



## Aboriginal and Torres Strait Islander Commission Amendment Bill 2004

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Law and Bills Digest Section  
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## **Aboriginal and Torres Strait Islander Commission Amendment Bill 2004**

**Date Introduced:** 1 December 2004

**House:** Senate

**Portfolio:** Immigration and Multicultural and Indigenous Affairs

**Commencement:** Abolition of ATSIC, amendments relating to the Office of Evaluation and Audit and amendments to other Acts: on proclamation or, failing that, 6 months after Royal Assent.<sup>1</sup> Abolition of Regional Councils: the later of 1 July 2005 or the day immediately after the abolition of ATSIC.<sup>2</sup>

### **Purpose**

To abolish the Aboriginal and Torres Strait Islander Commission ('the Commission' or 'ATSIC') and Regional Councils and make consequential and transitional arrangements.

### **Background**

#### History of the Bill

A Bill to abolish ATSIC was first introduced into the House of Representatives on 27 May 2004 (the May 2004 Bill). It passed the House of Representatives on 2 June 2004 and was introduced into the Senate on 15 June 2004. On 16 June 2004 the Senate appointed the Select Committee on the Administration of Indigenous Affairs ('the Committee') to report by 31 October 2004. The Committee's terms of reference were as follows:

- (a) the provisions of the Aboriginal and Torres Strait Islander Commission Amendment Bill 2004;
- (b) the proposed administration of Indigenous programs and services by mainstream departments and agencies; and
- (c) related matters.

As at 31 August 2004, the day on which the 40<sup>th</sup> Parliament was prorogued, the Committee had received 189 submissions and held seven public hearings. On 31 August 2004, the Committee produced two interim reports. The first, a report by the Committee's then Chair,<sup>3</sup> advised the Senate President that as a result of the prorogation of Parliament the Committee would be unable to report by its due date.<sup>4</sup> The second interim report, by

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dissenting Government Senators, also dated 31 August 2004 confirmed their support for ATSIC's abolition and stated:

The Government Members believe ... that the Bill should be returned to the Parliament for passage as soon as possible. The Committee could, if it chose, continue its deliberations on service delivery and replacement options on the basis that any further legislative or administrative changes thought necessary could be left to an incoming Government.

The 41<sup>st</sup> Parliament met for the first time on 16 November 2004. On 17 November 2004, the Senate reappointed the Committee with the same terms of reference and powers. Another Aboriginal and Torres Strait Islander Commission Amendment Bill 2004 (the December 2004 Bill) was introduced into the Senate on 1 December 2004. As at 1 March 2005, the Committee had received a total of 246 submissions (including the submissions made before the election was called). It held seven public hearings in January and February 2005. The Committee is due to report by 8 March 2005.

### The announcement of ATSIC's abolition

The Prime Minister, Mr Howard, and the Minister for Indigenous Affairs, Senator Amanda Vanstone, announced the government's intention to abolish ATSIC on 15 April 2004:

Our goals in relation to indigenous affairs are to improve the outcomes and opportunities and hopes of indigenous people in areas of health, education and employment. We believe very strongly that the experiment in separate representation, elected representation, for indigenous people has been a failure. We will not replace ATSIC with an alternative body. We will appoint a group of distinguished indigenous people to advise the Government on a purely advisory basis in relation to aboriginal affairs. Programmes will be mainstreamed, but arrangements will be established to ensure that there is a major policy role for the Minister for Indigenous Affairs.<sup>5</sup>

The government's decision to abolish ATSIC followed a review into ATSIC's roles and functions commissioned by the government in 2002. The review was conducted by Indigenous academic and author, and Co-Chair of Reconciliation Australia Jackie Huggins, former NSW Liberal state minister John Hannaford, and former federal Labor minister Bob Collins. The review panel concluded that ATSIC was in need of 'urgent structural reform', including an overhaul of ATSIC's representative structure, and increased emphasis on regional planning and on the role of Indigenous people at the regional level.<sup>6</sup> The Review Panel did not recommend abolition (according to the Prime Minister, the government's view that ATSIC should be abolished was formed following Cabinet's examination of the review panel's report<sup>7</sup>).

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## The history of ATSIC

ATSIC was established by the Hawke Labor Government with the passage of the ATSIC Act through the parliament in November 1989. It commenced operation in March 1990.

Prior to ATSIC's establishment, the Department of Aboriginal Affairs (DAA)—which had been established in 1972 by the Whitlam Labor Government—had been the central agency with responsibility for Indigenous affairs policy and programs at the Commonwealth level. It administered a range of Indigenous-specific policies and programs, and provided policy advice to the government. Its work was supplemented by the Aboriginal Development Commission (ADC)—established by the Fraser Coalition Government in 1980—which administered a small range of development-oriented Indigenous affairs programs. Both the DAA and the ADC were disbanded when ATSIC was established.

ATSIC was also preceded by two elected, Indigenous-only bodies: the National Aboriginal Consultative Committee (NACC), established by the Whitlam Government in early 1973, and the National Aboriginal Conference (NAC), established by the Fraser Government after it disbanded the NACC in 1977. While they differed slightly in structure and function, the essential role of both of these bodies was to provide advice on Indigenous affairs matters to the federal government. Unlike ATSIC, however, neither body had any executive power over Indigenous affairs policy-making or any direct role in administering Indigenous affairs programs or services.<sup>8</sup>

Following the disbandment of the NAC in 1985, the Hawke Government announced its intention to establish ATSIC in October 1987. In ATSIC, the government proposed to create a body which would combine the representative roles previously held by the NACC and the NAC, and the responsibilities for program management and service delivery hitherto held by the DAA and the ADC. The government proposed that ATSIC would be run by a national board, elected through an organisation of regional councils.<sup>9</sup>

## Key issues at the time of ATSIC's establishment

Through its proposal to combine both representative and program delivery roles in the one organisation, the Hawke government's ATSIC proposal was designed to 'allay the criticism [of earlier bodies such as the NACC and NAC] that decision-making power over Aboriginal affairs had never been fully given to Aborigines'.<sup>10</sup> Accordingly, the ATSIC proposal was—rightly or wrongly—a very bold innovation in Indigenous affairs.<sup>11</sup>

Not everyone embraced the ATSIC proposal as enthusiastically as the government, however. The Coalition Opposition was fiercely opposed to the establishment of ATSIC, as explained further below. Subsequently, when the ATSIC legislation came before the parliament in 1989, the debate was one of the longest in Australian parliamentary history.<sup>12</sup> Not all Indigenous people supported the ATSIC concept either: for example, the ADC's Aboriginal commissioners were concerned that welfare programs would be

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prioritised in an amalgamated body, at the expense of the development work then carried out by the ADC.<sup>13</sup> Nonetheless, the ATSIC Act was eventually passed in November 1989.

