping serves to trace the three-tier test's transformation from the guiding principle of self-constitution, towards an anachronistic imagining of race that is embedded and enforced by ALCs and ACs.

Cases will be considered through two separate lenses – a critical view of their contribution to the Australian court-based jurisprudence of the Aboriginal legal subject, and the information they provide on collective Aboriginal determination of Aboriginality. For the latter purpose, it should be re-emphasised that these

82 Bodkin-Andrews et al, above n 11, 9.

83 Will Sanders, John Taylor and Kate Ross, 'Participation and Representation in ATSIC Elections: A Ten Year Perspective' (Discussion Paper No 198, Centre for Aboriginal Economic Policy Research, Australian National University, 2000).

84 Whittaker, above n 4.

85 See National Congress of Australia's First Peoples, *Membership Application for Individuals* (3 September 2015) <http://nationalcongress.com.au/wp-content/uploads/2013/03/MembershipForm13.pdf>.

86 Chalmers, above n 12, 51.

provide only a preliminary and critical picture of ALC and AC determinations as recounted by courts.

1 Legal Aboriginality

Commonwealth and State cases that deliberate the meaning of Aboriginality post-1983 were examined to inform this article's analysis of the law's consideration of Aboriginality.[87] These cases were sourced from a case law database search with the following terms:[88]

- Concept 1: Aboriginal people/Aboriginality/Aborigine.
- Concept 2: Meaning of Aborigin*.
- Concept 3: Definition of Aborigin*.

Cases were selected from this pool for analysis on the operation of the law outside of courts and tribunals, firstly, on the basis that they concern the definition of Aboriginality or Aboriginal persons; secondly, that they are decided post-1983; and thirdly, that the Aboriginal legal subject must elicit a special relationship to the doctrinal area being deliberated.[89]

This left a remaining body of cases in the doctrinal areas of administrative and constitutional;[90] discrimination;[91] family;[92] tort;[93] sentencing;[94] native title;[95] and, electoral law.[96]

2 Operational Aboriginality

There are substantial barriers to obtaining documentation on the deliberative process of ALCs and ACs in determining Aboriginality. I acknowledge that this article can only preliminarily interrogate these sites as its theoretical approach prevents the use or collection of interpersonal qualitative data, despite the attested suitability of these methods to trace deep colonising in the literature,[97] given their

87 *Commonwealth v Tasmania* (1983) 158 CLR 1; *Aboriginal Land Rights Act 1983* (NSW).

88 *Australian Legal Information Institute*; *CaseBase* (LexisNexis Australia); *FirstPoint* (Westlaw Australia).

89 In order to control discussion over Aboriginality or race generally where it does not concern the construction of a legal definition.

90 *Queensland v Wyvill* (1989) 90 ALR 611; *Bleathman v Taylor* [2007] TASSC 82 (8 November 2007); *A v Minister for Community Services (NSW)* [2007] NSWADT 208 (10 September 2007); *Rankmore and Minister for Immigration and Citizenship* [2010] AATA 1079 (20 December 2010); *Commonwealth v Tasmania* (1983) 158 CLR 1; *Re A-G (Cth) v Queensland* (1990) 25 FCR 125; *Allen v Ministry of Transport* [2004] NSWADT 69 (13 April 2004).

91 *Re Maynard v Neilson* [1988] FCA 168 (27 May 1988); *Eatock v Bolt* [2011] FCA 1103 (28 September 2011).

92 *Re B and R* [1995] FamCA 104 (27 September 1995); *Re Simon* (2006) 68 NSWLR 306; *Hort v Verran* [2009] FCA 214 (6 March 2009); *Sheldon v Weir (No 3)* [2010] FamCA 1138 (8 December 2010); *Simons v Barnes (No 2)* [2010] FMCAfam 1094 (7 October 2010); *Sheldon v Weir* [2011] FamCAFC 212 (2 November 2011).

93 *Williams v Minister, Aboriginal Land Rights Act 1983* (1999) 25 Fam LR 86.

94 *Pollard v Police (SA)* [2010] SASC 23 (22 February 2010).

95 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

96 *Patmore v Independent Indigenous Advisory Committee* [2002] AATA 962 (18 October 2002); *Connolly v Dickson* (1992) 76 LGRA 104; *Re Watson* [2001] TASSC 105 (27 August 2001); *Re Watson* [2001] TASSC 81 (3 August 2001); *Patmore v Independent Indigenous Advisory Committee* [2002] FCAFC 316 (17 October 2002); *Gibbs v Capewell* (1995) 128 ALR 577; *Shaw v Wolf* (1998) 163 ALR 113.

97 Marchetti, above n 58; Bird-Rose, above n 9.

centring of Indigenous knowledge and epistemology.[98] An alternate approach will therefore be taken that sets ground for future qualitative research, but is not of itself a complete picture.

My analysis will be drawn from the methodological pool above, with the additional criterion that those cases describe the original determination of Aboriginality by an Aboriginal organisation.

I draw from these sources with a further caveat that court documentation of operational Aboriginality is limited by the adversarial and rigidly legalistic narrative approach taken by the courts,[99] and by virtue of these matters arising from disputes between Aboriginal organisations and individuals.[100] This prevents a full appreciation of operational Aboriginality, as courts are positioned as noble interveners on Indigenous disputes, and cannot fully capture the nuance of community inclusion and identity, which shifts with time [101] and across communities.[102]

This leaves a pool of 13 cases, which will be dissected to extract a preliminary body of principles and trends on operational Aboriginality and investigate any evidence of deep colonisation found in the relationship between the operational and legal models.

The cases drawn from this methodological pool are tabulated in the Appendix.

III WHITE LAW. MAPPING LEGAL ABORIGINALITY – TRENDS, INTERNAL CONTRADICTIONS, UNDERCURRENT PRINCIPLES

Aboriginal legal personhood is not marked by a consistent body of principle. Courts reject attempts to bind Aboriginality to precedent, [103] preferring it be determined only on the facts of the matter before it.[104] That Aboriginality is not doctrine in its own right, but rather is threaded through the law wherever the Aboriginal legal subject makes contact, is a significant impediment to developing an agreed model of Aboriginality through the common law.[105] This results in a racial subject that might not be defined at law by any feature it has, but rather by the contact it makes with settler legal systems.

98 Aileen Moreton-Robinson, 'Whiteness, Epistemology and Indigenous Representation' in Aileen Moreton-Robinson (ed), *Whitening Race: Essays in Social and Cultural Criticism* (Aboriginal Studies Press, 2004) 75.

99 Davis, above n 62.

100 Robert French, above n 3.

101 Gorringe, Ross and Fforde, above n 4.

102 Paul Havemann, 'Denial, Modernity and Exclusion: Indigenous Placelessness in Australia' (2005) 5 *Macquarie Law Journal* 57.

103 *A-G (Cth) v Queensland* (1990) 94 ALR 515; *Gibbs v Capewell* (1995) 128 ALR 577.

104 *Commonwealth v Tasmania* (1983) 158 CLR 1.

105 Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia*, Report No 96 (2003); Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986).

In light of the discussions undertaken in Part II, the contingency of legal Aboriginality on settler society perceptions of it is epistemically problematic. Moreover, this epistemic shift, incriminating the three-tier model that was built to address it, has broad impacts upon Aboriginal self-constitution, society and contemporary culture.[106] In part, due to the neutral treatment enjoyed by whiteness as a frame of reference for race,[107] some anachronistic principles that courts may subtly embed in legal Aboriginality are not explicitly articulated. Where previous scholarly work has been limited by tracing legal Aboriginality as it is articulated by judicial officers,[108] this mapping seeks to draw together a distinct body of precedent by examining both what is articulated, what is implied and what is omitted. In doing so, I do not attempt to replicate existing work that draws together shared principles of the three-tier model as courts express them, but rather map a series of critical principles that guide the three-tier model as a formal Australian jurisprudence.[109]

A Fluidity, Statutory Context and Procedure – Aboriginality as Fact

Despite the complex set of evidentiary, probative, legal and contextual rules underpinning Aboriginality, the judiciary continue to examine Aboriginality as a question of fact and of statutory interpretation rather than as a question of law.[110]

Although this could be perceived as only a technocratic shift, treating legal Aboriginality as a question of fact has given it a crucial fluidity through which a judicial pendulum might use the language of the three-tier model to return to biological race. The bench and legislature regard this fluidity to be asset,[111] allowing Aboriginal legal subjects to negotiate their legislative contexts. However, the treatment of Aboriginality as a question of fact more critically allows the import of settler understandings of race over it through the preferred statutory interpretation approach of 'ordinary parlance'[112] – referring to typical or natural use or understanding of language in statute.

Critical whiteness scholars have deliberated at length the extent to which 'ordinary' normalises the perspectives of whiteness by conferring it invisibility.[113] These criticisms hold that majority and dominant populations possess the 'ordinary' use of language, whilst language's use by minoritised populations

106 Jason Allen, 'Group Consent and the Nature of Group Belonging: Genomics, Race and Indigenous Rights' (2010) 20(2) *Journal of Law, Information and Science* 28.

107 Flagg, above n 60; Karen O'Connell, 'Pinned Like a Butterfly: Whiteness and Racial Hatred Laws' (2008) 4(2) *Australian Critical Race and Whiteness Studies Association Journal* 1.

108 *Eatock v Bolt* (2011) 197 FCR 261; Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia*, Report No 96 (2003); Gardiner-Garden, above n 15; Robert French, above n 3.

109 Davis, above n 62; Ritchie Howitt, 'Scales of Coexistence: Tackling the Tension Between Legal and Cultural Landscapes in Post-Mabo Australia' (2006) 6 *Macquarie Law Journal* 49.

110 *A-G (Cth) v Queensland* (1990) 94 ALR 515; *Commonwealth v Tasmania* (1983) 158 CLR 1; *Gibbs v Capewell* (1995) 128 ALR 577.

111 Robert French, above n 3; Commonwealth, *Parliamentary Debates*, House of Representatives, 1 March 2006 (Anthony Albanese, Deputy Manager of Opposition Business in the House).

112 *Commonwealth v Tasmania* (1983) 158 CLR 1; *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 29 CLR 129.

113 O'Connell, above n 107.

is cultured or racialised.[114] Ordinary parlances or natural interpretations of Aboriginality can disguise and prioritise judicial discretion or racial biases.[115]

Statements by the bench outlining how Aboriginality is described by ordinary Australians indicate that interpreting Aboriginality is no exception.[116] Courts enable a model of Aboriginality defined not by itself, but by the standards of the settler context in which it is enmeshed while casting Aboriginal understandings of Aboriginality into irrelevance as artificial interpretations.

