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## Defining Aboriginality in Australia

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## Defining Aboriginality in Australia

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## **Introduction**

The definition of Aboriginality has a long and contentious history in Australia. Different classification systems (many with significant personal and social consequences) have moved in and out of fashion. Even today, two very different definitions are concurrently in use. One, predominating in legislation, defines an Aboriginal as 'a person who is a member of the Aboriginal race of Australia'. The other, predominating in program administration but also used in some legislation and court judgements, defines an Aboriginal as someone 'who is a member of the Aboriginal race of Australia, identifies as an Aboriginal and is accepted by the Aboriginal community as an Aboriginal'.

There have been many problems with both of the currently used definitions. The 'race' definition is somewhat tautological, and offers no indication of the sort of evidence or 'blood-quotum' required to satisfy it, let alone any indication of how such evidence is to be collected and assessed. The 3-part definition can also be problematic when it is unclear as to what constitutes a 'member of the Aboriginal race', when self-identity as an Aboriginal might not be all pervasive, and when the Aboriginality of the community doing the accepting is brought into question. As a result, in addition to much debate about which definition should be used and when, there has been much debate about how these definitions might be judged to be met, which criteria are the most important in satisfying the definition and who should do the arbitrating.

Over the last few years census results revealing a broadening of the indigenous-identifying population, reports revealing that the needs of indigenous people vary greatly depending on region and circumstance, and disputes over eligibility to vote or stand in ATSIC elections, have all highlighted problems with current definitional arrangements. Several court cases have brought decisions on some points in some instances in the light of particular pieces of legislation, but, as recent events in Tasmania have made clear, problems with definitional arrangements remained<sup>1</sup>.

Given the above the merit of letting a definition of Aboriginality play a role in public policy has been questioned. As no other comparable country seems to have a problem free definitional arrangement, as Aboriginality does seem to be used in different public policy contexts as a poor proxy for a more particular need, and as defining Aboriginality is not necessary for achieving most public policy goals (or indeed indigenous aspirations), moving beyond, that is to say doing without, an official definition of Aboriginality would seem to be an option.

Part 1 of this paper overviews the history of defining Aboriginality in Australia, identifying four rough periods of 'fashion'. Part 2 discusses some of the problems which have recently made the definition of Aboriginality a contentious issue. Part 3 looks at definitions used by comparable countries overseas and Part 4 attempts to draw some lessons from both overseas experience and our domestic experience, to offer a way forward.



## **Part I: Historical Context**

### **From the 1830s to the 1950s and Definitions by Blood-Quotum**

Although in the first decades of settlement Aboriginal people were grouped by reference to their place of habitation, in subsequent years, as settlement resulted in more dispossession and intermixing, a raft of other definitions came into use<sup>2</sup> The most common involved reference to 'Blood-quotum'. 'Blood-quotum' classifications entered the legislation of New South Wales in 1839, South Australia in 1844, Victoria in 1864, Queensland in 1865, Western Australia in 1874 and Tasmania in 1912. Thereafter till the late 1950s States regularly legislated all forms of inclusion and exclusion (to and from benefits, rights, places etc.) by reference to degrees of Aboriginal blood. Such legislation produced capricious and inconsistent results based, in practice, on nothing more than an observation of skin colour. To illustrate the inconsistencies the historian Peter Read, drawing on documented sources, has offered the following conflation:

In 1935 a fair-skinned Australian of part-indigenous descent was ejected from a hotel for being an Aboriginal. He returned to his home on the mission station to find himself refused entry because he was not an Aboriginal. He tried to remove his children but was told he could not because they were Aboriginal. He walked to the next town where he was arrested for being an Aboriginal vagrant and placed on the local reserve. During the Second World War he tried to enlist but was told he could not because he was Aboriginal. He went interstate and joined up as a non-Aboriginal. After the war he could not acquire a passport without permission because he was Aboriginal. He received exemption from the Aborigines Protection Act—and was told that he could no longer visit his relations on the reserve because he was not an Aboriginal. He was denied permission to enter the Returned Servicemen's Club because he was.<sup>3</sup>

There were surprisingly few challenges to the appropriateness of these definitions (those there were came mostly from Europeans charged with supplying liquor to Aborigines) and few judicial pronouncements on their appropriateness (and those there were seemed to support the classifications).<sup>4</sup>

Federal legislation was quick to endorse State discrimination (the *Commonwealth Franchise Act 1902* effectively disqualified 'aboriginal natives' who were not already on State electoral rolls) and the Federal Government was quick to accept the administrative usefulness of the preponderance of 'blood' criteria (e.g. for deciding if an individual was Aboriginal for the purposes of being counted under section 127 of the Constitution or 'white only' labour laws as in the *Excise Tariff Act 1902*).<sup>5</sup>

### **The 1960s and 1970s and Definitions by Race**

Although the Federal Government tacitly accepted and worked in with State definitions right up to the 1950s, the Federal Government's constitutional preclusion from legislating with respect to Aboriginal people prior to 1967 prevented it from creating its own raft of

restrictive definitions.<sup>6</sup> When policy entered a more progressive period in the late 1960s and 1970s the blood-quantum definitions, which had never been accepted as meaningful by Aboriginal communities themselves, were relatively easy to abandon.

Throughout the 1970s a lot of legislation defined an 'Aboriginal' as 'a person who is a member of the Aboriginal race of Australia.'<sup>7</sup> Though possibly an improvement on 'blood-quotum' definitions, the utility of this 'Aboriginal race' definition can still be questioned, not least of all on the grounds that there is no such thing as an Aboriginal race. Most scientists long ago stopped using the word 'race'.<sup>8</sup> Darwin wanted to replace typological thinking with the concept of populations and in the *Descent of Man* (1874) devoted several chapters to refuting the notion that races were separate species. For the modern anthropologist a 'human tree' can do no more than show the frequency (not exclusiveness) of genetic traits in sample populations and more meaningful divisions of humankind are suggested by region, culture, religion and kinship.<sup>9</sup>

### **The 1980s and the Rise of the Three-part Definition**

In the 1980s a new definition was proposed in the Constitutional Section of the Department of Aboriginal Affairs' *Report on a Review of the Administration of the Working Definition of Aboriginal and Torres Strait Islanders* (Canberra, 1981). The section offered the following definition:

An Aboriginal or Torres Strait Islander is a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander and is accepted as such by the community in which he (she) lives.

A definition similar to this had already started to be used by the some parts of the Commonwealth in 1978 and the *Report of the Aboriginal Affairs Study Group of Tasmania*, (1978, p. 16) found that this definition:

provides three criteria which are necessary and sufficient for the identification of an individual as Aboriginal and is sufficient for such identification in Tasmania.

The 1981 Report gave the new definition added impetus and soon this three-part definition (descent, self-identification and community recognition) was adopted by all Federal Government departments as their 'working definition' for determining eligibility to some services and benefits. The definition also found its way into State legislation (e.g. in the NSW *Aboriginal Land Rights Act 1983* where 'Aboriginal means a person who: (a) is a member of the Aboriginal race of Australia, (b) identifies as an Aboriginal, and (c) is accepted by the Aboriginal community as an Aboriginal') and was accepted by the High Court as giving meaning to the expression 'Aboriginal race' within s. 51 (xxvi) of the Constitution.<sup>10</sup> It was also used by the Federal Court when, in a first instance decision, it found that the Royal Commission into Aboriginal Deaths in Custody had no jurisdiction to inquire into the death of Darren Wouters as the community did not identify him as Aboriginal nor did he identify himself as Aboriginal. Similarly, several justices in *The*

*Commonwealth of Australia v Tasmania*, (1983) 158 CLR 1, observed that there are several components to 'racial' identity and that descent was only one such component. Justice Brennan concluded that while proof of descent or lack of descent could confirm or contradict an assertion or claim of membership of a race, descent alone does not ordinarily exhaust the characteristics of a racial group', while Justice Deane argued that by 'Australian Aboriginal' would be meant 'a person of Aboriginal descent, albeit mixed, who identifies himself as such and who is recognised by the Aboriginal community as an Aboriginal'.