Some of the key issues of debate in the lead up to, and during the parliamentary debate on ATSIC's establishment included the following:

- public accountability and financial transparency within ATSIC: two of ATSIC's predecessors—the NAC and the ADC—had been the subject of various allegations about mismanagement and deficiencies in financial accountability (which in the case of the NAC, were one of the major reasons for the organisation ultimately being disbanded).<sup>14</sup> Subsequently, a series of inquiries into financial management and accountability in Aboriginal affairs were taking place at this time.<sup>15</sup> The issue of accountability was also one of the major foci of the Senate select committee which was set up to inquire into the ATSIC enabling legislation in 1988.<sup>16</sup> The Senate's inquiry resulted in revised legislation, with much stronger accountability mechanisms than had been contained in the original legislation, being put to the parliament in 1989. One of the accountability measures contained in the revised legislation was a provision for the establishment of an Office of Evaluation and Audit within ATSIC, to conduct regular audits and evaluations of ATSIC's operations<sup>17</sup>
- the combination of representative and program delivery roles: one of the key criticisms of ATSIC's precursors, the NACC and the NAC, was that they had no real power, as both were only ever advisory bodies. Subsequently, as discussed above, one of the government's stated aims in establishing Indigenous affairs was to give more genuine effect to the principle of 'self-determination' by establishing an Indigenous body which had both executive *and* representative roles. However, as discussed further below, this combination of executive and representative roles became a source of tension after ATSIC was established, which was never really resolved,<sup>18</sup> and
- the question of 'separate' versus 'mainstreamed' service delivery: one of the Coalition's major objections to ATSIC at the time it was established was its opposition to any body which gave Indigenous people 'separate' status. The rationale for the establishment of a 'separate' program delivery organisation was the principle of 'self-determination': the idea that Indigenous people should have significant involvement in decision-making about, and management of, their own affairs. However, the Coalition Opposition saw the establishment of a separate structure as a kind of 'black parliament': then Opposition Leader John Howard, for example, said in 1989 that the creation of 'a parliament within the Australian community for Aboriginal people' was a 'misguided notion', the pursuit of which would be a 'monumental disservice to the Australian community'.<sup>19</sup>

To varying degrees, these issues dogged ATSIC from the time it commenced operations in 1990: there were widespread perceptions that ATSIC was unaccountable and even incompetent in its management of public funds (though several external reviews and inquiries found no evidence of impropriety), and some of ATSIC's top elected officials were the subject of various allegations of fraud and impropriety.<sup>20</sup> The tension between

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ATSIC's representative and executive roles was never really resolved: on the one hand ATSIC played the role of public servant, accountable primarily to the government and the parliament for its oversight of Indigenous-specific government programs. On the other hand, ATSIC played the role of public advocate, in which it was responsible primarily to its Indigenous constituency. Finally, ATSIC wasn't able to convince its critics that separate program delivery for Indigenous people was the most effective and efficient means of delivering Indigenous-specific programs and services: the government's view that the 'experiment in separate representation' for Indigenous people had failed was one of the reasons for its decision to abolish ATSIC last year.<sup>21</sup>

### The administration of Indigenous affairs under ATSIC

Once it commenced operations in 1990, ATSIC was responsible for administering many of the Commonwealth's Indigenous-specific programs,<sup>22</sup> as well as for advising governments on Indigenous issues and advocating on behalf of Indigenous people.

ATSIC's original structure consisted of two parts: a representative arm (the basis of which was the ATSIC Regional Councils, which were responsible for electing the ATSIC Board of Commissioners), and an administrative arm (which consisted of several hundred Commonwealth public servants headed by a Chief Executive Officer appointed by the Minister). In the original structure, the administrative arm took direction from ATSIC's elected officials. However, in April 2003, the then Minister for Indigenous Affairs announced the establishment of a new agency—Aboriginal and Torres Strait Islander Services (ATSIS)—to administer ATSIC's programs. This was in response to the perceived potential for conflicts of interest in decision-making over ATSIC funding in the original structure.<sup>23</sup>

In 2003–04, ATSIC/ATSIS was responsible for administering approximately \$1.3 billion worth of Indigenous-specific Commonwealth programs.<sup>24</sup> The majority of ATSIC's annual funding was spent on economic development programs, such as the Community Development Employment Projects (CDEP) scheme, and on programs aimed at improving Indigenous people's social and physical wellbeing, such as the Community Housing and Infrastructure Program (CHIP). In considerations of and debates about ATSIC's effectiveness in improving the lot of Indigenous people, it is worth bearing in mind that the vast majority of its funding was quarantined for expenditure on particular programs (such as CDEP and CHIP).<sup>25</sup>

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## The administration of Indigenous affairs post-ATSIC

Since the announcement that it would abolish ATSIC, the government has proceeded with a series of reforms to the administration of Indigenous affairs.

In brief, the major features of the post-ATSIC administration of Indigenous affairs include the following:

- the transfer of programs formerly managed by ATSIC/ATSIS to mainstream Commonwealth departments and agencies from July 1 2004
- the establishment of an Office of Indigenous Policy Coordination within the Department of Immigration and Multicultural and Indigenous Affairs to coordinate services and programs
- the creation of a network of Indigenous Coordination Centres (ICCs) to replace ATSIC/ATSIS regional offices
- the establishment of a Ministerial Task Force on Indigenous Affairs, chaired by the Minister for Indigenous Affairs, and supported by a Secretaries Group on Indigenous Affairs, chaired by the Secretary of the Department of Prime Minister and Cabinet
- the establishment of a National Indigenous Council, comprised of ‘distinguished Aboriginal people’ appointed by the government, to provide advice on Indigenous affairs issues to the government.<sup>26</sup>

## ALP/Australian Democrat/Greens policy position/commitments

On 30 March 2004 (around two weeks before the government’s announcement), then Opposition Leader Mark Latham and Shadow Minister for Reconciliation and Indigenous Affairs Senator Kerry O’Brien announced that, if elected, Labor would abolish ATSIC and ATSIS, and ‘establish a new framework for Indigenous self-governance and program delivery with a focus on regional partnerships and a new directly elected national representative body.’<sup>27</sup>

While Labor holds the view that ATSIC should be dismantled, it did not support the expeditious passage of legislation to abolish ATSIC through the parliament last year, because of concerns about the government’s plans for the administration of Indigenous affairs in the post-ATSIC environment. Accordingly, Labor supported the establishment of the Senate’s inquiry into the administration of Indigenous affairs, so that it could spend more time ‘ensuring the new administrative arrangements will work’.<sup>28</sup>

Both the Democrats and the Greens have been strongly critical of the government’s decision to abolish ATSIC and are therefore unlikely to support the legislation.<sup>29</sup>

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## Indigenous responses to the abolition of ATSIC

Indigenous peoples' responses to the proposed abolition of ATSIC have been mixed. In brief:

- some Indigenous people, such as ATSIC Commissioner and former acting Chair Lionel Quartermaine, were strongly critical of the government's announcement that it would abolish ATSIC<sup>30</sup>
- others, such as inaugural ATSIC Chair Lowitja O'Donoghue, have argued that while ATSIC was flawed, wholesale abolition, particularly in the absence of plans for a replacement elected Indigenous body, represents a regressive step.<sup>31</sup> Similarly, Jackie Huggins, a member of the ATSIC review panel, was reported last year as being 'disappointed the Government had not accepted the review committee's recommendation to replace ATSIC with a different organisation designed to deliver better services',<sup>32</sup> and
- in the same vein, according to the former Chair of the Select Committee, Senator Trish Crossin, submissions received by the Select Committee in the course of its inquiry demonstrate little support for maintaining ATSIC, though there was 'widespread concern' about the transfer of Indigenous programs to mainstream departments.<sup>33</sup>

As noted above, however, the purpose of this Bill is to abolish ATSIC and make consequential and transitional arrangements—the transfer of ATSIC's functions to other departments and agencies, and the establishment of alternative policy advice and service delivery arrangements have proceeded independently from this Bill.