This exposes legal Aboriginality to the shifting popular perception of Aboriginality by an imagined, non-expert, contingent white public. The ordinary parlance approach was originally introduced to Aboriginality in 1923,[117] and produced a now universally-condemned Darwinist approach to defining Aboriginality as 'the stock that inhabited the land at the time that Europeans came to it.'[118] Although it is through the ordinary parlance approach that three-tier Aboriginality became common law,[119] ordinary parlance's momentum in the longer term compels Aboriginality back towards constructs of biological race.

Courts and scholars have attempted to justify these impacts by asserting that they maintain a justice-oriented flexibility to Aboriginality.[120] These justifications often emerge in cases where the centricity of biological race is firmly maintained by the bench.[121] Centricity of descent becomes the incontestable principle around which further deliberation of an individual's Aboriginality is fixed. The fluidity that is so strongly assured by courts, does not translate into any meaningful flexibility for its Aboriginal subject, but it does expose three-tier Aboriginality to seemingly spontaneous reshaping in such a way that it is not a predictable or useful legal standard, except for the legislature.

How, if and where Aboriginality is codified contributes to this effect. For instance, the *Racial Discrimination Act*[122] (which empowers Aboriginal persons to make functionally limited civil cases against discrimination)[123] defines Aboriginality as 'descendant of an indigenous inhabitant of Australia',[124] and the *Family Law Act*[125] (which mandates that courts consider the importance of cultural and social factors to an Aboriginal child)[126] defines an Aboriginal child as 'descended from the Aboriginal peoples of Australia'.[127] Although, in

114 Moreton-Robinson, 'Whiteness, Epistemology and Indigenous Representation', above n 98.
115 Allan Ardill, 'Australian Aboriginality and Sociobiology' (2010) 11 *Tribal Law Journal* 1, 44.
116 *Re Bryning* [1976] VicRp 8 (24 September 1975) 596; *Commonwealth v Tasmania* (1983) 158 CLR 1; *Re A-G (Cth) v Queensland* (1990) 25 FCR 125.
117 *Muramats v Commonwealth Electoral Officer (WA)* (1923) 32 CLR 500.
118 Ibid 507.
119 *Commonwealth v Tasmania* (1983) 158 CLR 1; McMillan and Clark, above n 48.
120 *Re A-G (Cth) v Queensland* [1990] FCA 235 (16 July 1990) [32].
121 See, eg, *A-G (Cth) v Queensland* (1990) 94 ALR 515; *Patmore v Independent Indigenous Advisory Committee* (2002) 122 FCR 559.
122 *Racial Discrimination Act 1975* (Cth).
123 Ibid s 9; *Eatock v Bolt* [2011] FCA 1103 (28 September 2011); Adrienne Stone, 'The Ironic Aftermath of *Eatock v Bolt*' (2015) 38(3) *Melbourne University Law Review* 926.
124 *Racial Discrimination Act 1975* (Cth) s 3(1) (definition of 'Aboriginal').
125 *Family Law Act 1975* (Cth).
126 Ibid ss 60CC(3)(h), (6).
127 Ibid s 4 (meaning of 'Aboriginal child').

construction, both refer to descent, their interpretation is distinct. In the former, Aboriginality has been perceived as a complex consideration of the three-tier test and its relationships.[128] The latter has been interpreted by the Family Court to necessitate only a consideration of descent, with probative value conferred to the other tiers insofar as they are relevant to prove descent where there is 'insubstantial … genetic material'.[129] Indeed, this approach has been reflected in child protection legislation, where a court is empowered to disregard the social tests entirely in favour of descent.[130]

Even within minute lexical shifts in codifying Aboriginality there is huge divergence in how the test is applied, predicated on the legislative or judicial purpose of the relevant law.[131] As a decolonising institution, intended by the *Report* to decentre biological race,[132] the three-tier test can provide an explanatory framework for it – to secure cultural boarders or to gatekeep redress.[133]

McCorquodale observed the same of prior models. This might indicate that the three-tier model is a rhetorical, rather than substantive, shift in defining Aboriginality:

> The vacuity or bankruptcy of policy … was matched only by the ingenuity of others in extending the reach of legislative control … 'Half-castes' might be placed on the same footing with 'full-bloods' for some purposes (testimony, liquor), but not others (reserves, guardianship of children).[134]

As much as Aboriginality is defined by the three-tier test and its internal complications, Aboriginality is equally contained by its legislative purpose and Australian race discourse, and whether these factors point to agency or intervention.[135] Rather than articulating Aboriginality by context, this approach conceptually links Aboriginality with statutory purpose in a way that burdens Aboriginality with a character of deficit to be addressed, or ignored, by statute. This is a position that enables and disguises institutional whiteness' influence over legal Aboriginality, and moreover, that opens the fissures through which deep colonisation can pierce the three-tier model as a legal institution with decolonial goals. Despite these goals, neutral legal processes fundamentally shape Aboriginality in such a way that returns Aboriginality to its blood-quantum guise.

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128 *Eatock v Bolt* [2011] FCA 1103 (28 September 2011) [188]-[189]; on prior models, see also Brian Kelsey, 'A Radical Approach to the Elimination of Racial Discrimination' (1975) 1 *Univesrity of New South Wales Law Journal* 56.

129 *Sheldon v Weir (No 3)* [2010] FamCA 1138 (8 December 2010) [491]; see also Richard Chisholm, 'Destined Children - Aboriginal Welfare in Australia: Directions of Change in Law and Policy' (1985) 1(14) *Aboriginal Law Bulletin* 6.

130 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 5.

131 Anne Graffam, 'Linguistic Manipulation, Power and the Legal Setting' in Leah Kedar (ed), *Power Through Discourse* (Ablex, 1987) 57.

132 Department of Aboriginal Affairs, above n 21.

133 Harris, Carlson and Poata-Smith, above n 42; Whittaker, above n 4; *Eatock v Bolt* [2011] FCA 1103 (28 September 2011); *Sheldon v Weir (No 3)* [2010] FamCA 1138 (8 December 2010); Plevitz and Croft, above n 44.

134 McCorquodale, 'Aboriginal Identity: Legislative, Judicial and Administrative Definitions', above n 5, 29.

135 Heather Douglas and John Chesterman, 'Creating a Legal Identity: Aboriginal People and the Assimilation Census' (2008) 32(3) *Journal of Australian Studies* 375.

B Threading the Subject – Aboriginality As Linked Principle

Case law on Aboriginality is diverse and sparse. Across contexts of doctrine, jurisdiction and time, some variance in accepted principle has occurred. Litigation on this issue tends to whether an individual factually fulfils the three-tier test, rather than any coherent challenge of the legal model itself,[136] or any question as to whether the law constructs the mirror of Aboriginality on terms by which we recognise ourselves.

Nevertheless, there are two especially prevalent threads of principle and dispute in the leading cases: the social conceptual base of heritage and the relationships between each tier.

Despite the seminal *Shaw v Wolf* determining that descent under the model be a genetic,[137] rather than social, construct,[138] some decision-making bodies have since required evidence such as family trees or some other articles attesting lineage.[139] Indeed, under variations of the *Aboriginal and Torres Strait Islander Commission Act* made close in time to *Shaw v Wolf*,[140] the Minister for Aboriginal Affairs deployed regulations where descent was proven only by verifiable family trees and archival or historic documentations establishing biological connections to known ancestors.[141] A large portion of this evidence is the product of settler anthropological impact in Tasmania,[142] or of tracing Aboriginal bloodlines in order to assimilate them, resulting in exclusion from identification or secondary trauma.

This ambiguity in the limits of biological race within the test,[143] and the preparedness of lawmakers to experiment with it,[144] has left open conceptual space within which descent anxiously consumes the inquiry, at great epistemic cost. Not only has descent become the conceptual hinge on which most contested Aboriginalities now must rely, attempts to underpin it with social evidence have polluted the communal and individual tiers with a probative character. No longer do community and self-identification hold their own as part of a decolonial construction of Aboriginality. They have become mere reference points contingent on and put to proving quantum and caste – blood 'triviality' and blood 'substantiality'.[145]

136 *Re Watson* [2001] TASSC 105 (27 August 2001) [188].
137 (1998) 163 ALR 113.
138 Ibid 210.
139 NSW Aboriginal Education Consultative Group Incorporated, above n 79.
140 *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth); *Aboriginal and Torres Strait Islander Commission (Regional Council Election) Amendment Rules 2002* (Cth).
141 *Aboriginal and Torres Strait Islander Commission (Regional Council Election) Amendment Rules 2002* (Cth) r 149(2).
142 Aboriginal and Torres Strait Islander Commission, 'Procedures for Tasmanian Pilot Aboriginal Electoral Roll' (Trial Election Guidelines No 1, July 2002); Gardiner-Garden, above n 15.
143 Plevitz and Croft, above n 44.
144 Robert French, above n 3; Land, above n 49.
145 *A-G (Cth) v Queensland* (1990) 94 ALR 515, 539; *Gibbs v Capewell* (1995) 128 ALR 577, 580.

C The Conceptual and Evidentiary Base of Race

Generally, following *Shaw v Wolf*,[146] it is at least articulated that the heritage limb of the test refers to a social construct,[147] and that, of those small number of matters which do make it to court, a higher *Briginshaw*[148] burden of civil evidence will apply in proving that heritage does *not* exist.[149] Although some degree of descent is necessary, it is not of itself enough to prove Aboriginality,[150] despite prior decisions in other doctrinal contexts articulating the self-sufficiency of descent.[151] The shifting terms and expectations of proof 'do not sit comfortably with the right of self-determination.'[152]

The social basis for determining a biological construction of race in no way decentres a biologically racialised approach, but rather implicates community and individual social evidence in determining race by imbuing it with a biological fixation. The individual and community identification requirements mandated by the model are manipulated to act as relational evidentiary tools which mitigate the need to determine descent,[153] only where it is 'not certainly, only possibly'[154] apparent. In this sense, the social evidentiary base of the two other tiers of the test might supersede any lack of evidence of Aboriginal descent, but nonetheless do not shift descent from the test's core. Descent may not be itself sufficient as Aboriginality at law, but it is effectively all that is examined.

Evidencing the heritage requirement has been a markedly inconsistent process. Processes range from the documentary protocol outlined by the Aboriginal and Torres Strait Islander Commission's 2002 *Amendment Rules*,[155] to judicial remarks that the person before the court is 'obviously Aboriginal.'[156] Both ends of extremity in evidence have their patent pitfalls.