The advantages of this three-part definition were not, however, apparent to all. In 1988 the Victorian State president of the RSL, Mr Bruce Ruxton, called on the Federal Government:

to amend the definition of Aborigine to eliminate the part-whites who are making a racket out of being so-called Aborigines at enormous cost to the taxpayers.<sup>11</sup>

When asked to explain the Ruxton resolution, the national RSL president, Brigadier Alf Garland, spoke of genealogical examination to determine whether the applicant for benefits was 'a full-blood or a half-caste or a quarter-caste or whatever'.<sup>12</sup> Public reaction to the suggestion of a blood test included the observation that there is no blood test that establishes Aboriginality and that:

When any of their numerous and varied kind put a foot wrong—and often even when they don't—white Australians will have no difficulty at all in identifying them as Aborigines and ascribing their shortcomings to their Aboriginality. But when there is some benefit flowing the Aborigines' way, such whites will raise silly questions. As Mr Ruxton did.<sup>13</sup>

The three-part definition was seen by most as preferable to 'blood quatum' definitions of a century earlier. It was seen as helping to protect individuals from the tendency among 'mainstream Australians' to consider 'real' indigenous people as people living somewhere else and others as manipulating the system.<sup>14</sup> The three-part definition did not, however, completely vanquish the favourite definition of the 1970's that 'Aboriginal person' means a person of the Aboriginal race of Australia. The Commonwealth went ahead in the 1980s to include the 'person of Aboriginal race' definition in the *Aboriginal Development Commission Act 1980*, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, the *Aboriginal Land Grant (Jervis Bay Territory) Territory Act 1986* and then, finally, despite the protests of the Shadow Minister for Aboriginal Affairs Mr Chris Miles,<sup>15</sup> in its Aboriginal and Torres Strait Islander Commission Bill 1998 clause 4(1). Senator Coulter, the Democrat spokesperson on Aboriginal Affairs, argued this definition was tautological and wanted it amended<sup>16</sup> but Minister Gerry Hand claimed in a press release on 30 September 1988 that:

The definition of an Aboriginal person in the Government Legislation establishing the Aboriginal and Torres Strait Islander Commission is the same definition used by all political parties over many years.

## **The 1990s and Problems for the Three-part Definition.**

The three-part definition was soon facing bigger problems than that posed by competition from either the blood-quotum definitions or the tautological race definition. In the 1990s the three-part definition continued to be used administratively and continued to be used by the courts to give meaning to the legislative expression 'person of the Aboriginal race' e.g. Justice Brennan's 1992 *Mabo (No. 2)* judgement:

Membership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people.<sup>17</sup>

It was soon apparent, however, that the three-part definition was itself open to different interpretation. When it came to the test, which of the three criteria was the most important? Which criteria, if satisfied, could carry an identification in the event that meeting the others proved problematic?

In the course of the 1990s there were cases when people identifying strongly as Aboriginal would claim that the sources were simply not available to prove their Aboriginal descent but that this should not mean their Aboriginality could not be recognised. On the other hand there were people who argued that Aboriginality should only be recognised with evidence of descent.

The debate became particularly divisive in Tasmania. In that state many people without 'known' Aboriginal family names, found themselves relying on self or community identification at a time when the Tasmanian Aboriginal Centre (TAC), the main operator of Aboriginal services in Tasmania, was putting more emphasis on evidence of descent and reassessing eligibility for services based on more stringent requirements than those that had been imposed for the issue of earlier certificates of Aboriginality. The TAC started to refuse to allow certain children to continue to attend the Aboriginal Community School in Hobart or access after-school services and extra tuition and started to deny other indigenous-identifying individuals access to legal services.<sup>18</sup> This prompted the Tasmanian office of ATSIC to commission Koori Consultants to prepare a report into how the three criteria in the widely-used Commonwealth definition could be applied in Tasmania. The findings of the *Final Report of the Community Consultation on Aboriginality in Tasmania*, February 1996, tended to support the TAC approach. The report found that an individual seeking to identify as an Aboriginal ought to be able to satisfy all three criteria - and that when it came to proving Aboriginal descent, authentic documentary evidence should be provided to show a direct line of ancestry through a known family name, to traditional Aboriginal society at the time of colonisation. The report suggested setting up an independent unit to research and verify genealogical material submitted in the support of claims.

Other inputs in the 1990s into the debate over whether the emphasis should be self/community-identification or descent, included judgement in three Federal Court cases.

The first case was the appeal against the Trial Judge's decision in the 1989 Wouters Case. The initial finding had been that the Royal Commission into Aboriginal Deaths in Custody had no jurisdiction to inquire into the death of Darren Wouters as the community did not identify him as Aboriginal and he did not himself identify as such. In *Attorney-General (Cwlth) v State of Queensland*, July 1990, the Full Federal Court reversed this decision and found that the Royal Commission's letters patent were framed in such a way as to make Aboriginal descent a sufficient criterion. Indeed, it was effectively found that the category of 'Aboriginal' could expand or contract according to the context and purpose—and the Royal Commission was intended to have such a broad ranging inquiry that its subjects could even include people whose identity was in some part in question. Justice French supported the three-part Commonwealth definition as used by Justice Deane in the *Tasmanian Dam* case but found that 'the context of those observations [by Justice Deane in that case] and the purposes they serve do not translate to this case'.

The second case was *Gibbs v Capewell*, (1995) 54 FCR 503. An order was sought under the *Aboriginal and Torres Strait Islander Commission Act 1989* (ATSIC Act) in relation to the validity of an election held under that act. The first respondent, Mr Capewell, had his election to the Roma Regional Council of ATSIC challenged on the grounds that he was not an 'Aboriginal person' as required under the act and that votes were cast by people not entitled to do so because they also were not Aboriginal persons as required under the act. In his findings Justice Drummond agreed with the findings of Justice French in the above discussed Wouters case - that the three-part definition is of use but that the emphasis to be placed on the different criteria in this definition will vary according to context. He argued that some degree of Aboriginal descent was essential, but that the extent to which the other criteria need to be deployed might depend on the degree of descent. In the absence of other factors a small degree of Aboriginal descent was not sufficient whereas a substantial degree of Aboriginal descent may by itself be sufficient to establish Aboriginality for legal purpose. In general Justice Drummond believed:

The less the degree of Aboriginal descent, the more important cultural circumstances become in determining whether a person is 'Aboriginal'. A person with a small degree of descent who genuinely identifies as an Aboriginal and who has Aboriginal communal recognition as such would I think be described in current ordinary usage as an 'Aboriginal person' and would be so regarded for the purposes of the Act. But where a person has only a small degree of Aboriginal descent, either genuine self-identification as Aboriginal alone or Aboriginal communal recognition as such by itself may suffice, according to the circumstances.

The third case was *Shaw v Wolf* (1998). Justice Merkel agreed with the conclusions of Justice Drummond in *Gibbs v Capewell* (e.g. that some degree of Aboriginal descent is a necessary, but not of itself a sufficient, condition of eligibility) and stressed the role of social processes in establishing individual identity. According to the judgement, Aboriginal descent did not need to be proved 'according to any strict legal standard', it being:

a technical rather than a real criterion for identity, which after all in this day and age, is accepted as a social, rather than a genetic, construct.

Indeed:

The development of identity as an Aboriginal person cannot be attributed to any one determinative factor. It is the interplay of social responses and interactions, on different levels and from different sources, both positive and negative, which create self-perception and identity.

In conclusion the court found that two, but only two, of the respondents were not Aboriginal persons for the purposes of the ATSIC Act and therefore not qualified to stand for election and that although an illegal practice had been committed, it had not been done intentionally, and did not require the election to be declared void—just for those candidates preferences to be redistributed.

## **Part II: Contemporary Problems**

### **The Crisis in Tasmania**

The issue of the adequacy of the system for determining Aboriginality reached a head in Tasmania in 1999 when the result of that years' ATSIC election was questioned on the grounds that many of the 824 voters and some of those who were elected were not in fact Aboriginals. Some also believe that the turn out of only 800 or so voters when 14 000 Tasmanians identified as indigenous in the 1996 census reflected a lack of confidence in the ATSIC poll procedure.<sup>19</sup>

As was usual and as was required under section 141 of the ATSIC Act following the election, an independent 5 member review panel was convened.<sup>20</sup> Such a panel would usually look at matters such as electoral boundaries but on this occasion it looked at all matters pertaining to the Tasmanian poll procedure.