## Differences between the May 2004 Bill and the December 2004 Bill

As stated earlier, a Bill to abolish ATSIC was first introduced into the Parliament in May 2004 and lapsed with Parliament's prorogation. The present Bill was introduced in December 2004. While the two Bills are substantially the same there are some differences between them, which may be worth mentioning:

- the originating chambers are different—the House of Representatives in the case of the May 2004 Bill and the Senate in the case of the December 2004 Bill. The difference may be due to the fact that the Government will have a majority in the Senate from 1 July 2004 so there is no need to ensure that the bill satisfies the double dissolution requirements in section 57 of the Constitution<sup>34</sup>
- there are differences in the abolition dates for ATSIC and its Regional Councils. The May Bill abolished ATSIC with effect from 1 July 2004. The December Bill abolishes ATSIC from a date to be fixed by proclamation or, if no proclamation is made, 6 months after Royal Assent. The May Bill abolished Regional Councils from 1 July 2005. The December 2004 Bill abolishes Regional Councils on the later of 1 July 2005 or the day immediately following the abolition of ATSIC

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- the December 2004 Bill makes some changes to the definitions provisions. For this and other reasons, the provisions have been renumbered
- the December 2004 Bill provides that specified instruments made under the ATSIC Act are not legislative instruments for the purposes of the *Legislative Instruments Act 2003*. This takes account of the commencement of the Legislative Instruments Act on 1 January 2005
- the December 2004 Bill makes changes to secrecy provisions so that the use of information by officers in statutory authorities or government departments that assume functions formerly carried out by ATSIC is not an offence
- the December 2004 Bill enables the Office of Evaluation and Audit (Indigenous Programs) to report not only to its portfolio Minister but to other Ministers in accordance with directions from its portfolio Minister, and
- the December 2004 Bill inserts omitted amendments to the *Aboriginal Councils and Associations Act 1976* that result from the abolition of Regional Councils.

## Main Provisions

### Abolition of the Commission

**Item 1 of Schedule 1** repeals Part 2 of the ATSIC Act. Part 2 establishes the Commission and sets out its functions, administrative and financial arrangements; provides for an Office of Evaluation and Audit; and establishes an Office of Torres Strait Islander Affairs and a Torres Strait Islander Advisory Board.

The Commission will be abolished on ‘ATSIC abolition day’—that is, either on proclamation of the Aboriginal and Torres Strait Islander Commission Amendment Act 2004 or, failing that, 6 months after Royal Assent (**clause 2**).

The Office of Evaluation and Audit will be replaced by an Office of Evaluation and Audit (Indigenous Programs) located in the responsible Commonwealth department.

The Office of Torres Strait Islander Affairs, which will be abolished, is responsible for monitoring the development and implementation of programs affecting Torres Strait Islanders, especially those living outside the Torres Strait area. The 2001 census shows that 48,791 people identified as Torres Strait Islanders.<sup>35</sup> The overwhelming majority (41,928) live in mainland Australia and 6863 live in the Torres Strait area.<sup>36</sup>

The Torres Strait Islander Advisory Board, which will also be abolished, is responsible for advising the Commission and the Minister in order to further the social, economic and cultural advancement of Torres Strait Islanders living outside the Torres Strait area. The Board also has functions under the *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989*.

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## Amendments consequential on the abolition of the Commission

**Part 2 of Schedule 1** makes amendments to the remaining provisions of the ATSI Act which are consequential on the abolition of the Commission. For instance, the ATSI Act is renamed the '*Aboriginal and Torres Strait Islander Act 2004*' and amendments to the definitions provision of the Act remove references to repealed provisions in the ATSI Act and references to the Commission.

## Regions and Regional Councils

### General

Regional Councils are part of the governance structure established by the ATSI Act. Under the ATSI Act, Australia is divided into 16 zones, with between one and four regions in each zone (making 35 regions in all). Each region has an elected Regional Council and the Torres Strait zone has the Torres Strait Regional Authority (TSRA). A representative from each zone is elected by the Regional Councils as an ATSI Commissioner and the TSRA also elects a person as an ATSI Commissioner.

Regional Councils meet at least four times per year. Their responsibilities include formulating plans designed to improve the economic, social and cultural status of Indigenous Australians in their regions and assisting ATSI and government agencies to implement those plans.<sup>37</sup> They also consult, represent and perform an advocacy role for their local communities.<sup>38</sup> As such, they are designed to give ATSI 'a more decentralised and representative structure.'<sup>39</sup>

### The Bill

The ATSI Act envisages 'a relationship between the ATSI board and the ATSI regional councils, so the abolition of the ATSI board creates a vacuum that has to be filled pending the ... abolition of the regional councils.'<sup>40</sup> For instance, under the ATSI Act the ATSI Board deals with misbehaviour by regional councillors—once the Commission is abolished this function needs to be performed by some other body or person until the Regional Councils also cease.

The May 2004 Bill provided that Regional Councils would remain in existence for 12 months following the abolition of the Commission. The reason for this appears to have been to allow the Prime Minister to 'take up at COAG the issue of consultation arrangements with Indigenous Australians at the regional level.'<sup>41</sup> Under the terms of the December 2004 Bill, the retention period for Regional Councils is likely to be much shorter and it is possible that Regional Councils will be abolished on the day after the abolition of ATSI.

**Items 25-84 of Schedule 1** make amendments relating to regions and Regional Councils.

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Some of these amendments remove redundant provisions referring to the Commission (for example, **items 50 and 61**) or its Chairperson (for example, **item 39**). In some cases the amendments give the Minister powers and functions previously exercised by the Commission as a decision maker or adviser. For instance, the Minister will become responsible for suspending Regional Councillors from office for misbehaviour, or physical or mental incapacity (**item 57**), removing Regional Councils and replacing them with an administrator (**items 59, 60, 62 and 63**). With exceptions, the Minister will be able to delegate his or her new statutory functions to the Secretary of the Department or an SES/acting SES employee (**new section 200B inserted by item 162**). For example, the Minister will not be able to delegate the power to declare that a regional councillor has resigned from their position or the power to remove a regional council and appoint an administrator. Regional Councils will be required to submit their annual reports to the Minister (**items 33 and 35**).

In other cases, Regional Councils will, until their abolition, perform what were Commission functions. For instance, at present, Regional Council members make disclosures of interests to the Commission which keeps a register of interests. **Item 48** requires the disclosures to be made to the Regional Council and a register to be kept by each Council.

Under the ATSIC Act, the Commission was responsible for formulating Regional Council Model Rules for the conduct of Regional Council meetings. With the abolition of ATSIC this task will fall to the Registrar of Aboriginal Corporations. The Model Rules will not be legislative instruments for the purposes of the Legislative Instruments Act (**item 82**). In other words, they are not subject to that Act's tabling and disallowance requirements.

## Zones and elections

Divisions 7 and 9 of the ATSIC Act deal with the conduct of zone elections and reviews of zone boundaries and election rules.

These divisions will be redundant with the abolition of ATSIC and are repealed by **items 85 and 87**. Other references to zones and zone elections in the ATSIC Act are repealed by **items 86, 161, 163, 180, 182-184, 186 and 190**.

## Torres Strait Regional Authority (TSRA)

### General

As stated above, the ATSIC Act provides for a Torres Strait Regional Authority (TSRA). The TSRA was established in 1994 following a review of the ATSIC Act. Like ATSIC, the TSRA has both elected and administrative arms. Torres Strait Islanders and Aboriginal people living in the Torres Strait Islands elect 20 representatives who form the elected arm.<sup>42</sup> These representatives then elect a Chairperson, Deputy Chairperson and a

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Commissioner. The Commissioner represents the TSRA on the ATSIC Board and also is the Chairperson of the Torres Strait Islander Advisory Board. A General Manager heads the administrative arm of the TSRA.<sup>43</sup>

The TSRA's functions include formulating and implementing programs for Torres Strait Islanders and Aboriginal people living in the Torres Strait, monitoring the effectiveness of such programs, developing policy proposals, advising and assisting constituents, and advising the Minister.

The Government's intention is to retain the TSRA.