The former approach proved to be of such a high evidentiary onus that it excluded just under 450 persons in a pool of 1298 from an Aboriginal electoral roll[157] – and clearly is impacted by how few Aboriginal persons have access to formal colonial identification of their ancestors.[158] The latter approach unproductively reinforces exclusionary perceptions of Aboriginality based on settler perceptions of Aboriginal appearance alone. And where descent is not

146 (1998) 163 ALR 113.
147 Rachel Connell, 'Who is an "Aboriginal Person"?: *Shaw v Wolf*' (1998) 4(12) *Indigenous Law Bulletin* 20.
148 *Briginshaw v Briginshaw* (1938) 60 CLR 336.
149 *Shaw v Wolf* (1998) 163 ALR 113, 127.
150 *Gibbs v Capewell* (1995) 128 ALR 577.
151 See, eg, *A-G (Cth) v Queensland* (1990) 94 ALR 515, 538.
152 Jennifer Nielsen, 'Images of the Aboriginal: Echoes From the Past' (1998) 11 *Australian Feminist Law Journal* 83, 105.
153 *A-G (Cth) v Queensland* (1990) 94 ALR 515, 517.
154 Ibid 517.
155 *Aboriginal and Torres Strait Islander Commission (Regional Council Election) Amendment Rules 2002* (Cth).
156 *Allen v Ministry of Transport* [2004] NSWADT 69 (13 April 2004) [12]; *Re Maynard v Neilson* [1988] FCA 168 (27 May 1988) [26].
157 Gardiner-Garden, above n 15; *Patmore v Independent Indigenous Advisory Committee* [2002] AATA 962 (18 October 2002) [42].
158 Paradies, above n 11; Cameron and Miller, above n 10.

'obvious'? An unsuccessful 2011 racial bias appeal in the Family Court centred on bench suggestions that a party's skin, and their grandmother's, indicated 'not substantial … genetic material'.[159] This traipses uncomfortably close to biological race essentialism,[160] or as McCorquodale might characterise it, an anthropometric test of Aboriginality.[161]

These evidentiary elisions and problematic approaches stem from a discord between the law's articulated willingness to consider Indigenous evidence, and its fundamental distrust of the veracity of this evidence. A body of general principles borne of *Hort v Verran*,[162] attest that '... it is now generally accepted in Australia that Aboriginal peoples can speak for themselves particularly in relation to their own culture and traditions.'[163] However, where this evidence concerns one's own Aboriginal descent in a nexus of culture and traditions, it has been treated with scepticism, 'suspicion and resentment'.[164] Courts treat even formal identification from ALCs and ACs with limited evidentiary value.[165]

1 Dis/connection

Courts have independently introduced their own position to the three-tier test, that intergenerational social disconnection from Aboriginal communities can break the relationship between descent and Aboriginality. Courts have previously used evidence related to a lack of community identification to assert that 'insubstantial' lineage cannot itself constitute Aboriginality.[166] Even where a community has asserted an applicant's Aboriginality, courts have entertained reasoning to suggest historic concealment of Aboriginality can sever continuity in community recognition, and nullify Aboriginality.[167] This logic has primarily been employed in cases where an Aboriginal person was denied their identity in childhood through deliberate government or inter-familial intervention.[168]

Although no court is yet to rule out Aboriginality based on discontinuance, courts have foreshadowed that Aboriginal lineage cannot go on 'as generations pass and Aboriginal blood is diluted',[169] and that severance from community culture could effectively terminate threads of Aboriginality, even where a race-centred approach would conclusively determine that applicant's Aboriginality.[170] These are not principles contained within the three-tier test, but its negotiability as a body of principle has contributed to this interpretations. It has set the scene for the legal elimination of the Aboriginal person with 'minimal genetic material', reminiscent of explicitly genocidal policies that advocated for a similar elimination

159 *Sheldon v Weir (No 3)* [2010] FamCA 1138 (8 December 2010) [491].
160 Land, above n 49.
161 McCorquodale, 'Aboriginal Identity: Legislative, Judicial and Administrative Definitions', above n 5.
162 [2009] FCA 214 (1 December 2009).
163 Ibid [121].
164 Australian Human Rights Commission, 'Social Justice Report 2000' (1999) 20.
165 *Sheldon v Weir (No 3)* [2010] FamCA 1138 (8 December 2010) [496]–[498].
166 *A-G (Cth) v Queensland* (1990) 94 ALR 515.
167 *Queensland v Wyvill* [1989] FCA 485 (24 November 1989) [26].
168 See also: *Sheldon v Weir (No 3)* [2010] FamCA 1138 (8 December 2010) [487]–[491].
169 *Queensland v Wyvill* [1989] FCA 485 (24 November 1989) [39].
170 *A-G (Cth) v Queensland* (1990) 94 ALR 515.

of 'half-castes'.[171] While the rhetoric has shifted, the flexibility of Aboriginality as a question of fact, and the biological racialisation of the community and individual tiers, surreptitiously continues its work.

2 Half-Castes: New Names

An ongoing trend throughout this body of cases is that considerations of the other tiers could be brought as evidence of descent if the court is unable to observe that a person is Aboriginal based on 'racial classification as ordinarily understood',[172] where 'genetic claims … are exiguous.'[173] This is presumed to refer to persons who courts do not perceive to be Aboriginal by appearance. As Jenkinson J remarked 'the closer to the boundary the person's genetic history … the greater the influence of his conduct and of the conduct of the Aboriginal community.'[174]

The courts have addressed their race anxieties by asserting a divergent standard of proof for those mixed-race Aboriginal persons. The three-tier test was developed in some way to resolve these complexities of in/visibility. Despite this, prior approaches to blood-quantum have been reinvigorated by courts, through their interpretation of the relationship between the tiers, in order to develop thresholds of descent under or over which different kinds of evidence of Aboriginality would be required. These same approaches were taken under quantum classification – where behaviour and association served as evidence where descent was ambiguous.[175]

3 Racialising the Post-Race Void

Courts equivocally assert the social base of the heritage requirement,[176] although their fixation remains on proving some biological basis to the Aboriginal legal subject. When Aboriginal heritage cannot be conclusively proven, the inquiry centres on the space it leaves behind, highlighting the court's failure to appreciate Aboriginal ways of knowing kinship and lineage, even to appreciate Western one-drop understandings of minimal descent.[177] Courts frame Aboriginal epistemic certainties on lineage as possibilities that courts allow to linger unanswered.[178]

Courts re-centre biological race, even in attempting to decentre it:

> [H]e who identifies as a person of Aboriginal descent and who is recognised as Aboriginal by the Aboriginal community, the word 'Aboriginal' will be used, notwithstanding that he is thought to be in only small part of Aboriginal descent, or to be not certainly, only possibly, of Aboriginal descent at all.[179]

171 McCorquodale, 'Aboriginal Identity: Legislative, Judicial and Administrative Definitions', above n 5; Land, above n 49.
172 *A-G (Cth) v Queensland* (1990) 94 ALR 515, 517.
173 Ibid 519.
174 Ibid.
175 McCorquodale, 'Aboriginal Identity: Legislative, Judicial and Administrative Definitions', above n 5.
176 *Shaw v Wolf* (1998) 163 ALR 113.
177 *A-G (Cth) v Queensland* (1990) 94 ALR 515.
178 Ibid.
179 Ibid 519.

Nevertheless, the biological grounding of race at law as a matter of foundational principle is difficult to shift from but is instead reasoned around, matter by matter. As Brennan J noted, despite later acknowledging that the space left by ambiguous race could be socially reasoned:[180] '"Race" is not a term of art … There is, of course, a biological element in the concept.'[181]

D Guiding Principles

These developments in the common law, although clearly altering the character of and expanding the evidentiary scepticism against Aboriginal legal personality, hold true to the foundational principles that are expressed by the three-tier test. This is to say that, despite strong divergence in principle, that the three-tier test was already vulnerable to the principles and processes of settler law in which it was installed.

As courts continue to treat Aboriginality as a question of statutory interpretation, with each new statutory intervention there are theoretically fresh frameworks within which to consider, and agitate, new legal Aboriginalities.

In existing case law, Aboriginality becomes contingent on its doctrinal and statutory context, bounded by constructions of ordinary meaning, and imbued with colonial evidentiary anxiety on race and homogeneity.[182] Crucially to ALCs and ACs, the test and tiers entrench the role of authenticity in dispelling these anxieties. Legal Aboriginality is moulded and distorted from two points of implicit epistemic force – one from the external structure of the laws in which Aboriginality is codified, and the other from the evidentiary and conceptual pressure to fuse the three tiers and their purposes. Insofar as these two forces remain under-articulated or unaddressed, the neutral frameworks of the law will continue to give momentum to the perilous swing of legal Aboriginality back to biology.

This case analysis offers understandings of how epistemic violence impacts legal Aboriginalities, even as they are articulated in good faith by courts. While this substantiates a deep colonising process within the law even by and within the judiciary, an understanding of deep colonisation in the context of legal Aboriginality is incomplete without a critical analysis of how it is enacted by Aboriginal organisations. This analysis now moves to this more prolific and potent application of legal Aboriginality.

180 *Commonwealth v Tasmania* (1983) 158 CLR 1,70.
181 Ibid 243.
182 Ardill, above n 115; Maddison, 'Indigenous Identity, "Authenticity" and the Structural Violence of Settler Colonialism', above n 46.

IV BLAK ARBITERS. CONSTRUCTING OPERATIONAL ABORIGINALITY ON THE GROUND AND AT THE EDGES – SELF-CONSTITUTION, LEGAL FORMALISM OR DEEP COLONISATION?

The operation of the three-tier test at the level of community determinations is 'ill-defined or … unknown'.[183] There has been no attempt to map an operational Aboriginality, likely due to its diffuse and inconsistent documentation,[184] the conceptually precarious location and jurisdiction of its arbiters,[185] and a lack of comparative guidance.[186]

This Part seeks to preliminarily suggest how Aboriginal organisations apply the law and the deep colonising impacts of the law of the triparted model itself. It will do this through providing a brief scope of observable trends in a pool of cases set out at in the Appendix, and critically scrutinising these undercurrent bodies of precedent through two case studies in family and administrative law.[187]

This Part will build on the probative complexities of the test outlined in Part III. It will provide an opportunity to contrast legal approaches to determining Aboriginality, with Aboriginality as arbitrated by its peers. This section will trace sites of deep colonising, where the principles outlined in Parts 1 and 2 are naturalised or otherwise adopted by Aboriginal corporate and statutory actors. This is not to serve as a criticism to ACs and ALCs, who navigate legal regulation, community-building and community expectations in complex and strategic ways, but to highlight discursive and other structures and influence over Indigenous self-constitution using the three-tier model.

Operational Aboriginality is embedded into communities in two distinct ways – first, by acting as a formal gatekeeper to policy, services and elections,[188] and secondly, by embedding itself in Aboriginal understandings of self and community.[189] This form of adjudication is the only form of legal Aboriginality most Aboriginal people encounter. Any naturalisation of the principles outlined in Part III on this level can therefore have profound social, policy and legal effect.