While the election review panel was taking submissions and conducting consultations, the debate continued. On one side were those suggesting that there were people identifying as indigenous who were not. For example, Tasmanian historian and author Cassandra Pybus claimed that four times more Tasmanians are claiming Aboriginal descent than can justify it, and that many of these are descendants of some five hundred black or coloured settlers and convicts transported to Van Diemen's Land before 1850.<sup>21</sup> Michael Mansell of the Tasmanian Aboriginal Centre claimed that '[t]he bulk of those falsely claiming to be Aboriginal are from the Hobart area', and arguing for a system where people have to prove they are eligible to vote—saying the documentary evidence is at hand.<sup>22</sup> On the other hand were those who said the TAC leaders simply wanted Aboriginality to be a monopoly of a few prominent families. There were also those, such as the State's archivist Ian Pearce, who pointed out '[t]he records don't show any particular person is of Aboriginal descent, now or in the past. It is extremely difficult to prove. Equally, it is just as difficult to disprove.'<sup>23</sup>

The review panel when it reported recommended, among other things, that in Tasmania the AEC establish a separate register of Aboriginal and Torres Strait Islander voters:

The aim of this roll would be to determine eligibility (ie Aboriginality) to nominate and vote prior to the elections taking place. This would ensure that all voters and Regional Councillors are in fact Indigenous and would therefore obviate the need for litigation.<sup>24</sup>

ATSIC accepted the recommendations and asked the Federal Government to agree to the trial of an Indigenous Electoral role in Tasmania. In a press release on 1 February 2002 the Minister for Immigration and Multicultural and Indigenous Affairs, Mr Philip Ruddock, announced the trial of such a role in the 2002 ATSIC Regional Council elections.

There has been ongoing controversy in past ATSIC regional council elections, particularly in Tasmania, involving eligibility questions' ... The trial is designed to address them.

Representatives of ATSIC and the Australian Electoral Commission (AEC) are about to embark on a major public awareness campaign regarding the trial to address any concerns members of Tasmania's Indigenous community may have about it.

The initiative did not require legislative changes, simply administrative action. The Minister made rules to give effect to the above recommendation (albeit in a modified 'postal vote only' form) and these rules were tabled in Parliament (as a disallowable instrument) on 12 February 2002. The rules were gazetted as the *Aboriginal and Torres Strait Islander Commission (Regional Council Election) Amendment Rules 2002 (No1)* and included the following:

149 (2), in which a person challenged must provide evidence that he/she:

is of Aboriginal or Torres Strait Islander ancestry, and  
identifies himself or herself as an Aboriginal person or Torres Strait Islander; and  
is accepted as an indigenous person by members of the indigenous community.

The rules also describe the sort of evidence that is acceptable.<sup>25</sup>

It was soon pointed out that the three-part criteria for eligibility and the evidence requirements which followed were nowhere to be found in the ATSIC Act itself, so on 27 March 2002 the Government Gazetted *Aboriginal and Torres Strait Islander Commission (Regional Council Election) Amendment Rules 2002 (No.2)*, in which the above mentioned subrules would be replaced with the following:

The submission must provide evidence that the applicant is an Aboriginal person or a Torres Strait Islander.

As it turned out objections were lodged against about 90 per cent of the people who had applied to be put on the trial electoral role. According to ATSIC officials quoted in the *National Indigenous Times* (17 July 2002), 1298 people had applied to go on the roll and

2572 objections had been received against about 1100 of them. The Independent Indigenous Advisory Committee (IIAC) was late getting off the ground (there being some dispute over its composition) but eventually it was constituted and accepted 621 people and rejected 587 people. Debate continued. Some suggested the IIAC was biased towards the TAC position and that the IIAC was being used to disenfranchise voters intent on reforming the TAC. Others argued that the TAC was being disadvantaged having all the onus of disproof being put on them and that more help was available to those who wanted to claim Aboriginality than who wanted to challenge someone's claim.

The IIAC plan to supplement archival family tree information with DNA evidence provided by tests conducted by the University of Arizona, a partner in the human genome project, also generated a lot of argument. The University of Arizona was pressured to stop providing the test information and the IIAC dropped its plans to admit the evidence.<sup>26</sup>

In September 2002 137 of those rejected (some candidates and John Clark, chairman of ATSIC's Tasmanian Regional Council) took a challenge to the IIAC's decision to the Administrative Appeals Tribunal (AAT).<sup>27</sup> They hoped that it would be found that the rules empowering the IIAC to determine voter eligibility were invalid, that the Federal Court alone had the power to determine the eligibility of voters and that the Federal Court could not delegate that power to an ATSIC committee. The Federal Court, to whom the AAT had referred these legal questions, did not find that any of this was the case, but the AAT itself found that the IIAC had placed too much emphasis on the public records when:

1. It is probable that there are in the wider Tasmanian community persons who have a degree of Aboriginal descent although there are no public records which support their claim.
2. Self identification and community recognition of applicants as Aborigines, particularly where there is evidence of a family history or tradition of Aboriginal descent passed on orally, can provide evidence of Aboriginal descent.<sup>28</sup>

After a case-by-case examination, all those who had challenged the IIAC's rejection were reinstated on the roll bringing the number entitled to vote in the 12 November election up to 750 people. The TAC reacted with the complaint that now more than a third of the 30 candidates being allowed to stand in the election were 'white' and called for a boycott of the poll.<sup>29</sup>

## **The Census Data**

Coinciding with the dispute over the Tasmanian indigenous electoral roll was the release of the 2001 Census figures. Since 1981 the Australian Bureau of Statistics has included in its 5 yearly censuses a question which requires people to identify themselves as indigenous or not indigenous. In the 1996 and 2001 census the wording was as follows:

Is the person of Aboriginal or Torres Strait Islander origin?



No \_\_\_                      Yes, Aboriginal \_\_\_                      Yes, Torres Strait Islander \_\_\_

(for persons of both Aboriginal and Torres Strait Islander origin, mark both 'Yes' boxes).

The indigenous-identifying population in the intervals between the last four censuses (1986, 1991, 1996 and 2001) has consistently risen at a rate far exceeding that of the total population and far exceeding that expected from natural increase (indeed, over this period the fertility-rate of Indigenous women has actually been falling). These statistics have generated some debate.<sup>30</sup> The explanation would seem to lie in a general increased preparedness to identify as indigenous (a phenomenon detectable in other comparable countries) and by the preparedness of children of mixed partnerships to identify as indigenous. Indeed, on the latter, the census question, while allowing a person to acknowledge both Aboriginal and Torres Strait Islander origins, does not allow a person to acknowledge both Indigenous and non-indigenous origins. There is an expectation implicit in the questioning that people of mixed Aboriginal and non-Aboriginal origin will identify as Aboriginal. This is despite the fact that in urban Australia at least, there is a high proportion of indigenous/non-indigenous partnerships—much higher, for example, than there are black/white partnerships in America. Similar points were made by the Administrative Appeals Tribunal in its October 2002 decision in favour of those whose applications to be on the Indigenous electoral roll had been rejected by the IIAC:

We note that there do not need to be a great many persons born from associations between Aboriginal women and European men to lead to a number of descendants in Tasmania today. On our calculation, with generations of 25 years and each having three children, one Aborigine could account for 2187 descendants over seven generations.