### **The Bill**

Changes effected by **items 86-107** relate to the TSRA and, in general, repeal references to the Commission or Commissioners. For instance, existing section 142AA of the ATSIC Act enables departmental functions and Commission functions to be conferred on the TSRA for the purpose of benefiting Indigenous people living in the Torres Strait area. The reference to Commission functions is removed (**item 88**). An instrument conferring departmental functions on the TSRA is expressly declared not to be a legislative instrument for the purposes of the Legislative Instruments Act.

## Indigenous Business Australia

### **General**

Indigenous Business Australia (IBA) is established under the ATSIC Act. Its functions include engaging in commercial activities and promoting and encouraging Indigenous self-management and economic self-sufficiency. It can enter into contracts, invest money, form companies, enter into partnerships and joint ventures and provide services for fees.

The IBA reports to the relevant Commonwealth Minister and to Parliament and has reporting and accountability responsibilities under the *Commonwealth Authorities and Companies Act 1997*.<sup>44</sup>

The ATSIC Act empowers the responsible Commonwealth Minister to appoint the IBA's Board of Directors. However, at present the Minister cannot direct the activities of the IBA except as provided for under the ATSIC Act or under the Commonwealth Authorities and Companies Act.

### **The Bill**

**Items 108 to 130** affect Indigenous Business Australia. References to the Commission are removed and functions formerly exercised by the Commission, such as delegating functions to the IBA, are transferred to the Minister (see **item 108**).

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In addition, the IBA is given new powers by **items 113 and 114**. These powers are to enter into contracts and make grants for the provision of business or housing loans—functions previously performed by ATSIC. The IBA will also be able to guarantee housing or business loans. In making such loans or grants the IBA will have to be satisfied that the loan or grant will further the social, economic or cultural development of Indigenous Australians.

Section 148 of the ATSIC Act requires the IBA to look at commercial matters and sound business principles when performing its functions. **Item 109** of the Bill alters the application of section 148 so that the section will not apply when the IBA makes business or housing loans or grants. The Explanatory Memorandum explains that ‘[t]his will ensure that Indigenous Business Australia can operate in relation to these loans and grants in the same way as ATSIC, and make loans on terms and conditions to facilitate the participation of indigenous people in home ownership and business activities.’<sup>45</sup>

As stated above, at present the Minister is not empowered to give directions to the IBA in relation to any of its activities—unless this is expressly allowed under the ATSIC Act or the *Commonwealth Authorities and Companies Act 1997* (section 151). Section 151 is repealed by the Bill and provisions are inserted which will require the IBA to perform its functions, powers and responsibilities in accordance with written Ministerial directives that must, in general, be tabled in Parliament (**items 112 and 119**).<sup>46</sup> The power to issue directions is not delegable [**new paragraph 200B(2)(c)**]. Lastly, a Ministerial directive is not a legislative instrument for the purposes of the Legislative Instruments Act (**item 112**).

Indigenous Business Australia must prepare an annual report under section 9 of the *Commonwealth Companies and Authorities Act 1997*. **Item 129 of Schedule 1** provides that IBA’s annual reports must include information about Ministerial directions given to the IBA. Subject to any Ministerial direction,<sup>47</sup> financial statements in the annual report must deal with the New Housing Fund separately from the other finances of the IBA.

## **New Housing Fund**

A New Housing Fund is established by **item 126** and replaces the existing Housing Fund which is established under section 67 of the ATSIC Act and administered by the Commission. The existing Housing Fund<sup>48</sup> provides money to Indigenous Australians and Indigenous organisations for home loans or to enable them to ‘obtain home loans from other sources.’<sup>49</sup>

The New Housing Fund will include monies from the Housing Fund previously established under section 67 of the ATSIC Act, New Housing Fund appropriations, and money that the IBA determines to make available to the New Housing Fund. IBA determinations are not legislative instruments for the purposes of the Legislative Instruments Act (**item 126**).

The Bill enables New Housing Fund monies to be used for housing loans to individuals or bodies, for loans enabling individuals or bodies to provide housing for Indigenous

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Australians or as grants so that Indigenous Australians can obtain housing loans from commercial providers. These provisions are generally the same as those in section 67 which provide for the existing Housing Fund.

An individual will be able to apply to the Administrative Appeals Tribunal (AAT) for a review of a decision made by the IBA to refuse a housing loan (**new section 181B**).

The ATSIC Act presently allows an individual or corporation to apply to the AAT if ATSIC refuses a business loan. However, there appears to be no provision in the Bill permitting individuals or bodies to appeal decisions to refuse business loans to the AAT.<sup>50</sup>

## Indigenous Land Corporation (ILC)

### General

The Bill transfers funds held in the Regional Land Fund to the ILC. The Regional Land Fund was established by the ATSIC Act so that Regional Councils could finance land purchases for their constituents.<sup>51</sup> It consists of money set aside by individual Regional Councils.

The ILC, an independent statutory authority established under the ATSIC Act, acquires and manages land for Indigenous corporations. Its functions include granting interests in land to Indigenous corporations, making grants of money to Indigenous corporations for land acquisition purposes, and managing Indigenous-held land. The funding required for these activities comes from a Land Fund.<sup>52</sup> Government allocations to the Land Fund commenced in 1994 for a 10 year period,<sup>53</sup> ceasing in June 2004. From 2004, the Fund's revenues will come from its investment returns.<sup>54</sup>

### The Bill

**Item 132** adds to the ILC's functions by enabling it to grant interests in land under such terms as the ILC determines. An instrument determining such terms and conditions is not a legislative instrument for the purposes of the Legislative Instruments Act.

**Item 133** empowers the ILC to make payments to the IBA. The Explanatory Memorandum states that this will 'allow Indigenous Business Australia to promote economic development on land the Indigenous Land Corporation granted to indigenous people.'<sup>55</sup>

As stated above, monies standing to the credit of the Regional Land Fund in the period between the abolition of ATSIC and the abolition of Regional Councils are transferred to the ILC. The Minister can give written directions to the ILC about the expenditure of such monies (**items 135 and 138**). Ministerial directions must be tabled in Parliament but are

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not legislative instruments for the purposes of the Legislative Instruments Act (ie they cannot be disallowed by Parliament).<sup>56</sup>

**Item 137** amends a provision in the ATSIC Act that deals with the composition of the ILC Board. The Board currently consists of 7 members—the Chairperson, Deputy Chairperson, and 4 ordinary members, all appointed by the Minister—and the ATSIC Chairperson. The abolition of the ATSIC Commission results in the substitution of another ordinary member for the ATSIC Chair. This additional ordinary member will also be appointed by the Minister.

**Item 153** ensures that the ILC cannot use any Regional Land Fund monies as security in the period starting on ATSIC abolition day and ending immediately before Regional Councils abolition day.

Other amendments reflect the abolition of the Commission by removing references to it and by making consequential changes.

## Assets, liabilities, instruments and other matters

### General

ATSIC assets fall into two broad categories. ‘Program assets’ include land and buildings, shares, the Housing Fund and the Regional Land Fund.<sup>57</sup> ‘Non-program assets’ include office land, buildings and equipment. The proposed abolition of ATSIC raises issues about the fate of such assets (see Concluding Comments).

### The Bill

**Items 191-193** deal with what happens to ATSIC’s assets and liabilities and ATSIC instruments.

On ATSIC abolition day, ATSIC’s assets and liabilities, other than what are called ‘class A’ or ‘class B’ exempted assets and liabilities, are transferred to the Commonwealth:

- a ‘class A exempted asset’ is money credited to the Housing Fund or any Commission housing loan, business loan or asset declared by the Minister to be a class A exempted asset
- a ‘class B exempted asset’ is money credited to the Regional Land Fund immediately before the transfer day or any other Commission asset declared by the Minister to be a class B exempted asset.

‘Class A’ and ‘class B’ exempted liabilities are liabilities declared to be such by the Minister.