The naturalisation of colonial principles of discontinuation and blood quantum, and colonial anxieties of identifying for benefit might already be observed in contestation of the model by prominent schools of Aboriginal identity:

> You can't just say it's your great great grandfather. It's got to be your mother and your father … there's not descent if that's broken.[190]

183 McCorquodale, 'Aboriginal Identity: Legislative, Judicial and Administrative Definitions', above n 5, 34.
184 Whittaker, above n 4.
185 Pearson, above n 72.
186 Pfefferle, above n 32.
187 *Sheldon v Weir (No 3)* [2010] FamCA 1138 (8 December 2010); *Patmore v Independent Indigenous Advisory Committee* [2002] AATA 962 (18 October 2002).
188 NSW Aboriginal Education Consultative Group Incorporated, above n 79.
189 Harris, Carlson and Poata-Smith, above n 42; Victoria Grieves, 'Membership and Identity: Culture Not Colour' (Speech delivered at the National Indigenous Legal Conference, Melbourne, Victoria, 4 September 2015); Chalmers, above n 12.
190 Berwick, above n 69.

> Nobody was Aboriginal in the 1950's. They all said they were Portuguese. Now these fullas turn around and want identification so they can get the benefits.[191]

This Part presents and assesses preliminary evidence that Aboriginal organisations have not only accepted the colonial language underpinning legal Aboriginality, but play a crucial role in policing the peripheries of Aboriginality – extrapolating, restricting and expanding them. In doing so, these bodies and decisions are not only products of the colonising process of defining Aboriginality, but potential mechanisms of it. Their interaction with the formal picture of the law is not one that closely mirrors legal principle, but one that has itself taken on a symbiotic development, alongside principles of blood quantum, discontinuation and authenticity.

A Preliminary Principles of Operational Aboriginality – Scoping from Contact with Courts

Preliminary scoping indicates that reliance on Aboriginal arbitration and contestation by no means confers any meaningful self-determination or focus on Aboriginal epistemologies of self.

Of the matters within the scope of this article (n=13),[192] only half of the depictions of an operational level of Aboriginality (n=6) permitted oral history to be provided as evidence of community identification and descent. None permitted self-evidence. A majority (n=10) had a genealogy requirement. A majority (n=9) required some form of public document to evidence either community identification or descent – eschewing Indigenous epistemologies against 'a biologically essential component to Aboriginality'.[193] All bar one (n=12) of these cases were contested on the grounds of descent. All bar one (n=12) cases were also contested on the grounds of community recognition. None were contested on the ground that one person did not identify, indicating that there is an operational relationship between descent and community recognition. These figures are not a full picture of the operational model, but pose questions on the role Aboriginal evidences and constructions of race have in adjudicating Aboriginality.

It is accepted that ALCs, ACs and other Aboriginal community organisations formally utilise the three-tier model,[194] but it is yet unclear how. Preliminarily, these figures suggest that there are operational complexities and elisions in the treatment of the three-tier test like a checklist – as the literature has previously suggested.[195] These elisions include the high level of documentary rigour around descent and community-identification and the institutional mediation of Aboriginal epistemologies.[196]

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191 Grieves, above n 189.
192 See Appendix.
193 Chalmers, above n 12, 50.
194 Ibid.
195 Ibid; NSW Aboriginal Education Consultative Group Incorporated, above n 79; Whittaker, above n 4.
196 Martin Nakata, 'Indigenous Memory, Forgetting and the Archives' (2012) 40(2) *Archives and Manuscripts* 98.

Clearly at law, evidence and relational weight play a considerable role in naturalising settler constructs of race.[197] I argue that these two elements play an equally insidious role in naturalising these constructs at an operational level.

The three-tier model enjoys some formal currency in the certification of Aboriginality by ACs and ALCs, despite a large body of diverse dissent from within our communities suggesting the definition suppresses Indigenous epistemologies, enforces unworkable constructs of authenticity, is unpredictable, is prescribed by governments, and is imperfect.[198] Indigenous epistemologies and perspectives on Indigenous identity and the three-tier model vary, but the model's institutionalisation has the potential to homogenise the forms an operational or legal Aboriginal identity may take. The author's own Confirmation of Aboriginality required the author to swear the following standard pledge after speaking to each tier of the test. The pledge is affirmed by a mover, a seconder and then taken to a vote of those present:

> 'I am of Aboriginal Descent and identify as Aboriginal in the community. I am accepted as such by the [insert community] Aboriginal community in which my family has resided for [enter number of years resided].'

The certificate, signed and stamped with a common seal, then serves as documentary proof of Aboriginality. In the author's own knowledge, a number of ALCs and ACs have introduced a further threshold of genealogical information to be provided prior to application. Aside from this comparatively recent development, more established protocol such as a formal appearance at an ALC and AC meeting and making a case before the present membership are also followed by some, not all, ALCs and ACs.

The following case studies set out to demonstrate that the varied anachronistic principles of race are naturalised not merely in passive adjudication by autonomous Aboriginal bodies, but have been actively incorporated, and even overplayed, by Aboriginal bodies themselves. It is the role of these case studies to situate this formative work from within Aboriginality itself, where its blak arbiters and this author reside.[199] These case studies will use a thematic Indigenous storying and discursive critical legal research methodology focussed on the experience of case study subjects in order to explore the tensions, ironies and traumas of this body of precedent,[200] locate the fissures of deep colonisation, and trace a potential body of undercurrent principle.

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197 Biber, above n 61.

198 Chalmers, above n 12; Bodkin-Andrews et al, above n 11; NSW Aboriginal Education Consultative Group Incorporated, above n 79; Bronwyn Carlson, 'Who Counts as Aboriginal Today?', *National Indigenous Television* (online), 21 March 2016 <http://www.sbs.com.au/nitv/article/2016/03/15/bronwyn-carlson-who-counts-aboriginal-today>; Luke Pearson, 'We May Never Find a Perfect Bureaucratic Definition Of Aboriginality', *National Indigenous Television* (online), 29 March 2016 <http://www.sbs.com.au/nitv/the-point-with-stan-grant/article/2016/03/29/luke-pearson-we-may-never-find-perfect-bureaucratic-definition-aboriginality>.

199 Martin Nakata, 'An Indigenous Standpoint Theory' in Martin Nakata (ed), *Disciplining the Savages, Savaging the Disciplines* (Aboriginal Studies Press, 2007) 213.

200 See Alison Whittaker, 'Observing Aboriginality, Aboriginality Observing: Epistemic and Methodological Paths to an Indigenous Student Jurisprudence From Within' (2016) 5 *Ngiya: Talk the Law* (forthcoming).

B Case Study: *Sheldon v Weir (No 3)*

Sheldon v Weir is a protracted dispute concerning the custody of a young girl.[201] Her Aboriginality evokes protective family law principles concerning Aboriginal children's connections to culture.[202] As the girl was reportedly 'too young to proclaim identification with any race',[203] the court turned its attention to the Aboriginality of 'Sheldon', the child's father. In that context, the court addressed his existing documentation as contributing evidence regarding his Aboriginality, turning its inquiry eventually to his Confirmation of Aboriginality and how it was acquired.[204] This case study draws from that discussion as its source.

This operational case study will focus on the rigour with which Sheldon had documented himself as an Aboriginal person through various autonomous Aboriginal institutions – a documentary rigour which nevertheless was heavily scrutinised by the courts – and the decision-making undertaken by Aboriginal organisations and courts who navigated the complex field of identity fragmentation by cultural deprivation.

1 Deliberating Aboriginality

Sheldon, a Riverina-based Aboriginal man, discovered his Aboriginality as a young adult, after it was deliberately kept from him in fear of government intervention.[205] His Aboriginality remained undisclosed until his grandmother fell ill and informed him.[206] Sheldon felt 'reassured' by this revelation and later applied to an AC for a Confirmation of Aboriginality.[207] Sheldon attended a meeting of the AC to state his case under the standard practice.[208] Sheldon lacked documented genealogical evidence and, due to prior deprivation from culture, was not well-known in his community, despite his strong self-identification.

Formal evidentiary practices, the phenomena of deep colonisation and the tightening aperture of Aboriginality outlined in earlier Parts suggest that, without formal identification or community knowledge, Sheldon might enjoy neither the legal clarity that heritage evidence brings,[209] nor the presumptions of community support that follow.[210] These controversies are widely contested in Aboriginal communities.[211] His initial application was not accepted immediately, because of these two crucial gaps in evidence required by the three tier model.[212]

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201 *Sheldon v Weir (No 3)* [2010] FamCA 1138 (8 December 2010).
202 *Family Law Act 1975* (Cth) ss 60CC(3)(h), (6).
203 *Sheldon v Weir (No 3)* [2010] FamCA 1138 (8 December 2010) [502].
204 Ibid [487]-[501].
205 Ibid [488]-[493].
206 Ibid [493].
207 Ibid [494].
208 Ibid [495]; NSW Aboriginal Education Consultative Group Incorporated, above n 79; Tharwal Local Aboriginal Land Council, above n 66.
209 *A-G (Cth) v Queensland* (1990) 94 ALR 515; *Gibbs v Capewell* (1995) 128 ALR 577.
210 Neil Lofgren, '*Gibbs v Capewell & Ors*: Defining Aboriginal Identity' (1995) 3(73) *Aboriginal Law Bulletin* 18.
211 Sanders, Taylor and Ross, above n 83; Maddison, *Black Politics: Inside the Complexity of Aboriginal Political Culture*, above n 71.
212 *Sheldon v Weir (No 3)* [2010] FamCA 1138 (8 December 2010) [495].

Aboriginal peoples on the periphery of white imaginings of blakness,[213] and those who have recently discovered their Aboriginality, [214] are especially vulnerable to exclusion – firstly, because these Aboriginal experiences are perceived to be inauthentic, despite evidence of colonially-forged disconnection; [215] and secondly, because these persons are perceived to be opportunistic.[216] I attribute these perceptions to a deep colonising effect where Aboriginality is performed before the law, and draws its currency from maintaining an anthropological perception of cultural and genealogical integrity.[217]

In this instance, Sheldon's grandmother was eventually permitted to present oral testimony to the AC meeting regarding the circumstances of their cultural deprivation, and her own heritage.[218] This kind of evidence can be seen to justify a lack of community identification, set the ground for future community identification and serve as a form of genealogical evidence. This was accepted.[219] After a two-year period wherein Sheldon confirmed his self-identification and affirmed his community's acceptance, Sheldon was issued a Confirmation.[220] The period of time is itself indicative of procedural and evidentiary rigour.

Although Sheldon was not conferred assumptions afforded to both community-identified and genealogically-documented persons, he was permitted the opportunity to demonstrate his Aboriginality through Indigenous epistemologies of reconnection. This affirmative practice is not unheard of, but is atypical practice among ALCs and ACs. Sheldon's experience before the AC does not precisely depart from the institutional 'suspicion and resentment' turned to the legal Aboriginality mapped in case law. [221] However, that Indigenous oral genealogies and processes of reconnection were utilised to identify persons unknown to the community is a welcome point of departure from anachronistic legal principles underpinning biological race, evidentiary rigidity and external perceptions of authenticity.