The resulting broadening of the indigenous-identifying group may mean that in urban Australia—the area today where the broadening-of-group dynamic is most at play—there is likely to be a narrowing of the gap between the geographic-specific socioeconomic indicators of the two groups. The policy implications of this may be that there is merit in moving away from indigenous-specific services or benefits in urban areas. The present Federal Government appears to be moving in this direction. Thus the convergence of some benefits' eligibility criteria and payment levels and thus the Government's recent commitment in the context both of the May 2002 Budget 'to continue improving Indigenous people's access to mainstream services and to better target Indigenous-specific programs to areas of greatest need'.<sup>31</sup>

Counting in favour of the above policy implication would seem to be the following:

- the cities are already the only places where more than 10 per cent of people identifying as Aborigines are on middle-class incomes (according to the 2001 census 13.7 per cent of the 76 263 working-age urban Aborigines were earning \$600-\$999 a week).<sup>32</sup>
- experimental data on Indigenous Socio-economic Disadvantage included in the Commonwealth Grants Commission's 2001 Report on Indigenous Funding, suggests

that many indigenous people living in mixed households in urban areas share, by and large, the same lifestyle of the surrounding non-Indigenous population and where the latter is better off, so too are most of the former.<sup>33</sup>

- marrying-out is not happening solely within the same socioeconomic bracket. Analyses of the last census have suggested that in every capital city and each state and territory, where an Aboriginal person is marrying a non-Indigenous person, the latter has on average more years of education and a higher income.<sup>34</sup>
- although it is true that the majority of metropolitan Aboriginals are on very low incomes, Aboriginals with non-Aboriginal partners are much less likely to be among this cohort than are Aboriginals with Aboriginal partners, and the number of the former is growing much more rapidly than the number of the latter.

Counting against the above policy implications might, however, be the following:

- indigenous-identifying city dwellers are not an homogenous group. Indeed, only a small proportion have relatively high incomes (according to the 2001 census only 5.1 per cent of urban Aboriginals earn more than \$1000 a week compared to 12.7 per cent of non-indigenous city dwellers).
- even if there is a trend to relative success in the city, it is from a very low base - most city dwelling Aboriginals are still on only \$1 to \$399 a week (compared to 40.5 per cent of non-indigenous city dwellers), share the rural Aboriginal profile of dying younger than the Australian average and have children with poorer than the Australian average school retention rate.<sup>35</sup> Even the Commonwealth Grants Commission *Report on Indigenous Funding 2001*, which stressed reallocation of resources on the basis of need and found the strongest need to be outside the metropolitan areas, observed that:
  - Indigenous people in all regions have high needs relative to the non-Indigenous population
  - [m]ainstream services do not meet the needs of Indigenous people to the same extent as they meet the needs of non-Indigenous people
  - [l]arge redistributions risk losing the benefits of investments made over long periods of time, including those in developing organisational capacity and people.<sup>36</sup>
- neither the broadening-out phenomenon nor the advent of an indigenous urban middle class necessarily means that Indigenous identity of city dwellers is going to weaken. Most children of mixed parentage may identify strongly as Indigenous; pressure on indigenous specific urban services, far from abating, may even increase, and resistance to mainstreaming may be, as it was in Canada 33 years ago, resisted strenuously.

- the number of indigenous people in urban centres is increasing at a rate beyond that explicable through natural increase or a broadening of category. Many Indigenous people are simply 'migrating' from the regions to the cities, and within the cities they are moving from the old increasingly gentrified inner city suburbs to the cheaper outer suburbs (for example, in Sydney moving out of Redfern and La Perouse to the western suburbs).<sup>37</sup> This phenomenon, ATSIC has been arguing, is creating a need for new indigenous-specific assistance points, not fewer.

### **Part III: International Comparisons**

In 1986 the UN Working Group on Indigenous Populations offered the following description, prepared by Special Rapporteur José Martínez Cobo, of what is meant by Indigenous community, peoples and nations:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies ..., consider themselves distinct from other sectors of the societies now prevailing in those territories ... They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.<sup>38</sup>

This description, however, offers little guidance as to what might be a useful administrative or legal definition for the purpose of the nation state attempting to enumerate, recognise the rights of, or run programs for, the benefit of indigenous people. For these purposes different countries have found different ways forward—some putting the emphasis on self-identification, others on verifiable descent.

#### **New Zealand**

The *Maori Affairs Restructuring Act 1989*, the (recently repealed) *Rununga Iwi Act 1990* and the *Maori Land Act 1993* define a Maori as a person of the Maori race of New Zealand or a descendant of any such person (just as many Australian Acts define an Aboriginal person simply as a person of the Aboriginal race). The Census definitions of Maori have differed over time, but in the most recent New Zealand censuses, unlike the Australian ones, it is possible for a person to identify either solely as a Maori (in 1996, 274 000) or as both a Maori and a member of another group such as Pakeha/European (in 1996, 250 000). In addition to these people, the 1996 census reveals another 56 000 New Zealanders who do not identify in any way as Maori but who have Maori ancestry.

Government agencies add all three of the above figures together to arrive at a total Maori population of 580 000 or 16 per cent of the population. Sometimes, as in the New Zealand Yearbooks, this number is given as the number of people of Maori descent.<sup>39</sup> At other times it is used less accurately to suggest the number of people in a discreet Maori-identifying group. The statistical error, Simon Chapple has noted, is compounded when it

comes to projecting future Maori population, with all children with just one Maori parent automatically assumed to identify as Maori.<sup>40</sup> This is despite the fact that 66 per cent of Maori people aged 24–34 years old who are married (legally or de facto) are married to non-Maori, and many of the 34 per cent who marry Maori are themselves of multi-ethnic identity and that intermarriage (historically stronger for some iwi/tribes than others) has produced a mixed group with socioeconomic outcomes very close to those of non-Maori. Indeed, as Chapple notes:

Some people of Maori descent have a strong ethnic Maori identity; others have little or none. For some, their Maori identity is central to their lives; for others, different aspects of their social and personal identities—class, occupation or profession, job, education, religion, leisure pursuits, sports clubs or other gang connections, regional location, family, gender, political leanings and so on—seem to take precedence.

That ethnic identity is not necessarily primary is evidenced by the fact that many (roughly half of enrolled Maori) of Maori ancestry are reluctant to take part in national ethnic politics, preferring to enrol on the general rather than the Maori electoral roll for general elections. Of the Maori on the Maori roll, noteworthy are the relatively low levels of support for a number of parties based solely on the Maori ethnic group. Most Maori on the Maori electoral roll vote for mainstream non-ethnic parties...<sup>41</sup>

In short, according to Chapple, in seeking to explain and address socioeconomic variations in New Zealand too great an emphasis has been placed on ethnicity. The projected rise in Maori population was therefore partly a statistical artefact.

## **Canada**

In 1969 the Liberal Government of Pierre Trudeau, which believed policy should be based on individual needs and not historical ethnic identity, produced a white paper which proposed the termination of all forms of special status for Indians and the dismantling of the Indian Affairs Branch. The paper was, however, overwhelmingly rejected by the Indian people and withdrawn by the Government—leaving in place a system of rigid categorisation of Indian people.

In the *Constitution Act 1982* Aboriginal peoples of Canada include the Indian, Inuit (once called 'Eskimos') and Metis peoples (people of mixed descent). Indians registered under the *Indian Act* are termed Registered Indians (once called Status Indians) and are entitled to benefits which may not be available to other Indians. The latter are often the descendants of Indians who were never registered, did not register as a matter of choice or lost their status under the original Act (an Indian woman and her children lost status rights if she married a non-status man, while a non-status woman gained status rights if she married a status man). In 1985 the *Indian Act* was amended to reinstate 'any Indian person who lost or was denied status because of the discriminatory sections of the previous Act'.<sup>42</sup> It is estimated that 1.3 million (3.8 per cent) of Canadians have Aboriginal ancestry, half of whom are Registered Indians.<sup>43</sup>

## **The United States**

The census counts anyone an Indian who declares him or herself to be an Indian. In 1997 the American Indian, Eskimo and Aleut population was 2.3 million, or 0.9 percent of the total population.<sup>44</sup> By legislative and administrative decision, all indigenous people of Alaska are eligible for Bureau of Indian Affairs services and programs. How intermixed descendants of these people will be regarded in generations to come is not clear. Nor does the legal definition of an indigenous person in other states always coincide with self-identity. To be eligible for Bureau of Indian Affairs services, an Indian must:

- be a member of a Tribe recognised by the Federal Government
- have one-half or more Indian blood of tribes indigenous to the United States, or
- must, for some purposes, be of one-fourth or more Indian ancestry.