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Ministerial declarations identifying assets or liabilities as ‘class A’ or ‘class B’ are not legislative instruments for the purposes of the Legislative Instruments Act.

As a result of the amendments:

- money standing to the credit of the Housing Fund becomes money of the New Housing Fund (to be administered by the IBA)
- money standing to the credit of the Regional Land Fund is vested in the ILC and can only be used by the ILC in the ways set out in **item 194**. For instance, in the period from beginning on ATSIC abolition day and ending immediately before the abolition of the Regional Councils, such money can only be used as proposed by a Regional Council for the purpose of furthering the social, economic and cultural development of Indigenous Australians
- the IBA becomes liable to pay and discharge ‘class A exempted liabilities’ of the Commission that existed immediately before ATSIC abolition day
- the ILC becomes liable to pay and discharge ‘class B exempted liabilities’ of the Commission that existed immediately before ATSIC abolition day.

What will happen to other Commission loans and assets will depend on whether the Minister declares them to be ‘class A’ or ‘class B’ exempted assets. If they are not so declared then they will vest in the Commonwealth. The Commonwealth is also liable to pay and discharge Commission liabilities that are not ‘class A’ or ‘class B’ exempted liabilities.

ATSIC instruments continue in force as though they were Commonwealth instruments, with certain exceptions (**item 193**). If the Minister declares a Commission instrument to be a ‘class A exempted instrument,’ then references in the instrument to the Commission are taken to be references to the IBA. If a Commission instrument is declared by the Minister to be a ‘class B exempted instrument,’ then references in the instrument to the Commission are taken to be references to the ILC. Once again, Ministerial declarations identifying instruments as ‘class A’ or ‘class B’ exempted instruments are not legislative instruments for the purposes of the Legislative Instruments Act.

If ATSIC is a party to legal proceedings that are on foot immediately before ATSIC abolition day, then the Commonwealth, the IBA or the ILC is substituted as a party (depending on the nature of the asset, liability etc) (**item 195**).

There are also provisions governing the repayment of grants or loans made by the Commission before ATSIC abolition day (**new section 199**).

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## Office of Evaluation and Audit

### General

The ATSI Act establishes an Office of Evaluation and Audit located within ATSI. Its functions are to conduct regular evaluations and audits of ATSI, Aboriginal Hostels Ltd, Indigenous Business Australia and the TSRA. It can also evaluate and audit particular aspects of the operations of those bodies or Regional Councils if requested to do so—for instance, by the portfolio Minister or the Commission.

The ATSI Act stipulates that the Director of Evaluation and Audit is appointed by the Minister following consultation with ATSI. In conducting their statutory functions, the Director of Evaluation and Audit and ‘authorised persons’ (including Commission staff and consultants) are empowered under the ATSI Act to access documents and require individuals to answer questions and produce material. There are penalties for failing to do so.

The Office’s statutory powers and functions do not preclude the Auditor-General from auditing bodies established under the ATSI Act.

### The Bill

The Office of Evaluation and Audit, previously within ATSI, is abolished with the repeal of Part 2 of the ATSI Act (**item 1 of Schedule 1**).

**Schedule 2** of the Bill establishes an Office of Evaluation and Audit (Indigenous Programs) within the relevant Commonwealth department. Its functions will be to evaluate and audit relevant programs administered by ‘Australian Government bodies’<sup>58</sup> and the activities of individuals or organisations that have received funding under relevant programs. It must also report to the Minister. A ‘relevant program’ is one where money, guarantees or interests in land are provided in order to further the social, economic or cultural development of Indigenous Australians (**new section 193V**).

Audits of ‘Australian Government bodies’ are to be conducted in accordance with a program developed by the Director of Evaluation and Audit or at Ministerial request. Other audits, for example, audits of individuals or organisations that have received money from an Australian Government body will be conducted at Ministerial request or with Ministerial consent.

An annual report by the Director of the Office of Evaluation and Audit (Indigenous Programs) will be included in the annual report of the Department [**new subsection 193ZA(4)**].<sup>59</sup> Additionally, a new section added by the December 2004 Bill provides that the Minister has a discretion to table in Parliament any reports of the Office of Evaluation and Audit (Indigenous Programs) that are made to him or her (**new section 193Z**).

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The Director of Evaluation and Audit and persons authorised by him or her (‘authorised persons’) have the powers set out in **new section 193ZG**. These powers include the power to access, examine and copy documents, require persons to answer questions or produce documents within a reasonable period. It is a strict liability offence, punishable by a maximum fine of 20 penalty units (\$2 200), not to comply with a requirement to answer questions or produce documents. A strict liability offence means that the prosecution does not have to prove that the person put their mind to the offence. However, the defendant has a defence of mistake of fact and also, in this case, a defence of reasonable excuse. A ‘reasonable excuse’ does not include the potential for self-incrimination. In such a case, the information or document is not admissible in evidence against the person. ‘Authorised persons’ may include independent contractors engaged by the department as well as staff member. The authority of authorised persons to exercise coercive powers is dependent upon them producing a written authority.

These powers and offence provisions in general reflect those currently found in section 78A of the ATSI Act. However, the functions of the Office of Evaluation and Audit (Indigenous Affairs) have been considerably expanded. The existing Office of Evaluation and Audit can only exercise its powers in respect to funding provided under the ATSI Act. The new Office of Evaluation and Audit (Indigenous Affairs) will be able to audit individuals and organisations who receive funding previously provided by ATSI that has been transferred to other departments and agencies and those who receive funding under Indigenous specific programs provided by other departments and agencies.<sup>60</sup>

The amendments make it clear that the functions of the Office of Evaluation and Audit (Indigenous Affairs) and the powers of its officers do not affect the Auditor-General’s ability to conduct audits.<sup>61</sup> Additionally, as is the case at present, Indigenous bodies may also be subject to auditing under section 203DF of the *Native Title Act 1993* (in relation to native title representative bodies) and under other statutory regimes.

Amendments in **Schedule 2** also provide transitional and savings arrangements for the Office of Evaluation and Audit from ATSI abolition day. For instance, the current Director of Evaluation and Audit becomes the new Director of Evaluation and Audit and the Office of Evaluation and Audit (Indigenous Programs) is required to complete any audits that were on foot on ATSI abolition day.

### Schedule 3—Abolition of Regional Councils

**Part 1 of Schedule 3** repeals Part 3 of the ATSI Act, the Part that deals with zones and regions and creates Regional Councils. These amendments have effect from either 1 July 2005 or immediately after the abolition of ATSI, whichever occurs later.

**Schedule 3** also makes amendments to the Act which are consequential on the abolition of Regional Councils. For example, it repeals the definition of ‘Regional Council’ and

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provisions relating to Regional Councils and Regional Council elections (**Part 2 of Schedule 3**).

The amendments also provide for the transfer of assets and liabilities of Regional Councils. When Regional Councils are abolished any assets that, immediately before that day, were vested in a Regional Council, are vested in the Commonwealth. The Commonwealth becomes liable to discharge Regional Council liabilities that existed immediately before the abolition day. According to evidence given to a Senate Estimates Committee in May 2004 ‘the assets of regional councils are ATSIC assets.’<sup>62</sup>

## Schedule 4—Amendment of other Acts

### General

There are references to the Commission, Regional Councils etc in a range of Commonwealth statutes. The amendments in **Schedule 4** remove such references and, in some cases, replace them. For example, section 21B of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* enables the Minister to delegate indigenous heritage protection functions to Commission staff. The amendments repeal this provision and enable those functions to be delegated to departmental officers (**item 1 of Schedule 4**).