The AC's jurisprudence on Sheldon's application is visualised in Figure 1. As might be observed, this treatment of the three-tier model obfuscated Sheldon's role as an applicant in its building of social evidence. As the inquiry moves from evidence of descent and towards its cultural and personal implications for Sheldon, it becomes less concerned with the probative value of evidence and more focussed on building relationships and resilience as a means of affirming Aboriginality. Nevertheless, its constraints as a fact-finding inquiry restrains this decolonial

213 Paradies, above n 11.
214 Maureen Perkins, 'False Whiteness: "Passing" and the Stolen Generations" in Aileen Moreston-Robinson (ed), *Whitening Race: Essays in Social and Cultural Criticism* (Aboriginal Studies Press, 2004).
215 Gorringe, Ross and Fforde, above n 4; Paradies, above n 11; Diana Henriss-Anderssen, 'The Stolen Generation in Queensland: A Critical Perspective' (2002) 11(2) *Griffith Law Review* 286.
216 NSW Aboriginal Education Consultative Group Incorporated, above n 79.
217 Aileen Moreton-Robinson, 'When the Object Speaks, a Postcolonial Encounter: Anthropological Representations and Aboriginal Women's Self-Presentations' (1998) 19(3) *Discourse: Studies in the Cultural Politics of Education* 275; Harris, above n 64.
218 *Sheldon v Weir (No 3)* [2010] FamCA 1138 (8 December 2010) [495].
219 Ibid.
220 Ibid.
221 Australian Human Rights Commission, above n 164.

jurisprudence from the community, resilience and identity-building work it could do if it was not assigned the task of assigning persons a legal race, irrespective of how it transforms the three-tier test.

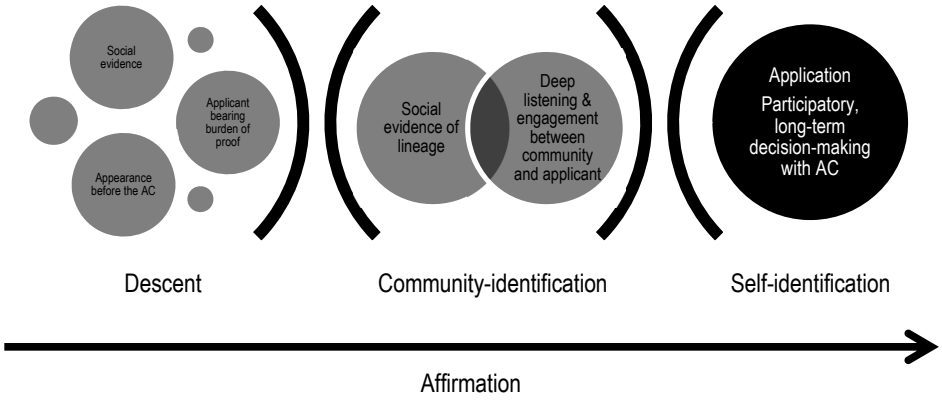

Figure 1 - Decision-Making for Sheldon

Despite working within colonial frameworks, there is evidence in this case study of ontological resistance to the deep colonising impact of these factors through processes of affirmation, rather than mere confirmation.

2 Divergences and Similarities with Doctrine

The approach taken to Sheldon in court dramatically diverges from that undertaken by the AC. Sheldon's grandmother provided an oral genealogy in court similar to that provided to the AC.[222] The court prompted her to provide names of her deceased ancestors in that genealogy,[223] a breach of cultural protocol, particularly as Mrs Sheldon expressed a strong concern that the disclosure might impact her living family.[224] There is no mention in the recounting of the operational process whether Sheldon's grandmother recounted specific names or kin groupings in her oral genealogy, but had she done so, it is assumed that she would not be forced to provide evidence that would be culturally inappropriate, nor with such explicit disregard for secondary trauma.

Of Mrs Sheldon's hesitation to disclose names of deceased ancestors, the bench remarked:

> [In other cases] Aboriginal people gave detailed information about their ancestry, which included the names of deceased family.[225]

Of the authenticity of Sheldon's community associations, the bench remarked:

222 *Sheldon v Weir (No. 3)* [2010] FamCA 1138 (8 December 2010) [486], [491]-[492].
223 Ibid [492].
224 Ibid.
225 Ibid [492].

> [T]he father did not attend [ALC] meetings ...[226]
>
> Neither [of Sheldon's nephews] attend childcare with Aboriginal organisations …[227]

These remarks, aside from demonstrating an artificially homogenous approach to Aboriginal epistemologies of death, ancestry and disclosure and Aboriginal models of community association,[228] demonstrate a further gap which has been met with at least some operational resistance – the push for evidence at all cultural costs;[229] the push for institutional evidence;[230] the rejection of family and kin association evidence;[231] and punitive perceptions of inauthenticity or insufficiencies when providing oral evidence.[232]

Courts are wedged between the cultural evidence that Aboriginal people may permissibly bring and ongoing suspicion of Aboriginal evidence. In subsequent cases, Sheldon would be precluded from calling on his own cultural knowledge frameworks to support his claim that his daughter was Aboriginal.[233] An academic or an anthropologist would later be allowed to be called, but never was.[234]

In a subsequent racial bias appeal, the trial judge's preoccupation with 'Aboriginal genetic material',[235] 'physical characteristics' and 'skin colour' became apparent.[236]

> Does [Mr Sheldon] have as part of his DNA … a link to his Australian Indigenous origins?
>
> [I]t is plain that [Mr Sheldon] is notably fair, so presumably he has DNA connection to his non-Indigenous origins as well?[237]

The court also sought photographs, Sheldon alleged, for 'visual confirmation of [deceased relatives] Aboriginality.'[238]

Although bias was not found,[239] the judgment reflects a chasm between Aboriginal epistemologies and the scrutiny of Aboriginal applicants who were separated from their ancestry and who are said by courts to have 'limited Aboriginal genetic heritage'.[240] The momentum of centring race makes outcasts of those whose identity is complicated by colonialism.

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226 Ibid [498].
227 Ibid [499].
228 Harris, Carlson and Poata-Smith, above n 42.
229 Diana Eades, 'I Don't Think It's an Answer to the Question: Silencing Aboriginal Witnesses in Court' (2000) 29(2) *Language in Society* 161.
230 Plevitz and Croft, above n 44; David Price and Bess Price, 'Good Culture - Bad Culture. Where Do We Go From Here?' in Rhonda Craven, Anthony Dillon and Nigel Parbury (eds), *Black & White: Australians All at the Crossroads* (Connor Court Publishing, 2013); Newcomb, above n 34.
231 Plevitz and Croft, above n 44.
232 Eades, above n 229.
233 *Sheldon v Weir* [2011] FamCAFC 212 (2 November 2011) [83].
234 Ibid [61]-[63].
235 *Sheldon v Weir (No 3)* [2010] FamCA 1138 (8 December 2010) [491].
236 Ibid [492]; *Sheldon v Weir* [2011] FamCAFC 212 (2 November 2011) [40].
237 *Sheldon v Weir* [2011] FamCAFC 212 (2 November 2011) [39].
238 Ibid [40].
239 Ibid [49].
240 *Re Bryning* [1976] VR 100, 103; *Sheldon v Weir (No 3)* [2010] FamCA 1138 (8 December 2010) [483].

Aboriginal organisations have adopted a similar scepticism when examining Aboriginal applicants,[241] but have at least explicitly accounted for deprivation and separation,[242] a centricity of decolonial understandings of the self and the whole. However, Aboriginal understandings of settler criteria are insufficient to themselves constitute decolonial models of Aboriginality.

Sheldon reveals that the limits of the frameworks of proof themselves prevent nuance in determining not only Aboriginality,[243] argued to be an artificial monolith created by settler law,[244] but membership of Aboriginal groups with their own frames of self-reference, ancestry and association. Until these Aboriginal frames of reference can take their own shape, rather than clinging to the probative question of tiers, Aboriginal organisations will be self-constituting only insofar as they arbitrate settler notions of Aboriginality with settler constructions of proof.

3 Over-Documented Blakness and Under-Documented Whiteness

Sheldon[245] points to inherent complexities in how Aboriginal persons of mixed Aboriginal and white descent conceptualise ourselves as racial subjects.[246] However, in articulating more nuanced understandings of how Aboriginality may be disguised for self-protection,[247] how kinship might be severed by colonisation,[248] and the complexities of white-passing in the context of the Stolen Generations,[249] whiteness, although silently the undefined alternative to Aboriginality, is never articulated. Further, whiteness is necessarily not required to be proven; it is the default racialised position of and stake in the law.[250] From this invisibility and establishment as a neutral norm whiteness acquires its adjudicative power.

Indeed even 'years before the parties met',[251] Sheldon had produced no fewer than six pieces of proof regarding his Aboriginality:

- his grandmother's oral history;[252]

241 Bodkin-Andrews et al, above n 11; NSW Aboriginal Education Consultative Group Incorporated, above n 79.
242 NSW Aboriginal Education Consultative Group Incorporated, above n 79.
243 *Sheldon v Weir (No 3)* [2010] FamCA 1138 (8 December 2010); *Sheldon v Weir* [2011] FamCAFC 212 (2 November 2011).
244 Robert French, above n 3; Chalmers, above n 12.
245 *Sheldon v Weir (No 3)* [2010] FamCA 1138 (8 December 2010); *Sheldon v Weir* [2011] FamCAFC 212 (2 November 2011).
246 Perkins, above n 214; Paradies, above n 11; Cindy Solonec, 'Proper Mixed-Up: Miscegenation Among Aboriginal Australians' (2013) 2 *Australian Aboriginal Studies* 76.
247 David Mello, 'Responses to Racism: A Taxonomy of Coping Styles Used By Aboriginal Australians' (2004) 74(1) *American Journal of Orthopsychiatry* 56.
248 Yvonne Clark, 'The Construction Of Aboriginal Identity in People Separated From Their Families, Community and Culture: Pieces of a Jigsaw' (2000) 35(2) *Australian Psychologist* 150.
249 Perkins, above n 214.
250 Helen Hatchell, 'Invisibility of Whiteness, Invisibility of Torres Strait Islanders' (2008) 2 *Ngiya: Talk the Law* 17; O'Connell, 'Pinned Like a Butterfly', above n 107.
251 *Sheldon v Weir (No 3)* [2010] FamCA 1138 (8 December 2010) [489].
252 Ibid [486].