Becoming a member of a federally recognised tribe requires meeting tribal membership rules and the degree of requisite Indian ancestry varies among the tribes. In 1993 the Bureau of Indian Affairs estimated that 1.2 million of the Indian population lived on or adjacent to Federal Indian reservations and were eligible for Bureau of Indian Affairs services.<sup>45</sup>

## **Sweden**

To register for the right to vote in elections to the Swedish Sami Assembly a person must define himself or herself as Sami and either speak the Sami language as a home language or have a parent or grandparent who spoke the language as a home language. To cater for those whose families had lost their language under assimilation pressures but who still thought of themselves as Sami, if the applicant's parents or grandparents did not speak Sami but were registered to vote for the Sami Assembly, the applicant can be registered.<sup>46</sup> There is no official census of the Sami population which is estimated at 17 000 people or 0.2 per cent of the Swedish Population. 3808 Sami were registered to vote for the Sami Parliament in 1993.<sup>47</sup> Sweden recognises the Sami as a minority, not an indigenous group.

## **Norway**

According to the 1987 *Sami Act* relating to the Sami Parliament and other Sami legal issues, a Sami is a person who considers himself or herself a Sami, lives in accordance with rules of the Sami society, and is recognised by the representative Sami body as Sami, or who has Sami as his/her first language, or whose father, mother or one of whose grandparents has Sami as their first language, or has a father or mother who satisfies the above-mentioned conditions for being a Sami. There is no official census of the Sami population which is estimated to be between 40 000 and 45 000 or approximately 1 per cent of the Norwegian population.<sup>48</sup>

## **Part IV: Looking to the Future**

From the discussion in the above three sections it is clear there are many ways of defining Aboriginality. By including self-identification in its most commonly used definition, Australia has been closer to Norway or Sweden than to countries such as Canada and the United States where definitions for the purpose of accessing to programs centre on registered descent. In trialing an indigenous electoral roll in Tasmania, Australia may be interpreted as doing no more than Sweden does when it requires registering to vote in Sami Parliament elections. The emphasis, however, which the IIAC had placed on proof of descent may be seen as a diversion towards the Canadian and US system—a system not without problems in Canada and the US even though in those countries there has been a longer history of federal government involvement in indigenous affairs and a longer history of federally recognised classifications.

In no countries is identification of indigeneity a cut-and-dried process resulting in an all-pervasive all-purpose-serving identity. Whoever would attempt to define ethnicity confronts the reality that an individual's ethnic identity is always to some degree fluid, multiple, differing in degrees, and constructed.

Given the above, why then attempt to define legally an indigenous person? Justice Merkle recognised in *Shaw v Wolf & Ors (1998)* FCA 20 April 1998 that:

In a democratic society individuals have the right to adopt such identity and culture as they may choose to adopt. Likewise, subject to human rights and equal opportunity legislation, communities in such a society are free to recognise or refuse to recognise the identities or cultures adopted by the various members of that society. Those are matters of sociology and generally there should be little or no role for the law in that process.

and that:

Aboriginality as such is not capable of any single or satisfactory definition.

but:

In seeking to redress some of the wrongs of the past as well as to assist Aboriginal persons, a number of laws have been enacted and services provided by the state which understandably are solely for the benefit of Aboriginal persons. Consequently some criterion is necessary to define the beneficiary group.

Justice Merkle, while not disputing the need for a category, did, however, suggest that there might be a case for looking at who decides who is or is not in the category:

It is unfortunate that the determination of a person's Aboriginal identity, a highly personal matter, has been left by a Parliament that is not representative of Aboriginal people to be determined by a Court which is also not representative of Aboriginal people. Whilst many would say that this is an inevitable incident of political and legal life in

Australia, I do not accept that that must always be necessarily so. It is to be hoped that one day if questions such as those that have arisen in the present case are again required to be determined that that determination might be made by independently constituted bodies or tribunals which are representative of Aboriginal people.

If part of the problem is Aboriginal people not having the power themselves to determine who is and who is not Aboriginal, who should have the power to decide? In Tasmania the TAC believes it is themselves (or at least the newly constituted IIAC) while others say the TAC has no right to have the final say and that it stacked the IIAC.

The problem of identifying Aboriginality is not simply deeper than a problem with the mechanism for deciding it. It is also broader than just a Tasmanian problem. A letter sent to Indigenous Affairs Minister Ruddock at the time of the 2002 ATSIC regional elections challenged the Aboriginality of Roma region candidate Wayne Baker and asked that the election be postponed. After a spokeswoman for the Minister said the Minister would not intervene and a spokeswoman for the Australian Electoral Commission said the dispute was unlikely to delay the election in southwest Queensland, the writers of the letter said that if no action was taken they would file a petition in the Federal Court to have the Goolburi Regional Council election declared void.<sup>49</sup> Do we solve these problems and other problems simply by tightening the measure of Aboriginality?<sup>50</sup>

If it is your task to interpret and apply existing laws, it is certainly reasonable to say, as Justice Merkel did in *Shaw v Wolf & Ors (1998)*, that 'Aboriginal persons' needs to be defined because laws have been enacted for the benefit of 'Aboriginal persons' and to say, as Justice French did in the 1989 *Wouters Case*, that the purpose of the statute or instrument under scrutiny has a bearing on who should be included in the group described as 'Aboriginal'. If, however, your task is to make the laws, you may consider the possibility that there is a more fundamental problem with a system of defining Aboriginality than simply who may or may not be embraced by a definition and who should or should not arbitrate on it. There is a problem even more fundamental than making sure that the purpose of the legislation or regulation is taken into account when determining who under that legislation is an 'Aboriginal'.

The fundamental problem is that the term 'Aboriginal' is effectively being used as a surrogate for something else, a poor proxy for 'people with the needs which a piece of legislation is trying to address'. Alterations to definitions or to arbitration mechanisms will not alleviate difficulties arising from a problem of this nature. Another approach entirely may be required. Perhaps these difficulties will be alleviated only when the surrogate/proxy term is abandoned and the 'something else' is spelt out. If legislation is intended to benefit people with a particular need, why not define the need? This happens in land and native title claim assessments, for critical to such assessments is not some abstract or broad-brush 'Aboriginality' but the much more particular criteria of recognition as a descendant of a traditional owner, continued attachment to the land etc. Could it not be the same in other areas? If the purpose is to identify people in need of particular health, employment, welfare or educational benefits or with a possible interest in a particular

cultural or land issue, the determining factors need not include Aboriginality, simply need, situation and/or purpose.

In short, one solution to the problem of defining Aboriginality for public-policy and public-money-receiving purposes may be not to require the identification of Aboriginality for these purposes.

Several objections might quickly be raised to such a policy option.

- the fact that membership of a racial group might be something which is difficult to define at law does not mean that such categorisation should be abandoned as there is hardly anything that is not difficult to define in law. Moreover, in some cases, perhaps especially to do with cultural matters, definition by ethnicity may be one of the easiest shorthands for helping to define the intended beneficiaries of a law or program.
- as has been noted in Part II above, this approach was canvassed by Pierre Trudeau's government in 1969 but abandoned in the face of indigenous resistance. Such an approach would certainly also meet a lot of resistance in Australia from people who felt this was an attack on their personal identity and/or were concerned at the capacity for mainstream institutions and agencies to be sufficiently sensitive to indigenous needs and concerns.
- such an approach risks giving indigenous people the feeling that their inherent right to self-identify (as well as to self-government and self-determination etc) is being denied. Thus, the Social Justice Commissioner, Bill Jonas, in his 1999 Social Justice Report, regarded a letter he had received questioning the efficacy of legal definitions of Aboriginality as an example of:

the suspicion and resentment with which some non-Indigenous people regard the assertion by Indigenous people of their status as Indigenous.

and referred to a 1996 paper in which he had written:

Historically ... attacks on the identity of Aborigines have taken many forms but the ultimate aim has not been the denial of identity per se but the denial of other associated rights.<sup>51</sup>

- the 'no-official definition' option would mean rewording a lot of existing legislation and reconfiguring a lot of service-delivery programs and indeed, may result in the creation of a new set of definitional problems.

Several observations may, however, be made in support of such a policy option.

- the domestic and international context for the debate has changed considerably over the last decade. Domestically there are now many indigenous leaders wanting to put addressing critical needs in their community ahead of an inherent rights agenda.