Amendments to the *National Health and Medical Research Council Act 1992* repeal the present requirement that one member of the National Health and Medical Research Council<sup>63</sup> must be an ATSIC nominee who is knowledgeable about the health needs of Indigenous Australians. This position will continue to be held by a person who is knowledgeable about the health needs of Indigenous Australians (**item 26**). In contrast to other ‘representative’ appointments to the NHRMC,<sup>64</sup> there is no requirement for the Minister to seek nominations from peak organisations before appointing this person.

In some cases, no individual or organisation is substituted for the role formerly assigned to ATSIC or another statutory body. For instance:

- the Council<sup>65</sup> established under the *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989*, must include one Torres Strait Islander appointed by the Minister on the recommendation of the Torres Strait Islander Advisory Board. This provision is presumably designed to ensure that a Torres Strait Islander living in mainland Australia is represented on the Council. The amendments remove the reference to the Advisory Board, which is abolished with the repeal of Part 2 of the ATSIC Act (**item 17**). No individual or other body is substituted.
- under the *Environment Protection and Biodiversity Conservation Act 1999* as amended in 2003,<sup>66</sup> ATSIC must be informed and invited to comment about any proposal to take an action that could have a significant impact on the indigenous heritage values of a National or Commonwealth heritage place. This provision is repealed (**item 23**)

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- under the *Human Rights and Equal Opportunity Act 1986*, the Social Justice Commissioner reports on and makes recommendations about the human rights of Indigenous Australians. In performing this function, the Commissioner must, ‘as appropriate’, consult with ATSIC and may consult with other bodies (such as organisations established by Indigenous communities). The Bill removes the reference to ATSIC without substituting any other Indigenous body or bodies (**item 24**).

### **Native Title Act 1993**

At present, the *Native Title Act 1993* provides that ATSIC is responsible for granting money to native title representative bodies (NTRBs) so that they can fulfil the functions mandated by the Native Title Act. NTRBs are established as a result of a determination made by the responsible Commonwealth Minister. Their functions include preparing native title applications, assisting native title holders in native title negotiations and proceedings, certifying native title applications, resolving disputes between native title holders about native title applications, and assisting in the negotiation of indigenous land use agreements.<sup>67</sup> There are currently 15 NTRBs.<sup>68</sup>

The amendments provide that the Secretary of the relevant department will be responsible for providing funds to representative bodies ‘by making a grant to the representative body or in any other way the Secretary considers appropriate’ (**item 34 of Schedule 4**). The Explanatory Memorandum states that a reference to ‘funds’ rather than ‘grants’ ‘... will remove the restriction of funding being provided through grants.’<sup>69</sup> Presumably, this might mean that financial assistance to NTRBs might take the form of funds other than grants. Other forms of funding might include loans. It may also be that funds are provided ‘on the basis of an outcomes-based contract for the provision of services’ in order to ensure ‘greater accountability for outcomes for funds provided to bodies which provide services to Indigenous people.’<sup>70</sup>

The Secretary, rather than ATSIC, will also be responsible for setting conditions for funding, reporting to the Minister about serious breaches of funding conditions and advising what action will be taken in such circumstances. The Secretary will become responsible for informing the Minister if representative bodies are not performing satisfactorily—for example, if they are not effectively consulting with Indigenous people or if there are financial irregularities. Finally, the Secretary is also responsible for reviewing assistance decisions made by a representative body.

### **Remuneration Tribunal Act 1973**

**Item 80 of Schedule 4** removes references to the remuneration for Commissioners and Regional Councillors from the *Remuneration Tribunal Act 1973*. At present, the Tribunal determines the remuneration payable to these officeholders from moneys available to ATSIC.

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**Item 81** substitutes references to the proposed Aboriginal and Torres Strait Islander Act 2004 for the current references to the *Aboriginal and Torres Strait Islander Commission Act 1989* found in section 7 of the Remuneration Tribunal Act.

### **Social Security Act 1991**

**Items 82-84** remove references to ATSIC from the *Social Security Act 1991* and make the Secretary of the responsible Government department for the administration of the Community Development Program (CDEP) responsible for approving CDEP participant schedules. This is currently an ATSIC responsibility.

## **Concluding Comments**

In its combination of representative and program delivery roles, the establishment of ATSIC in 1989 represented a bold new experiment in Indigenous affairs policy making and service delivery in Australia. Accordingly, the abolition of ATSIC, and the related reforms to the administration of Indigenous affairs the government has put in place since its announcement that ATSIC would be abolished, represent a major new direction in the administration of Indigenous affairs.

While ATSIC was widely perceived to be a flawed body, and the Select Committee examining the legislation to abolish ATSIC has reportedly heard that there is little support for its continued existence,<sup>71</sup> the abolition of ATSIC nonetheless raises important questions about the future of Indigenous affairs policy making and program delivery. For example, is there a role for an elected Indigenous representative body in some capacity? Once ATSIC's regional councils are abolished, what formal mechanisms will be in place for consultation and negotiation on service delivery at regional and local level?<sup>72</sup> More generally, is there a special place for Aboriginal and Torres Strait Islander people within the Australian political system, by virtue of their unique status as Indigenous people? If so, in the absence of an elected Indigenous body, what should that role be?

The Bill also raises a series of specific issues.

### **ATSIC Act—preamble and objects**

The Bill does not amend either the preamble or the objects clause of the ATSIC Act. Both refer to 'self-management' for Indigenous people. The preamble also refers to the establishment of 'structures to represent Aboriginal persons and Torres Strait Islanders to ensure maximum participation of Aboriginal persons and Torres Strait Islanders in the formulation and implementation of programs and to provide them with an effective voice within the Australian Government.' Questions may arise about whether these provisions

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continue to be appropriate ones given that the Bill will abolish both ATSIC and its Regional Councils.

## ATSIC assets

Since about May 2004, concerns have been expressed about the fate of ATSIC assets.<sup>73</sup> Draft values of ATSIC's major assets as at 30 June 2004 were provided to the Senate Select Committee by the Department of Immigration and Multicultural and Indigenous Affairs and are found in the Appendix.

The Department has advised the Senate Select Committee that non-program assets are expected to be vested in the Commonwealth. Non-program assets are defined to include office land, buildings and equipment; artwork and artefacts; and computer equipment. The ultimate fate of non-program assets is a matter of Ministerial determination.

The assets which are expected to be vested in the Commonwealth are those assets which ATSIC/ATSIS have needed to perform their functions. With the functions now the responsibility of the Commonwealth, these assets will follow function and are to be distinguished from programme assets.<sup>74</sup>

As stated above, ATSIC also has program assets, which include pastoral properties. However, with the exception of monies in the Housing Fund and the Regional Land Fund, the fate of other program assets is not set down in legislation—once again, it will depend on Ministerial discretion. In answers to questions on notice from the Senate Select Committee, the Government stated:

Which specific assets will be declared exempted class A and B assets is a matter yet to be determined by the Minister. However, it is expected that those programme land and buildings remaining in ATSIC's ownership at transfer day [now ATSIC abolition day] will become class B assets ie will vest in the ILC.

It is not yet known whether shareholdings (eg in Yeperenye and Imparja Television) are to be declared class A or class B assets but, unless divested beforehand, they are expected to be declared as exempted in one of those categories.<sup>75</sup>

There has been more recent controversy about ATSIC's assets. In late February 2005, the ATSIC Board voted to give its artworks to Indigenous communities and to divest itself of small parcels of land, houses and businesses. ATSIC's artworks reportedly comprise almost 800 works. However, before the divestment of artworks occurred, the art was taken by Government removalists to an undisclosed location for storage.<sup>76</sup>

Parliament may wish to consider whether there needs to be a more prescriptive regime for the disposal of ATSIC's assets. Questions have also been raised about whether some assets should be divested directly to Indigenous organisations.<sup>77</sup>

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## Amendments of other Acts (Schedule 4)

A number of Commonwealth Acts currently provide for consultation with the Commission. In some but not all cases, a replacement is provided. The Government's view is that consultation with Indigenous people can occur as part of any wider community consultation (where this is mandated). However, Parliament may wish to consider whether the special interests or knowledge of Indigenous people suggests that specific reference should be made to them or an Indigenous body and, if so, who that should be.