- his own oral history about his immediate family and upbringing, and intra-familial and inter-racial racism;[253]
- an application to an AC;[254]
- a Confirmation of Aboriginality;[255]
- unspecified evidence relating to the Confirmation;[256]
- a letter from the local ALC Secretary;[257] and
- evidence of his position within a Queensland Indigenous Services Organisation.[258]

Although this substantial evidence was lower than the calibre of evidence usually received for matters concerning Aboriginality,[259] it did substantiate both 'a degree of descent',[260] and self and community identification.[261] Despite this, the gaps in the evidence became the primary matter of reflection by the court, demonstrating schisms in evidence approaches at law and at an operational level, where even Aboriginal evidence in the form of a Confirmation of Aboriginality, despite its notorious rigour,[262] is cast into scrutiny. At law, all that was required to cast this evidence into doubt, despite the higher standard of proof mandated in another doctrinal field by *Shaw v Wolf*,[263] was that Sheldon's siblings did not all identify as Aboriginal[264] and that his physical characteristics were ambiguous.[265]

These are fissures in the interaction between operation and law that must be bridged. Why foster an operational model of identification backed by Aboriginal organisations that is inconsistent with the very Indigenous epistemologies it mimics if its outcomes are thought to be insubstantial? Secondly, if this evidence is insubstantial, what would be substantial and accessible to groups whose genealogical and community connections were deliberately severed by the same machinations that now identify them?

This evidence was discussed for 17 paragraphs.[266] This interrogation, and even the prior interrogation of Sheldon by the AC, reflects a systemic legal vulnerability of Aboriginal persons, even in the law that seeks to support them:

253 Ibid.
254 Ibid [495].
255 Ibid.
256 Ibid [495], [501].
257 Ibid [496].
258 Ibid [497].
259 Ibid [486].
260 Ibid [480]; *Shaw v Wolf* (1998) 163 ALR 113.
261 *Sheldon v Weir (No 3)* [2010] FamCA 1138 (8 December 2010 [486].
262 Bronwyn Carlson, 'The "New Frontier": Emergent Indigenous Identities and Social Media' in Michelle Harris, Martin Nakata and Bronwyn Carlson (eds), *The Politics of Identity: Emerging Indigeneity* (UTS ePress, 2013) 147.
263 *Shaw v Wolf* (1998) 163 ALR 113, 127.
264 *Sheldon v Weir (No 3)* [2010] FamCA 1138 (8 December 2010) [498].
265 Ibid [491]-[492].
266 Ibid [486]-[503].

> [There is] a danger for the Indigenous participant … [that] he or she will remain vulnerable to the way that a given decision maker will describe, and then respond to the very qualities that he or she must establish in order to attract protection.[267]

In contrast, evidence for the child's Irish ancestry was discussed for only one paragraph, as it was 'not in dispute',[268] and 'strongly support[ed]' by:[269]

- an Irish passport;[270] and
- a social history.[271]

It is not stated how the latter is evidenced, and is not contested further.

Demarcating what is Aboriginal at law relies, in part, on declining to acknowledge what is not legally racialised, whiteness.[272] A specific legal Aboriginality may be mandated by a number of laws targeting Aboriginal people,[273] and even where those laws confer benefit rather than intervention,[274] the hyper-visibility of Aboriginality serves to depict whiteness as a passive norm. Even in accessing protective policy, the Aboriginal legal subject is confronted with enduring scrutiny, suspicion and ongoing epistemic trauma.

A lack of evidentiary and judicial suspicion of whiteness plays a substantive role in the deep colonisation of operational Aboriginality, resulting in Sheldon's over-documentation. Embedded in an operational level appears to be a presumption that, without identification, an Aboriginal person is otherwise assumed to be white.[275] Whites are also assumed to be white when undocumented, although this assumption is clearly structured around white racial integrity and norm status.

The adoption of even substantively self-determinative identification processes is insufficient to address this over-documentation. Indeed, demarcating legal Aboriginality is always bounded by documentation for the protection of whiteness, historically reminiscent of dog tags and exemption certificates.[276] On an operational level, these meta-evidentiary processes naturalise otherwise popularly-repugnant histories of registration, and transfer their administrative and conceptual burdens to Aboriginal peoples.

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267 O'Connell, 'Pinned Like a Butterfly', above n 107, 8.
268 *Sheldon v Weir (No 3)* [2010] FamCA 1138 (8 December 2010) [504].
269 Ibid.
270 Ibid.
271 Ibid.
272 Aileen Moreton-Robinson, 'The Possessive Logic of Patriarchal White Sovereignty: The High Court and the Yorta Yorta Decision' (2004) 3(2) *Borderlands e-Journal* <http://www.borderlands.net.au/vol3no2_2004/moreton_possessive.htm>.
273 McCorquodale, 'Aboriginal Identity: Legislative, Judicial and Administrative Definitions', above n 5; Land, above n 49.
274 Karen O'Connell, 'We Who Are Not Here: Law, Whiteness, Indigenous Peoples and the Promise of Genetic Identification' (2007) 3(1) *International Journal of Law in Context* 35.
275 Perkins, above n 214; ibid.
276 Land, above n 49.

C Case Study: *Patmore v Independent Indigenous Advisory Committee*

Patmore provides a unique insight into the decision-making process regarding the identification of Aboriginal applicants,[277] attributable to the doctrinal position of the decision-maker, the Independent Indigenous Advisory Committee ('IIAC'), which was delegated administrative power under the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) ('ATSIC'). By virtue of provisions through the *Aboriginal and Torres Strait Islander Commission (Regional Council Election) Amendment Rules 2002* (Cth), the decisions of the Aboriginal committee were subject to merits review.[278] The *Rules* also set strict evidentiary requirements.[279]

Although these stringent regulations account for the IIAC's refusal to admit oral or photographic evidence regarding descent,[280] the IIAC make other deviations from both the state of knowledge on the operation of the three-tier model and from legal knowledge of the operational model. Investigating the decision-making processes of the IIAC provides valuable insight into a largely invisible determinative process.

The IIAC relied on a broad definition of Aboriginal, meaning 'a person of the Aboriginal race of Australia',[281] which attracts the common law three-tier model.[282] Enrolment relied on evidence of all three tiers of the test.[283] Where evidence of Aboriginality was sufficient, the person enrolled, subject to an objection.[284]

Of 1298 applications, 140 went without objection.[285] These objections were considered by the IIAC, which ultimately found that 444 applicants were not Aboriginal.[286] Over 130 of these failed applicants appealed to the Administrative Appeals Tribunal ('AAT').

1 'Over-Zealous' Evidentiary Standards

Deep colonisation might be evidenced in the gaps made by excessively empirical approaches to evidence, approaches that outstrip even rigorous attempts by the judiciary to demarcate based on degrees of descent. Prior to opening the electoral roll, the IIAC planned to supplement records with genetic mapping in partnership with the Human Genome Project.[287] The AAT noted that the IIAC placed 'very substantial' weight on the public records that may reflect 'Aboriginal

277 *Patmore v Independent Indigenous Advisory Committee* [2002] AATA 962 (18 October 2002).
278 *Aboriginal and Torres Strait Islander Commission (Regional Council Election) Amendment Rules 2002* (Cth) ('*Rules*') r 166.
279 Ibid r 149; Aboriginal and Torres Strait Islander Commission, above n 142.
280 Gardiner-Garden, above n 15; Aboriginal and Torres Strait Islander Commission, above n 142.
281 *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) s 4 (meaning of 'Aboriginal person').
282 *Shaw v Wolf* (1998) 163 ALR 113; *Gibbs v Capewell* (1995) 128 ALR 577.
283 *Rules* r 149.
284 Ibid rr 145, 148.
285 *Patmore v Independent Indigenous Advisory Committee* [2002] AATA 962 (18 October 2002) [42].
286 Ibid.
287 Gardiner-Garden, above n 15.

descent',[288] notwithstanding that the Archives Office themselves only expressed 'the records it had access to and what might reasonably be deduced from them'.[289]

Such weight was conferred to this archival record that any person without archival evidence establishing descent was ruled by the IIAC to not be Aboriginal.[290] This was a notable deviation even from Australian law's probative harnessing of social tiers of the test to address descent,[291] or even allowing the question of descent to remain possible,[292] but unanswered. Applications were even rejected based on archival administrative error, including spelling mistakes,[293] rather than a lack of evidence. Notwithstanding that oral and photographic evidence was excluded by the *Rules*,[294] it would not be beyond the knowledge of the IIAC that archival knowledge of Tasmania, with a fraught genocidal history, would be both inadvertently laden with inaccuracy from the impact of assimilation policy and deliberately minimised.[295]

Not only did this strictly evidentiary approach become an exclusionary mechanism wielded by the IIAC against those who were not adequately documented, it prompted a deep colonising response from some Aboriginal applicants. Challenged applicants brought extensive genealogical evidence to the IIAC and AAT in response to the deeply traumatic question posed by this evidentiary rigour[296] – that by virtue of violent, genocidal policy, the severance of kin lines and/or the deliberate non-documentation of the state, that they could not be considered to be Aboriginal.[297] This evidence pertained to contextually-repugnant but legally-favoured records detailing the diaspora, deaths and forced migration of 'full-blood Aborigines'.[298] The notion of 'full-blood Aborigines' has particular dissonance in a Tasmanian context symbolically loaded by colonial narratives on the supposed demise of Aboriginal bloodlines,[299] and the ascendancy of white settlement.[300] The responsive reflex of some applicants and appellants to document themselves in these traumatic terms, especially where these terms are demanded not by regulation, but by their peers, is a strong indication that the zealous standards imposed by the IIAC naturalised, or at least necessitated, the

288 *Patmore v Independent Indigenous Advisory Committee* [2002] AATA 962 (18 October 2002) [33],[35].
289 Ibid [35].
290 Ibid.
291 *Gibbs v Capewell* (1995) 128 ALR 577; *A-G (Cth) v Queensland* (1990) 94 ALR 515; *Shaw v Wolf* (1998) 163 ALR 113.
292 *A-G (Cth) v Queensland* (1990) 94 ALR 515.
293 *Patmore v Independent Indigenous Advisory Committee* [2002] AATA 962 (18 October 2002) [53]-[54].
294 *Rules* r 149; Aboriginal and Torres Strait Islander Commission, above n 142; Gardiner-Garden, above n 15.
295 Ian Anderson, 'Reclaiming Tru-ger-nan-ner: Decolonising the Symbol' in Penny van Toorn and David English (eds), *Speaking Positions: Aboriginality, Gender and Ethnicity in Australian Cultural Studies* (Victoria University of Technology, 1995) 31; Cameron and Miller, above n 10; Foord, above n 2.
296 See *Patmore v Independent Indigenous Advisory Committee* [2002] AATA 962 (18 October 2002) [58]-[402].
297 Ibid [42].
298 Ibid [21].
299 Anderson, above n 295.
300 Cameron and Miller, above n 10.

adoption of anachronistic notions of race and caste by Tasmanian Aboriginal persons.

The approach to this operational determination is visualised in Figure 2. Even accounting for the prohibitive evidentiary rigour provided in the *Rules*, this appears to be an adoption of methodological and lateral scrutiny of biological race at which even settler law baulked on appeal.[301] This may be attributable to the formalising of the evidentiary process through Ministerial regulation, the mandate of state evidence and to the removal of crucial decision-making autonomy. The IIAC not only naturalised white settler legal approaches, but performed them to excess.