Internationally, ethnic separatism has a very mixed image. For example, in October 2002 South Africa's chief electoral officer, Pansy Talakula, after a tour of Top End communities, criticised policies which appeared to have 'ghetto-ised' indigenous people and said it reminded her of what used to happen in South Africa with the Bantu homelands:

Do you want to have a separate system in which issues are addressed? Does it augur well for racial integration? If your ultimate goal is to build a united Australia, are you going to integrate Aboriginal people or are you creating a separate society? The time has come for Australians to evaluate whether this is the way they want to continue.<sup>52</sup>

- the principle that 'need' is a more accurate determinant than 'Aboriginality' appears even to have been accepted by the ATSIC board. Thus in 1995 Lowitja O'Donoghue signed ATSIC resolution 1483 stipulating that ATSIC commissioners, as high-income earners, would not be eligible for assistance under the Home Ownership Program.<sup>53</sup>
- the 'no official definition' option would not involve denying anyone an identity they hold dear (people could identify as they wish and form associations based on that identity) or a culture to which they have an attachment (funding could still go or be devolved to organisations and programs supporting indigenous culture and language, and legislation could still protect sacred sites, heritage, copyright etc). Nor would this option deny anyone land to which they have a right (most land rights and native title instruments would be unaffected), a service or benefits for which they have a need (its just that these would be received because of the defined need without any additional ethnic caveat), or the possibility of forming an organisation (this could still happen through non-ethnic-specific legislation).

Between maintaining the status quo and a policy revolution there is, as always, a possible middle way. If Aboriginality was removed from (and the specific target group made more clear in) the eligibility criteria for most funds, programs, services and benefits, then Aboriginality could possibly remain in the eligibility criteria for participating in elections to an organisation with representational, advocacy and negotiating tasks without the question of Aboriginality engendering excessive community division and litigation (though this would remain to be seen). If, as the Federal court Judges say, purpose is important in interpreting what is meant by Aboriginality, then purpose could come well to the fore of Aboriginality in most public policy areas, even if Aboriginality remains at the fore in some areas.

Whatever way forward is chosen, it is clear that the path would be smoother if there were a greater investment in ensuring that mainstream agencies were fully sensitive and responsive to the needs and aspirations of indigenous people wherever they lived, It would also be smoother if short-horizon funding and multiple-agency involvement were replaced with more streamlined lines of responsibility and if every measure possible were taken to ensure that people who do identify as indigenous are accorded full respect (e.g. addressing grievances over past injustices) and that people who don't so identify have their

understanding of and appreciation of indigenous ethnography (both local and national), history (ancient and modern) and culture (past and present) enhanced.

## Endnotes

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1. Objections were lodged against 90% of the people who applied to go on the trial Indigenous roll for the Tasmanian ATSIC regional election, the final roll could only be decided after a court case and some still refuse to work with people elected.
2. John McCorquodale, in his 'The Legal Classification of Race in Australia', *Aboriginal History*, vol. 10, no. 1, 1986, pp. 7–24, analysed of over 700 pieces of legislation, and found no less than 67 different definitions of Aboriginal people.
3. Unpublished paper, Aboriginal Citizenship conference at the ANU in February 1996.
4. McCorquodale, *op cit.*, pp. 16–18.
5. For more on such legislation see John Summers, 'The Parliament of the Commonwealth of Australia and Indigenous Peoples 1901–1967', *Research Paper*, no. 10, 2000–01, Department of the Parliamentary Library.
6. Bradford W. Morse, 'Aboriginal Self-Government in Australia and Canada', *Aboriginal Peoples and Constitutional Reform Background Paper*, no. 4, Kingston, Ontario, 1984, p. 15.
7. For examples of Commonwealth legislation see *Aboriginal Land Rights (Northern Territory) Act 1976*. For examples of State legislation see *Aboriginal and Torres Strait (Queensland Discriminatory Laws) Act 1975* and *Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-Management) Act 1978*.
8. Gordon Bowles, *The Peoples of Asia*, 1977, pp. 2–3.
9. *ibid.*, p. 369.
10. Justice Deane in *Commonwealth v. Tasmania* (1983) 158 CLR 1.
11. John Slee, 'Definitions of an Aboriginal', *The Sydney Morning Herald*, 16 September 1988.
12. *The Australian*, 9 September 1988.
13. Slee, *op. cit.*
14. Report by Sweeney and Associates for the Aboriginal Reconciliation Branch of the Department of the Prime Minister and Cabinet, *A New Beginning: Community Attitudes towards Aboriginal Reconciliation*, January 1995, p. i.
15. Chris Miles, *Press Release*, 10 September 1988.
16. *The Age*, 1 October 1988.
17. *Mabo v Qld* (No. 2) (1992) 175 CLR 1 at p. 70.
18. *Mercury*, 16 February 1996, 22 February 1996, 28 February 1996 and *Examiner*, 13 April 1996.

19. For a comprehensive background to the dispute over identification in Tasmania see Marina Fusescu's *Aboriginality in Tasmania*, Issue Brief 2000, no. 3, September 2000, Tasmanian Parliamentary Library, Parliamentary Research Service.
20. Such a panel under the act consists of the ATSIC Chairperson (as chair), the Australian Electoral Commissioner (AEC) or AEC nominee, 2 Indigenous people who are not elected ATSIC or TSRA officials and the General Manager of the Australian Surveying and Land Information Group (AUSLIC) or AUSLIC nominee.
21. These included 60 men and women from India, Mauritius and Ceylon, and about 300 African convicts from the Cape Colony, the United States, West Indies and Portugese and Spanish colonies, as well as numerous black free men and women who came as seamen, servants to officers and wealthy settlers or as free settlers in their own right. Cassandra Pybus, 'Manalargenna's Daughters', *Heat*, no. 15, 2000.
22. *Mercury*, 29 January 2001.
23. *The Sunday Tasmanian*, 11 February 2001.
24. As quoted in Sean Brennan's Bills Digest, *Aboriginal and Torres Strait Islander Commission Amendment Bill 2002*, Department of the Parliamentary Library, Bills Digest No. 139 2001–02.
25. For more detail on the procedure see Appendices 1 and 2.
26. e.g. ATSIC, *Media Release*, 15 August 2002; *The Sydney Morning Herald*, 31 August 2002; AAP, 'TAS: US university stops testing Aboriginal DNA', 2 September 2002; *The Age*, 4 September 2002.
27. e.g. AAP, 'Aboriginal group slams Tasmanian "impostors"', 4 October 2002.
28. Administrative Appeals Tribunal, RE: Bruce William Patmore and Others, Applicant, and Independent Indigenous Advisory Committee, Respondent, *Reasons for Decisions*, 18 October 2002.
29. e.g. *The Mercury*, 22 and 30 October 2002; ATSIC, *Media Release*, 25 October 2002.
30. e.g. an exchange of letters to the editor of *The Mercury* on 20 and 22 June 2002.
31. The Hon. Philip Ruddock, MP, 'Government to focus on Indigenous Need', *Media Release*, 27 June 2002. This undertaking was repeated in the Government's June 2002 response to the Commonwealth Grants Commission's *Report on Indigenous Funding 2001*.
32. George Megalogenis, 'Secret life of city blacks', *The Weekend Australian*, 28 September 2002.
33. Commonwealth Grants Commission, *Report on Indigenous Funding 2001*, Vol. III Consultants Reports - Report on Experimental Indigenous Socioeconomic Disadvantage Indexes.
34. Bob Birrell and John Hirst, 'Aborigines: the real story', *The Age*, 15 August 2002.
35. George Megalogenis, op. cit.
36. Commonwealth Grants Commission, *Report on Indigenous Funding 2001*, pp. xvi– xvii.