There have also been suggestions that the functions of funding on the one hand and monitoring and reviewing NTRBs on the other hand should be undertaken by 'an independent statutory agency, rather than by the department that provides the funding.'<sup>78</sup>

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## Appendix—ATSIC assets

The Department advised the Committee that ATSIC's non-program assets were as follows:

Staff land/housing	\$28,591,150.00
Office land/buildings	\$1,135,000.00
Office improvements	\$9,050,808.64
Software	\$2,394,106.00
Office equipment	\$1,503,855.69
Office Furniture	\$48,150.00
Artwork and artefacts	\$1,763,750.00
Computer equipment	\$1,138,194.00
Motor vehicles accessories	\$1,000.00
Finance Lease Agreement IT equipment	\$1,989,617.00 <sup>79</sup>

ATSIC's program assets:

Pastoral leases etc	\$11,801,701
Business loans (net of doubtful assets)	\$43,523,680
Home loans (net of doubtful assets)	\$339,335,706
Regional Land Fund	\$9,330,714

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## Endnotes

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- 1 Schedules 1, 2 and 4.
- 2 Schedule 3.
- 3 Senator Trish Crossin (ALP). Senator Claire Moore (ALP) is currently the Chair of the Committee.
- 4 See:  
[http://www.aph.gov.au/Senate/committee/indigenousaffairs\\_ctte/report/interim/interim%20\\_report.pdf](http://www.aph.gov.au/Senate/committee/indigenousaffairs_ctte/report/interim/interim%20_report.pdf), accessed 3 March 2005
- 5 Transcript of the Prime Minister the Hon. John Howard MP, Joint Press Conference with Senator Amanda Vanstone, Parliament House, Canberra, 15 April 2004, see <http://www.pm.gov.au/news/interviews/Interview795.html>, accessed 3 March 2004.
- 6 J Hannaford, J Huggins and B Collins, *In the Hands of the Regions—A New ATSIC: Report of the Review of the Aboriginal and Torres Strait Islander Commission*, November 2003, pp. 5–6, see [http://www.atsicreview.gov.au/ATSIC\\_Review\\_report.pdf](http://www.atsicreview.gov.au/ATSIC_Review_report.pdf), accessed 3 March 2004. For a more detailed discussion of the ATSIC Review, and in particular the Review Panel’s interim discussion paper released in June 2003, see Angela Pratt, ‘ATSIC Review: Complex Challenges, No Simple Solutions’, *Research Note*, no. 5, Department of the Parliamentary Library, Canberra, 2003–04.
- 7 Transcript of the Prime Minister the Hon. John Howard MP, op. cit.
- 8 For a more detailed discussion of ATSIC’s precursors, see Angela Pratt, ‘[Make or Break? A Background to the ATSIC Changes and the ATSIC Review](#)’, *Current Issues Brief*, no. 29, Department of the Parliamentary Library, Canberra, 2002–03; and Angela Pratt and Scott Bennett, ‘[The end of ATSIC and the future administration of Indigenous affairs](#)’, *Current Issues Brief*, no.4, Parliamentary Library, Canberra, 2004–05.
- 9 Though note that the inaugural chair of ATSIC, Ms Lois (Lowitja) O’Donoghue was appointed by the federal government. The ATSIC Chair did not become an elected position until 1999.
- 10 W Sanders, ‘Reconciling Public Accountability and Aboriginal Self-Determination/Self-Management: Is ATSIC Succeeding?’, *Australian Journal of Public Administration*, vol. 53, no. 4, December 1994, p. 475.
- 11 See: A Pratt, op. cit., and A Pratt and S Bennett, op. cit.
- 12 A Pratt, op. cit.
- 13 Shirley McPherson and Lenore Nicklin, “‘No, Minister’ Says Black Bureaucrat’, *Bulletin with Newsweek*, vol. 110, no. 5620, 24 May 1988, pp. 140–143.
- 14 A Pratt, op. cit.
- 15 Australian Audit Office, *Special Audit Report: The Aboriginal Development Commission and the Department of Aboriginal Affairs*, AGPS, 1989; Public Service Commission, *Report on Allegations about Personnel Management in the Department of Aboriginal Affairs*, AGPS,

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- 1989; Department of Finance, *Report on Certain Staff Classification Matters in the Department of Aboriginal Affairs*, AGPS, 1989; Department of Finance, *Report on the Financial Management of the Aboriginal Development Commission*, AGPS, 1989; A. C. C. Menzies, *Inquiry into Allegations as to the Administration of Aboriginal Affairs: Final Report*, Department of the Prime Minister and Cabinet, 1989.
- 16 Senate Select Committee on the Administration of Aboriginal Affairs, *Administration of Aboriginal Affairs*, Parliament of the Commonwealth of Australia, 1989.
- 17 The Hon. GL Hand, 'Speech: Aboriginal and Torres Strait Islander Commission Bill 1989: Second Reading', House of Representatives, *Debates*, 4 May 1989, p. 1994.
- 18 A Pratt, op. cit.
- 19 The Hon. John Howard, 'Ministerial Statement: Administration of Aboriginal Affairs', House of Representatives, *Debates*, 11 April 1989, p. 1328.
- 20 A Pratt, op. cit.
- 21 Transcript of the Prime Minister the Hon. John Howard MP, op. cit.
- 22 Though responsibility for Indigenous health was transferred to the Department of Human Services and Health (as it was then called) in 1995.
- 23 For a more detailed explanation of ATSIC's structure and governance, and the creation of ATSIIS, see A Pratt, op. cit., and A Pratt and S Bennett, op. cit.
- 24 This represented around 46 per cent of the total \$2.8 billion identifiable Commonwealth expenditure on Indigenous affairs in 2003–04—the remaining \$1.5 billion was spent through other agencies, such as in the education, health, and social security portfolios.
- 25 See: A Pratt, op. cit., and A Pratt and S Bennett, op. cit.
- 26 *ibid.*
- 27 Mark Latham and Kerry O'Brien, *Opportunity and Responsibility for Indigenous Australians*, policy statement, 30 March 2004.
- 28 S Rintoul and M Schubert, 'Getting used to life after ATSIC', *The Weekend Australian*, 24 April 2004.
- 29 Senator Kerry Nettle, 'Greens say NO to abolition of ATSIC', *Media Release*, 24 May 2004; Senator Aden Ridgeway, 'Howard wastes Indigenous money by ignoring ASTIC review recommendations', *Media Release*, 15 April 2004.
- 30 'ATSIC to wind up, says PM', *Canberra Times*, 16 April 2004, p. 1.
- 31 M Phillips, 'Picking up the pieces of a shattered ideal', *Adelaide Advertiser*, 17 April 2004, p. 29.
- 32 M Phillips and M Cole, 'Labor raises ATSIC hopes', *Courier Mail*, 17 April 2004, p. 1.
- 33 AAP, 'Inquiry bodes poorly for maligned ATSIC', *Mercury*, 6 August 2004, p.12.
- 34 Double dissolution bills cannot originate in the Senate.