[301] *Patmore v Independent Indigenous Advisory Committee* [2002] AATA 962 (18 October 2002) [34]-[40].

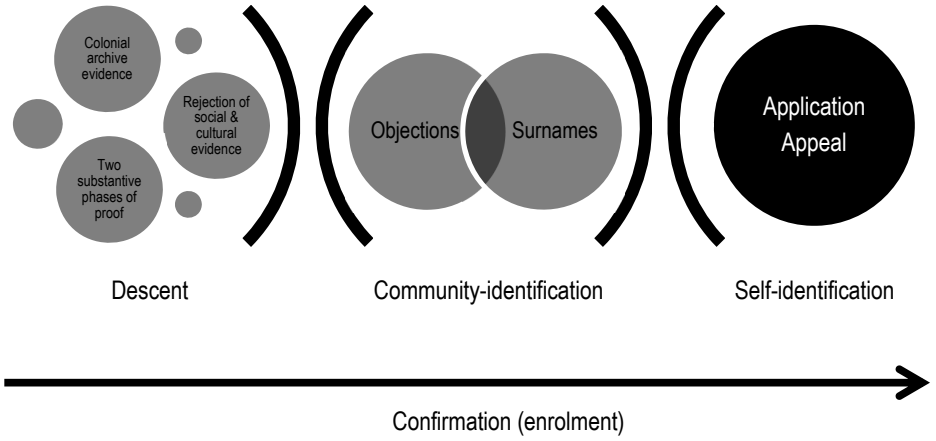

Figure 2 - Decision-Making of IIAC

2 Aboriginal Epistemologies in Settler Legal Frameworks

The development of the objection system may be perceived to be an exercise that lends Aboriginal communities some substantive power in determining whom their groups comprised through our own affirmative and collaborative knowledge systems. The power conferred to the community to object to unknown persons might be better understood as subjecting applicants to two rigorous phases of proof – firstly, proof to the IIAC that they were Aboriginal within the strict construction of the *Rules*,[302] and – secondly, withstanding further inquiry from vexatious objectors.[303]

Despite the evidentiary onus within the *Rules* placed substantially on those who sought to enrol,[304] the AAT ruled that the IIAC too readily accepted unsubstantiated objections.[305] One prolific objector offered no evidence for any claim, merely that '[h]e did not know [the applicant]'.[306] Rather than an empowering regulatory scrutiny that conferred the community substantive decision-making influence, the power conferred through objections was insubstantial engagement,[307] paradoxically conferring near-unilateral power to a group of individuals to make uncorroborated refutations of applicant evidence.[308] Compared to the community decision-making model of ALCs, this model allowed

302 *Rules* r 149.
303 *Patmore v Independent Indigenous Advisory Committee* [2002] AATA 962 (18 October 2002) [10], [48]-[50].
304 *Rules* r 149.
305 *Patmore v Independent Indigenous Advisory Committee* [2002] AATA 962 (18 October 2002) [50].
306 Ibid [49].
307 *Rules* r 148.
308 *Patmore v Independent Indigenous Advisory Committee* [2002] AATA 962 (18 October 2002) [50].

for one particular person to dislocate an applicant's identity in a punitive and restrictive sense, whereas ALC meetings, despite their shortcomings, take a facilitative, non-adversarial approach to decision-making.[309]

Interrogation of this case study cumulates with a thread of principle common to the operation of the triparted model – Aboriginal persons play a crucial role in tightening the evidential and conceptual apertures of Aboriginality in ways a settler legal institution may not be sufficiently embedded to do. Just as the jurisprudence on Aboriginal legal personhood continues to hinge on how one particular applicant might fit or be excluded by the definitions of Aboriginality,[310] so too the operational model is less concerned with challenging the model and its evidentiary base, and more with contesting the Aboriginality of individuals.[311] Both operational and legal individual eligibility approaches naturalise race, by layering complex protocols that lyricise Aboriginal epistemologies while minimising their role.

This is not to say that Aboriginal epistemologies were not present in this case, and nor to say that these epistemologies are not implicated in settler legal frameworks by naturalising problematic constructions of race.

For example, one rejection letter from the IIAC read: 'You are not of his race. He is a well-known Tasmanian Aboriginal and has the right to question Aboriginality.'[312]

One popular means of understanding ancestry and kin relationships in some Aboriginal communities is through the use of surnames.[313] Surnames might denote a relationship or affiliation with a particular group of persons. Surnames and local knowledge became significant to the IIAC as they were shared across well-known and influential Tasmanian Aboriginal groups.[314] While not a distinct tracking of ancestry, these names and their familiarity served the function outlined in Parts I and II: they opened the potential for proof of heritage through community knowledge.[315] As the character of most of the challenges received by the IIAC hinged on the notion of community knowledge,[316] and were then to be rebutted by the applicant through further proof of ancestry,[317] a particular deep colonising process in both institutional and individual deliberation of Aboriginality comes to the fore. Although the deep colonising impact of the model might be most prolifically centred on the notion of biological race, the communal limb of the test is the primary site where this impact plays out. In this sense, the law and the

309 NSW Aboriginal Education Consultative Group Incorporated, above n 79.
310 Gardiner-Garden, above n 15; Sanders, Taylor and Ross, above n 83; *Re Watson* [2001] TASSC 105 (27 August 2001).
311 Sarah Cefai, 'Policing Aboriginality in Aboriginal Community Policing: Cultural Labour and Policing Policy' (2015) (1) *Australian Aboriginal Studies* 12.
312 *Patmore v Independent Indigenous Advisory Committee* [2002] AATA 962 (18 October 2002) [48].
313 Larissa Behrendt, 'Aboriginal Urban Identity: Preserving the Spirit, Protecting the Traditional in Non-Traditional Settings' (1995) 4 *Australian Feminist Law Journal* 55.
314 *Patmore v Independent Indigenous Advisory Committee* [2002] AATA 962 (18 October 2002) [26].
315 Ibid [54], [197]-[198], [241].
316 Ibid [48]-[50].
317 *Rules* r 149.

operation of the model share a character of potent scepticism on race, explored on only superficially divergent terms.

This establishes a standard of authenticity that is paradoxically predicated on colonial understandings of Aboriginality, evidenced both through government documentation and the lateral use of Aboriginal descent and affiliation constructs. This is not to say that Aboriginal familial epistemologies are in any way deficient, however, in establishing decolonial knowledge frameworks it is crucial to acknowledge the fragmentation and discontinuity of kin lines,[318] and the edges they give to our own evidences,[319] especially when orienting this evidence towards the shifting settler target of race production.

This may confirm suggestions by prior work that whether a person is found to have biological descent hinges on community knowledge of their family.[320] In this instance, in addition to evidence through public records, the day-to-day operation of Aboriginal decision makers supports community-embedded archival knowledge on descent. Rather than genealogical knowledge, these oral archives rely on surnames and prior knowledge to evidence kin and family relationships, an extraordinarily high standard of proof for unaffiliated Aboriginal persons, and therefore pose no real alternative to equally-prohibitive archival evidence. In an evidentiary sense, this is a rejection of the legal approach to determining Aboriginality – where the Aboriginality of a blood relative cannot alone attest to an applicant's Aboriginality.[321] Conversely, it also holds close to the principle that prior community knowledge can be evidence of descent.[322] Its concomitant, that the assumption of heritage cannot apply to a community stranger, may be problematic, and could account for the epistemic displacement of some groups from our communities and memberships.

D Comparison

These case studies and preliminary trends substantiate that at an operational level, the three-tier model is constructed more subtly and with greater diversity between decision-making bodies than its statutory framework. Nevertheless, through either policy intervention and oversight or discursive means, the settler legal frameworks that give flesh to the triparted model have made deep colonising impact in the communities that enforce them.

In summary, at an operational level, the following may be observed:

- naturalisation of biological race as 'descent';
- de-centring of social limbs of the test as community evidentiary mechanisms to prove descent, rather than as constitutive of the descent model itself;
- diverting approaches to the decision-making process as affirmation or confirmation;

318 Harris, above n 64; Bodkin-Andrews et al, above n 11; Clark, above n 248.
319 Bodkin-Andrews et al, above n 11.
320 Whittaker, above n 4.
321 *Shaw v Wolf* (1998) 163 ALR 113; *Sheldon v Weir (No 3)* [2010] FamCA 1138 (8 December 2010).
322 *Gibbs v Capewell* (1995) 128 ALR 577.

- conflicting treatment of Aboriginal epistemologies; and
- prevalent roles of lateral contestation of Aboriginality.

This deep colonising impact at an operational level is made through both the prioritisation of settler evidence, the subjection of Aboriginal epistemologies to the scepticism and scrutiny of white burdens of probity, and the neutrality of those bringing the evidence. Such a process that is so fraught with notions of tightening and performing authenticity that within a framework of probity and documentation,[323] it becomes vulnerable to settler-conceived notions of tradition and race with legal, institutional and evidentiary backing. Not only is the suspicion and resentment of Aboriginal identifiers made out externally, the same suspicion and resentment is played out often amongst our own communities as they turn to enforce their conceptual borders.

These case studies reveal that deep colonisation is a process, rather than an outcome, intervening upon the autonomous decision-making of Indigenous persons. There may be nothing inherently colonial about the three-tier model, except that its hinging in colonial institutions guarantees the import of a settler lens over a decolonising institution, and an expression of settler interests.

Its deep colonising impact at the community level is drawn from the model's predication of community identification, in contrast with the legal level, which draws deep colonising impact from race. This has shifted the bulk of demarcating work from non-Indigenous persons to Aboriginal institutions, and in doing so, has impacted on the decision-making autonomy that these groups might have had whilst simulating decolonisation of outcome. As the divergence between the affirmation process of *Sheldon*[324] and the decisions of the IIAC might reveal,[325] the greater degree of rigour the tests of Aboriginality, the greater that process and epistemic autonomy is impacted and transformed.

Indeed, so long as the decision-making is only implicitly intervened upon through the development of the three-tier model, this deep colonising impact remains invisible, and instead of challenging the three-tier model for its value, Aboriginal persons challenge ourselves based on its terms. The incapability to challenge statutory definitions or the long-established principle of Aboriginality as a matter of fact ensures that ongoing reform is restricted to high-level political will.[326] Rather, Aboriginal people develop these discourses through the only power afforded to us – lateral contestation.[327] This serves to further tighten the test, and restrains the effect of any substantive self-constitution remaining in the decision-making process.