37. Malcolm Farr, 'Indigenous Population shift', *The Daily Telegraph*, 24 June 2002.
38. Chris Cunneen and Terry Libesman, *Indigenous People and the Law in Australia*, Butterworths' Legal Studies Series, Sydney, 1995, p. 238.
39. Statistics New Zealand, *New Zealand official yearbook*, Wellington, 1997, p. 122. For a discussion of census definitions of Maori see: Statistics New Zealand, *New Zealand now: Maori*, Wellington, 1994.
40. Simon Chapple, 'Maori socio-economic disparity', *Political Science*, vol. 52, no. 2, December 2000, pp. 101–115.
41. *ibid.*, p. 104.
42. *Changes to the Indian Act*, QS-5214-000-BB-A2, 1985.
43. 1995 Statistics on Registered Indians in *Facts from Stats*, no. 11, March–April 1996. Web site at: <http://www.inac.gc.ca> (accessed March 1998). See also: Department of Indian Affairs and Northern Development, *Basic departmental data 1996*, Canada, 1997, pp. 1–21.
44. United States Census Bureau, *Census Facts for Native American Month*, October 1997. Web site at: <http://www.census.gov/Press-Release/fs97-11.html> (accessed November 2002).
45. *Who is an Indian? Answers to frequently asked questions* at: <http://www.doi.gov/bia> (accessed March 1998).
46. Fae Korsmo, 'Claiming territory: the Saami Assemblies as ethno-political institutions', *Polar Geography*, no. 20, vol. 3, 1996, p. 173.
47. *ibid.*, p. 170. See also: Swedish Institute, 'The Sami people in Sweden', *Fact sheets on Sweden*, February 1999. Web site at: <http://www.si.se/docs/infosweden/engelska/fs59.pdf> (accessed November 2002).
48. Ministry of Foreign Affairs, *The Sami of Norway*, Norway, December 1997.
49. Kristen Smith, 'Ancestry row mars ATSIC poll', *The Courier Mail*, 9 October 2002.
50. For example, Bob Birrell and John Hirst, 'Aborigines: the real story', *The Age*, 15 August 2002 ask: 'People are free, of course, to identify themselves as they wish, but should government programs for Aborigines extend to all the children of the mixed households in the capital cities?'
51. W. Jonas, 'Identity rights - Introductory seminar', Australian Institute of Aboriginal and Torres Strait Islander Studies, unpublished, 1996, p. 33.
52. *The Northern Territory News*, 30 October 2002.
53. ATSIC, 'Courier Mail Wrong', *Media Release*, 31 July 2002.

## **Appendix 1: Procedures for Tasmanian Pilot**

Extract from ATSIC's web site at

[http://www.atsic.gov.au/events/elections\\_2002/tasmania/Information\\_Indigenous\\_Electoral\\_Roll/default.asp](http://www.atsic.gov.au/events/elections_2002/tasmania/Information_Indigenous_Electoral_Roll/default.asp)

### **1. Introduction**

Following a recommendation made by the independent review of ATSIC electoral systems undertaken in 2000, and consultation with the ATSIC Board of Commissioners and the Australian Electoral Commissioner, the Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs (the Minister) approved the trial of an Indigenous Electors Roll (IER) for use in the 2002 round of Tasmanian ATSIC Regional Council elections.

Consequently, to be eligible to vote in the 2002 ATSIC election in Tasmania a person MUST be enrolled on the Indigenous Electors Roll. Eligible Aboriginal and Torres Strait Islander Electors who fail to lodge an application for inclusion on the IER by 5.00pm on 31 May 2002 will not be able to vote in the 2002 ATSIC Regional Council elections in Tasmania. Voting in the 2002 ATSIC Regional Council elections in Tasmania will be by postal vote only.

The requirements for the pilot Indigenous Roll are set out below.

### **2. Enrolment**

The enrolment form is available from all Australian Electoral Commission (AEC) offices and *Service Tasmania* shops. Once completed by an applicant, the enrolment form must be posted to the AEC (in the pre-paid envelope provided). The AEC will check the details, and if correct, will include the applicant on the Commonwealth Electoral Roll (CER). The AEC will then place a provisional Indigenous elector notation against the elector's name on the CER.

Enrolment for the Indigenous Electoral Roll commenced on 4 February 2002, and the IER for the 2002 ATSIC election will close at 5.00pm on 31 May 2002. Applications for enrolment must be received in one of the Tasmanian offices of the AEC by 5.00pm on Friday 31 May 2002.

After the enrolment period closes, the AEC will generate the Provisional Roll and provide it to the Independent Indigenous Advisory Committee (IIAC) Secretariat. The IIAC Secretariat will distribute the Provisional Roll and make it available for public inspection, for election-related purposes only, at all AEC offices and *Service Tasmania* shops. The right of Australian citizen who is at least 18 years of age to object to the indigenous enrolment of an individual will be advertised through the daily press in Tasmania on closure of the enrolment period.

Objections to the inclusion of a person who appears on the Provisional Roll must be lodged with the IIAC by Friday 28 June 2002 and can only be on the ground that the applicant is not an Australian Aboriginal person or Torres Strait Islander. Prior to the election the AEC will check the Provisional Roll to delete deceased electors and to take account of changes of address including movement out of Tasmania.

### **3.Criteria For Inclusion On The Indigenous Roll**

#### **Eligibility**

To be included on the Indigenous Electoral Roll a person must:

- be an Aboriginal person or Torres Strait Islander; and
- be 18 years of age at the date of the election; and
- live in the ATSIC electoral ward for which they wish to be enrolled.

The *Aboriginal and Torres Strait Islander Commission Act 1989* (the Act) requires that to be entitled to vote in an ATSIC election, a person's name must appear on the Commonwealth Electoral Roll. The age and residency requirements for the IER will be satisfied if a person is already on the Commonwealth Electoral Roll and the address shown there is in the appropriate ward. Application for inclusion on the IER will also enrol eligible electors on the Commonwealth Electoral Roll.

At the time of application for enrolment on the IER, applicants will declare that they satisfy the normal Commonwealth Enrolment criteria as well as the following criteria. Proof of meeting these criteria will only be required in the event of an objection being made to the applicant's enrolment on the IER.

The criteria are:

- Australian Aboriginal or Torres Strait Islander ancestry; and
- self-identification as an Aboriginal person or Torres Strait Islander; and
- communal recognition by members of the Aboriginal and Torres Strait Islander community.

#### *Aboriginal or Torres Strait Islander ancestry*

Where a person is required to answer an objection to their enrolment as an Aboriginal or Torres Strait Islander Elector, they must be able to satisfy the Independent Indigenous Advisory Committee that they are of Australian Aboriginal or Torres Strait Islander descent, through the provision of evidence that shows a line of ancestry back to traditional Aboriginal or Torres Strait Islander society.

Documentary evidence will generally be required in the form of a verifiable family tree, or archival or historical documentation that links a person to a traditional family or person.

Photographic evidence or family folklore alone will be taken into account, but will not normally be sufficient to prove Aboriginal or Torres Strait Islander ancestry.

Where a person claims Indigenous ancestry from outside Tasmania, proof of descent must be available from the relevant area of Australia.

### **Self-identification**

An applicant must affirm their self-identification as an Australian Aboriginal person or Torres Strait Islander.

### **Communal recognition**

In addition to showing Aboriginal or Torres Strait Islander ancestry and self-identification as an Aboriginal person or Torres Strait Islander, a person must be able to demonstrate communal recognition or acceptance by members of the broader Aboriginal or Torres Strait Islander community.

This means that an applicant must be known to other Aboriginal or Torres Strait Islander people in the local community and show a link to Aboriginal or Torres Strait Islander ancestry through either their own or their family's acknowledgment of their Aboriginal or Torres Strait Islander ancestry and their involvement with that local community.

In practical terms it will generally be required:

- for a person to obtain three signatures from recognised members of the Aboriginal or Torres Strait Islander community; and
- that these three community members be able to acknowledge that person's or family's identification as Aboriginal or Torres Strait Islander within that community; and
- that the signatories not be from the immediate family group of the person seeking confirmation and be from family groups who are accepted as members of the broader Aboriginal or Torres Strait Islander community.

It would not be sufficient for confirmation of communal recognition to come from an Aboriginal or Torres Strait Islander Indigenous organisation alone, without separate support from local families and community members. However, evidence of communal recognition may be considered from one or more Indigenous organisations alone, if the basis of the evidence can be properly demonstrated.