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- 35 This includes people who identified as being of both Torres Strait Islander and Aboriginal origin.
- 36 Australian Bureau of Statistics, *Population Characteristics, Aboriginal and Torres Strait Islander Australians*, Cat. no. 4713.0, table 9.1.
- 37 ATSIIC, *Annual Report 2002-2003*.
- 38 *ibid.*
- 39 Sean Brennan, Aboriginal and Torres Strait Islander Commission Amendment Bill 2003, *Bills Digest No. 139, 2001-2002*, p. 2.
- 40 Peter Vaughan, Evidence to the Senate Select Committee on the Administration of Indigenous Affairs, 29 June 2004, p. 7.
- 41 Wayne Gibbons, Evidence, Senate Estimates Committee (Legal and Constitutional Affairs), Immigration and Multicultural and Indigenous Affairs portfolio, Aboriginal and Torres Strait Islander Services, *Hansard*, 27 May 2004, p. L&C 56.
- 42 Elected under the *Queensland Community Services (Torres Strait) Act 1984* and under the ATSIIC Act.
- 43 Torres Strait Regional Authority, *Annual Report 2002-2003*.
- 44 For a description of IBA activities see Indigenous Business Australia, *Annual Report 2002-2003* and the Indigenous Business Australia website at <http://www.iba.gov.au/>, accessed 3 March 2005.
- 45 Explanatory Memorandum, p. 5.
- 46 Directions laid before Parliament must not contain disclosures that would be inconsistent with the views or sensitivities of Indigenous Australians because of their sacred or significant nature [**new section 151(3)**].
- 47 These Ministerial directions are not legislative instruments for the purposes of the Legislative Instruments Act.
- 48 The Housing Fund consists of monies received from 'loan repayments, discharges and interest' ... [o]ccasionally... supplemented by funds from ATSIIC's general appropriation.' ATSIIC, *Annual Report 2002-2003*, p. 174.
- 49 *ibid.*
- 50 Existing paragraphs 196(1)(a)-(c) are repealed by item 156.
- 51 ATSIIC, *Annual Report 2002-2003*, p. 320.
- 52 The Aboriginal and Torres Strait Islander Land Fund Reserve.
- 53 Each year an amount of \$121 million (indexed) was allocated to the Land Fund.
- 54 For more information about the ILC, see the ILC's *Annual Report 2002-2003* and its website: <http://www.ilc.gov.au>, accessed 3 March 2005.
- 55 Explanatory Memorandum, p. 6.

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- 56 Directions that are tabled cannot contain disclosures that would be inconsistent with the views or sensitivities of Indigenous Australians because they relate to sacred or significant matters [**new subsection 135(4)**].
- 57 Wayne Gibbons, Evidence, Senate Estimates Committee (Legal and Constitutional Affairs), Immigration and Multicultural and Indigenous Affairs portfolio, Aboriginal and Torres Strait Islander Services, *Hansard*, 27 May 2004, p. L&C 76.
- 58 ‘Australian Government bodies’ include Commonwealth and parliamentary departments and Commonwealth agencies, authorities and companies.
- 59 At present, section 72(3) provides that a report from the Director of Evaluation and Audit must be included in ATSIC’s annual report.
- 60 Answers to Questions on Notice from the Senate Select Committee on the Administration of Indigenous Affairs:  
[http://www.aph.gov.au/Senate/committee/indigenousaffairs\\_ctte/submissions/sub128b.pdf](http://www.aph.gov.au/Senate/committee/indigenousaffairs_ctte/submissions/sub128b.pdf), accessed 3 March 2005
- 61 A similar provision currently exists in relation to the Office of Evaluation and Audit.
- 62 Wayne Gibbons, Evidence, Senate Estimates Committee, Immigration and Multicultural and Indigenous Affairs portfolio, Aboriginal and Torres Strait Islander Services, *Hansard*, 27 May 2004, L&C p. 103.
- 63 The functions of the Council include issuing guidelines and advising the community on matters relating to disease prevention, diagnosis and treatment; advising the Commonwealth, States and Territories on such matters and advising on Commonwealth expenditure on public health research and training (section 7, National Health and Medical Research Council Act).
- 64 For instance, the Minister appoints Council members knowledgeable about the medical profession, business and consumer issues after seeking nominations from peak organisations that are prescribed for the purpose (sections 20 and 21, National Health and Medical Research Council Act).
- 65 The Council’s functions are ‘to ensure the proper and efficient performance of the functions of the Institute and to determine the policy of the Institute with respect to any matter’ (section 13, Australian Institute of Aboriginal and Torres Strait Islander Studies Act).
- 66 Amended by the *Environment and Heritage Protection Legislation Amendment Act (No. 1) 2003*.
- 67 These are agreements about land use and management which are negotiated between native title holders and other parties, such as governments, pastoralists and miners. For further details, see <http://www.ntrb.net>, accessed 3 March 2005.
- 68 There are also two alternate Native Title Service Delivery Agencies providing professional services in accordance with the Native Title Act.
- 69 Explanatory Memorandum, p. 14.
- 70 Answers to Questions on Notice from the Senate Select Committee on the Administration of Indigenous Affairs.

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- 71 AAP, 'Inquiry bodes poorly for maligned ATSIC', *Mercury*, 6 August 2004, p.12.
- 72 A Pratt and S Bennett, op. cit.
- 73 An article published in the *Sydney Morning Herald* on 27 May 2004, reported that some ATSIC representatives were concerned that ATSIC assets would be transferred to mainstream government departments. ATSIC assets mentioned in the article were 'buildings in Alice Springs worth more than \$50 million, notably the Yeperenye Shopping Centre built 25 years ago with a contribution from the late Aboriginal activist Charles Perkins, and now worth close to \$25 million.' 'Leaders fear post-ATSIC loss of community assets', *Sydney Morning Herald*, 27 May 2004.
- 74 Answers to Questions on Notice from the Senate Select Committee on the Administration of Indigenous Affairs, answer to question 3.
- 75 *ibid.*
- 76 See, for example, Minister for Indigenous Affairs, 'Protecting ATSIC assets', *Media Release*, 28 January 2005, 'ATSIC no right to art, says Vanstone', *The Age*, 22 February 2005; 'ATSIC to give away assets' & 'ATSIC assets to be given away', *Koori Mail*, 23 February 2005, 'Death throes of ATSIC a disgrace', *The Australian*, 24 February 2005, 'A cultural history in crisis', *The Australian*, 25 February 2005, 'ATSIC gift snags in delivery', *Canberra Times*, 26 February 2005.
- 77 ATSIC had a program of divesting some of its assets to Indigenous communities. For instance, the ATSIC *Annual Report* for 2002-2003 stated that it was in the process of divesting a number of properties:
- ... to suitable Indigenous organisations. These properties, located in New South Wales, Queensland, Western Australia and Tasmania, were inherited from the former ADC [Aboriginal Development Corporation] or acquired through the operation of past ATSIC programs.
- During 2002-02, two properties were transferred to recipient organisations and another four were substantially progressed towards final divestment. The remaining 14 properties are either subject to the outcome of community consultations to determine recipient organisations, or identified recipient organisations are restructuring their legal and financial arrangements to enable them to receive title.
- 78 Central Land Council, Submission to the Senate Select Committee on the Administration of Indigenous Affairs, August 2004, p. 43. Similar concerns are expressed in the submission by the Jumbunna Indigenous House of Learning, Submission to the Senate Select Committee on the Administration of Indigenous Affairs, p. 19. Additionally, the Jumbunna Indigenous House of Learning expressed concern that, as a result of the amendments, the Commonwealth Government will decide what native title bodies 'and therefore what native title claims are to be funded' when there is a view 'already expressed by OIPC staff that no native title exists in the south east of Australia which leaves large questions over the funding that will be allocated to the respective organisations.' *ibid.*
- 79 Answers to Questions on Notice from the Senate Select Committee on the Administration of Indigenous Affairs.

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