As is demonstrated by *Patmore*,[328] Aboriginal actors have become implicated through their enforcement of these constructions often beyond and independent of

323 Maddison, 'Indigenous Identity, "Authenticity" and the Structural Violence of Settler Colonialism', above n 46.
324 *Sheldon v Weir (No. 3)* [2010] FamCA 1138 (8 December 2010).
325 *Patmore v Independent Indigenous Advisory Committee* [2002] AATA 962 (18 October 2002).
326 Brennan, above n 24; Howitt, above n 109; Reilly, above n 59.
327 Larissa Behrendt and Loretta Kelly, *Resolving Indigenous Disputes: Land Conflict and Beyond* (Federation Press, 2008).
328 *Patmore v Independent Indigenous Advisory Committee* [2002] AATA 962 (18 October 2002).

the requirements of settler colonial law, naturalising its principles as a strict enforcement of our own, and providing Aboriginal bodies with some stake in tightening these borders even further. *Sheldon* offers hope that processes of affirmation which use our own epistemologies to pull away from both the three-tier model and confirmation.[329] Nevertheless, an outcome of this deep colonising process is what was demonstrated in *Sheldon*[330] – excessive documentation, increased scrutiny and a fundamental distrust of settler evidentiary processes of the Aboriginal person at law, a scrutiny that is rarely turned to the ordinary, or even racialised, non-Indigenous subject.

V CONCLUSION

The question of deep colonisation in racialising Aboriginal persons at law cannot turn merely to the three-tier test itself. Rather, a richer analysis emerges if the question expands to the relationships between its tiers, its role in settler colonial law and these factors' impacts on Aboriginal self-perception.

The methodological and disciplinary limits of this article, and the comparative sparseness of literature on this issue, restrict me from commenting with any specificity on how this process of deep colonisation occurs within the minds, societies and frameworks of Aboriginal arbiters. This is a site for further interdisciplinary inquiry, and indeed, remains as a gap in the present literature of deep colonisation generally.

This is not to say that this article cannot conclusively comment on the institutional processes of deep colonisation in legal Aboriginality. Indeed, it has undertaken three crucial, as yet undone projects – mapping the invisible threads of legal Aboriginality, scoping a picture of operational Aboriginality, and situating a deep colonisation between these two Aboriginalities.

What can be revealed through this article's analysis is that settler colonial law's many external and 'neutral' contexts (doctrinal circumstances, technical elements of statutory interpretation, contextual fluidity, firm evidentiary standards) shape the three-tier test as a vector through which biological race, as perceived through settler epistemologies, can be re-centred.[331] This macabre fascination with tracing biological race has cumulated over decades to effectively corrupt the communal- and self-identity limbs of Aboriginality and minimise their value beyond the probative weight they give to biological race. On the level of judicial enforcement, Aboriginality is articulated in the terms of self-constitution, but is delivered upon the same anachronistic notions of caste. The conceptual grounds of Bird-Rose's model of deep colonisation are thus made out in their previously unexplored terrain of legal Aboriginality.[332]

329 *Sheldon v Weir (No 3)* [2010] FamCA 1138 (8 December 2010).
330 Ibid.
331 Davis, above n 62.
332 Bird-Rose, above n 9.

A Deep Colonising – The Role of Aboriginal Organisations

The hopes of a post-biological legal Aboriginality are defeated by the formality of Australian law and its resolve to definitively understand a group of persons with whom settler states have an anxious conceptual relationship.[333]

This is an insidious process, rarely impacting on outcomes, but polluting judicial decision-making with key epistemic violence whose impacts can be observed where Aboriginal legal identity is most commonly made out – within our own communities. Deep colonisation can be understood in these processes to be less of a one-dimensional process of colonial transmission from the coloniser to the colonised, but one which is symbiotic, multidimensional and borne of the subtle internal compromises ALCs, ACs and statutory bodies are forced to make in order to inhabit and draw even minimal decolonial power from settler law.

That there is such a substantial fissure between the law's articulation and its application, even within courts, should broadly indicate a substantive conceptual gap that Aboriginal actors must bridge. This gap is where the bulk of the work in demarcating an Aboriginal population lies, and in a policy context of self-determination,[334] it is a space that settler law cannot explicitly operate within.

It is, however, where Aboriginal persons and bodies reside, and through the influence and oversight of legal Aboriginalities, these persons and bodies are charged with the role of defining ourselves on the terms of another. Restricted in our own self-constitution by these terms, we enforce them laterally with great potency. We have entrenched them so deeply into a contested space of Aboriginal arbitration and community decision-making, that they have become our own. The corruption of the model, and positioning this work within ALCs, ACs and statutory bodies, renders a once-decolonial way of articulating a self with relation to the whole as one that is increasingly bent on laterally policing its fringe.

B Reform

What began as a critical reform project finds itself with a limited scope to address the flaws of legal Aboriginality. Although the end of reform of legal Aboriginality has been vaguely espoused for some time,[335] this article provides an analytical framework against which it might be constructed. Prior understandings that had critically focussed on outcomes of compromised governance, warped identity and exclusion are crucial to justifying reform, but of themselves an insufficient launching point to understanding how the process of defining Aboriginality might be rehabilitated.

Certainly, Aboriginality's statutory inconsistency and treatment as a matter of fact have empowered the return of Aboriginality to caste, but strict and central

333 Barry Morris, 'Crisis of Identity: Aboriginal Politics, the Media and the Law' in Barry Morris (ed), *Protest, Land Rights and Riots* (Aboriginal Studies Press, 2013) 13.

334 Brennan, above n 24.

335 Australian Institute of Aboriginal and Torres Strait Islander Studies, Submission No G286 to Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia* (16 December 2002); Law Institute of Victoria, Submission No G275 to Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia* (19 December 2002).

codification bears the same risk of racialisation in judicial interpretation, with far wider reverberating consequences. Moreover, abolishing definition risks the disempowerment of Aboriginal persons in accessing substantive redress and reform in settler law, and risks ongoing judicial agitation of race to our detriment. Where, then, should the findings of this article be located if they are to redress the fissures in Aboriginality?

These findings point to the benefits of untethering legal and operational Aboriginality, equipping ACs, ALCs and other self-constituting groups to embark upon 'appropriate … relevant' and substantively decolonial projects of defining themselves[336] – a challenge when these epistemologies have been so fractured by both prior demarcation, and the deep colonisation of the three-tier model. The legislative and administrative purposes for which Aboriginality has been constructed too must be rethought. These purposes motivate and shape to what end Aboriginality is interpretively constructed, and simply reconfiguring any definition while putting it to the same work is likely to result in a return to the same racially essentialist construction using reformed language.

Further, I propose codifying legal Aboriginality by its context and position relative to the law and Australian state, empowering pluralistic understandings of Aboriginality beyond race and need, and requiring courts to render themselves visible as creators of legal Aboriginality. This reform necessitates acceptance of ambiguity and contention; shifting the impact and burden of interpretive flexibility from Aboriginal subjects to the law itself. While this is unlikely to of itself disrupt legislating Indigeneity for the purposes of intervention or service-provision, by making attempts to legally racialise Indigenous persons and their purposes visible, advocacy and community momentum might more cogently move away from those purposes and definitions. If separated from sources of deep colonising pressure, Indigenous expressions of Aboriginality could assert themselves in a legally pluralistic and self-sustaining way that legal and operational definitions of Aboriginality become either increasingly sidelined, or positioned as settler colonial standards to be rejected.

Internally, it requires an intra-communal shift from Confirmation, towards more porous practices of affirming identity. This may require that legal or operational Indigenous identity itself be removed from its vetting purpose in determining AC or ALC membership, to make way for more plain criteria on what is required of members and more porous and affirmative Indigenous status. From here, the mandate of Confirmation that drives the deep colonial objectives of the three-tier model is eased, and a non-administrative object of community-building and cultural revival can take place. Aboriginalities and Aboriginal peoples are epistemically resilient, and well-equipped to bear and meet these challenges.

C Grey Legal Subjects

Aboriginal legal identity is a construction almost external to Aboriginality itself – a guise adopted to navigate institutionally-white law. Aboriginal legal identity is a grey legal subjectivity, precisely because the law attempts to define

336 Australian Institute of Aboriginal and Torres Strait Islander Studies, above n 335, 5.

something other than Aboriginality itself, something which, through deep colonisation, might fuse itself to Aboriginality. This something is imprecisely racialised, clumsily located, innately vexed by what it is, but is not stated to be – a category by which settler colonial law seeks to reconcile its position relative to the native, and to address the entrenched deprivation it set in motion.

Aboriginalities have long inhabited a position of contention with the law, even as we are crudely adopted into it. Laden with a strong sense of what they are and might be, Aboriginalities outside law might be impossibly richer ways of locating self in relation to the whole, outside of the oversight of the law, and even its institutional Aboriginal arbiters. Within the law, however, these ambiguities are overborne by legal rigidity.

APPENDIX

Table 1: Operative Cases by Features

Brought by Indigenous persons?	Oral history permitted as evidence of social tiers?	Genealogy requirement? (oral or otherwise)	Government/public documentary requirement?	Contestation of descent?	Contestation of community?	Contestation of self-identification?	Self-evidence accepted?
***Bleathman v Taylor* [2007] TASSC 82 (8 November 2007)**							
Yes	No	Yes	Yes	Yes	Yes	Yes	No
***Hort v Verran* [2009] FCA 214 (1 December 2009)**							
No	Yes	No	No	Yes	Yes	Yes	No
***Gibbs v Capewell* (1995) 128 ALR 577**							
Yes	No	No	No	Yes	Yes	Yes	No
***Rankmore v Minister for Immigration and Citizenship* [2010] AATA 1079 (20 December 2010)**							
No	No	No	Yes	Yes	Yes	Yes	No
***Re Simon* [2006] NSWSC 1410 (12 December 2006)**							
Yes	Yes	Yes	No	Yes	Yes	Yes	No
***Simons v Barnes (No 2)* [2010] FMCAfam 1094 (7 October 2010)**							
Yes	Yes	Yes	No	Yes	Yes	Yes	No
***Sheldon v Weir* [2011] FamCAFC 212 (2 November 2011) (discusses separate processes)**							
Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
***Sheldon v Weir (No. 3)* [2010] FamCA 1138 (8 December 2010) (discusses separate processes)**							
Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
***Shaw v Wolf* (1998) 163 ALR 113**							
Yes	No	Yes	Yes	Yes	Yes	Yes	No
***Re Attorney-General (Cth) v Queensland* (1990) 25 FCR 125**							
No	No	Yes	Yes	No	Yes	Yes	No

Brought by Indigenous persons?	Oral history permitted as evidence of social tiers?	Genealogy requirement? (oral or otherwise)	Government/public documentary requirement?	Contestation of descent?	Contestation of community?	Contestation of self-identification?	Self-evidence accepted?
***Re Watson* [2001] TASSC 81 (3 August 2001)**							
Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
***Williams v Minister, Aboriginal Land Rights 1983* [1999] NSWSC 843 (26 August 1999)**							
No	No	Yes	Yes	Yes	No	Yes	No
***Patmore v Independent Indigenous Advisory Committee* [2002] AATA 962 (18 October 2002)**							
Yes	No	Yes	Yes	Yes	Yes	Yes	No