## **4. Applications**

To be included on the Indigenous Electoral Roll for the 2002 ATSIC elections in Tasmania a person will need to:

- complete an ATSIC Election Enrolment Form obtained from all AEC offices and *Service Tasmania* shops; and
- lodge it with the AEC by 5.00pm on Friday 31 May 2002.

A Provisional Roll comprising the names of all people who have applied for inclusion on the pilot Indigenous Electors Roll will be made available at all AEC offices throughout Tasmania and *Service Tasmania* shops on 3 June 2002. At this time it will be open to Australian citizens who

have attained the age of 18 to object to the inclusion of a person on the Indigenous Electoral Roll by 28 June 2002.

## **5. Objections**

The only basis upon which an objection can be based is the belief that the lineage of the applicant is not that of an Australian Aboriginal or Torres Strait Islander person.

The onus of proof of Aboriginality will lie with the person seeking to be included on the Indigenous Electors Roll.

Any Australian citizen who is 18 years old or over can make an objection. The objection will be made by completing an objection form available from all AEC offices and *Service Tasmania* shops. In order to make a valid objection, the person objecting ('objector') must provide their name and address on the objection form. The name of the objector will be made available to the person being objected against ('the applicant').

All objections will be processed by the IIAC Secretariat and given to the IIAC for consideration. Both parties will be notified that an objection has been received. In cases where there is more than one objection to an individual being included on the IER, they will be treated as one objection.

When an objection is received, the person to whom it relates will be notified by the IIAC Secretariat, and asked to make submissions on the matter by 29 July 2002.

The objection, and any submissions received from the applicant will then be referred to the IIAC, who will assess the validity of the claim based upon the evidence supplied by the applicant, and advise the Minister that the committee either:

- is satisfied that the applicant is an Australian Aboriginal or Torres Strait Islander person and that the objection should be rejected. The applicant's enrolment will be confirmed and both the applicant and objector will be notified of the decision; or
- believes that the person is not an Australian Aboriginal or Torres Strait Islander person. The applicant's name will not be included on the Indigenous Roll and the applicant and the objector will be notified of the decision; or
- believes that there is insufficient information to make a decision, in which case the IIAC Chairperson will write to the applicant requesting further evidence of their eligibility. The request will indicate the sort of evidence required, the date by which it must be provided and places where assistance to obtain evidence may be available.

In a case where further evidence is sought and provided, the IIAC will further consider the applicant's eligibility on the basis of the additional information and provide advice to the Minister as outlined above.



## **6. Independent Indigenous Advisory Committee (IIAC)**

All applicants fulfilling the criteria will be included upon a provisional Indigenous Electoral Roll, and the inclusion of any applicant on the provisional Indigenous Electoral Roll will be open to objection. All objections can be contested by the applicant to the Independent Indigenous Advisory Committee (IIAC).

The IIAC will consist of nine Aboriginal or Torres Strait Islander people, who will be appointed by the Minister for Reconciliation and Aboriginal Affairs after lodging expressions of interest against published selection criteria. The IIAC members will be widely accepted as being of high-standing within the Tasmanian Aboriginal or Torres Strait Islander community, and will include at least two who are resident in each of the three ATSIC electoral wards. Two specialist advisers, one being an archivist nominated by the Director of State Archives and the other being a historian having particular expertise in the fields of Indigenous genealogy and history, will be available to assist the IIAC.

The IIAC will be supported by a Secretariat who will undertake the administrative requirements of the IIAC including correspondence, liaison and information management.

## **Appendix 2: Question and Answers on Tasmanian Indigenous Electoral Roll**

Extract from ATSIC web site (same text in a Australian Electoral Commission pamphlet)  
[http://www.atsic.gov.au/events/elections\\_2002/tasmania/FAQ/default.asp](http://www.atsic.gov.au/events/elections_2002/tasmania/FAQ/default.asp)

### **Q1. Whose idea was the Tasmanian Indigenous Electoral Roll?**

A. During 2001, public meetings were held in Tasmania as part of a review of the ATSIC electoral systems. A review of ATSIC's electoral systems, known as a Section 141 review, must occur after every round of Regional Council elections. At these meetings it was suggested to the review panel that an indigenous electoral roll be established in Tasmania for the purpose of ensuring that only eligible people vote in elections for the ATSIC Regional Council in Tasmania.

Following advice from ATSIC and the Australian Electoral Commission on eligibility criteria for voters, the Minister for Immigration and Multicultural and Indigenous Affairs approved a recommendation from the review panel that a trial of an electoral roll of eligible Aboriginal and Torres Strait Islander electors be held in Tasmania for the 2002 ATSIC Regional Council elections. The Tasmanian Indigenous Electoral Roll that is being created will be used only for the 2002 ATSIC Regional Council elections in Tasmania.

### **Q2. Why is the Tasmanian Indigenous Electoral Roll being tried out in Tasmania?**

A. Issues of Aboriginal identity have been the subject of controversy for many years in Tasmania. This controversy has impacted on ATSIC as the peak Indigenous consultative body in the State. The trial is an attempt to ensure that all the people who vote in the ATSIC elections are properly entitled to determine the composition of the Commission Regional Council in Tasmania.

### **Q3. If the Tasmanian Indigenous Electoral Roll trial is successful will an Indigenous Roll be introduced throughout the rest of Australia?**

That issue has not been considered at this stage.

### **Q4. Was the Tasmanian Regional Aboriginal Council (TRAC) consulted?**

A. TRAC was free to put its views to the s141 Review review Panel that consulted widely throughout Tasmania before it recommended the trial roll. The Minister also considered the views of TRAC before deciding to allow the trial to proceed. TRAC was not consulted by the Board of Commissioners, when recommending the methodology of the trial to the Minister, because of the perception that there could be a possible conflict of interest.

### **Q5. Who is eligible to be included on the trial Tasmanian Indigenous Electoral Roll?**

A. A person who applies to be on the Tasmanian Indigenous Electoral Roll is eligible if the person:

- is an Aboriginal or Torres Strait Islander
- will be at least 18 years of age at the date of the next ATSIC election

- lives in the ATSIC electoral ward for which the person wishes to enrol

**Q6. Under the ATSIC Act a person has to be enrolled on the Commonwealth Electoral Roll to be eligible to participate in ATSIC elections. Does this requirement still apply for the Tasmanian Indigenous Electoral Roll trial?**

A. Yes. Where people are not already enrolled on the Commonwealth Electoral Roll, completion of the Electoral Enrolment Form for ATSIC Elections will also be treated as an application for inclusion on the Electoral Roll for Federal and State elections.

**Q7. Do I have to be enrolled on the Tasmanian Indigenous Electoral Roll to vote in the 2002 ATSIC elections in Tasmania?**

A. Yes. You will not be eligible to vote in the 2002 ATSIC elections in Tasmania if you are not on the roll.

**Q8. How do I enrol on the Tasmanian Indigenous Electoral Roll?**

A. To get on the roll you must complete an ATSIC Election Enrolment Form. Enrolment forms are available from all AEC offices in Tasmania and Service Tasmania shops. Completed Enrolment forms must be received by the AEC no later than 5.00 p.m. on Friday 31 May 2002. Please note that by enrolling on the Tasmanian Indigenous electoral roll, you may also be enrolling on the Commonwealth and Tasmanian State electoral rolls.

**Q9. If I am already enrolled on the Commonwealth Electoral Roll, do I still need to apply to be enrolled on the Tasmanian Indigenous Electoral Roll?**

A. Yes, if necessary your Commonwealth and/or Tasmanian State enrolment details will be updated.

**Q10. When can someone apply to be included on the Roll?**

The enrolment period opens on Monday 4 February 2002 and closes at 5.00pm on Friday 31 May 2002.

**Q11. How will I know who has applied to be on the Roll?**

A. The AEC will generate a provisional roll of eligible ATSIC electors after the close of registration. This provisional roll will include the names and addresses of applicants. The provisional roll will be made available for inspection at all AEC offices in Tasmania and Service Tasmania Offices.

**Q12. How can I object to someone whom I believe is not of Aboriginal or Torres Strait Islander descent being on the Roll?**

A. Any Australian citizen, who is at least 18 years of age, and who wishes to object to a provisional ATSIC elector must complete an ATSIC Objection Form. The objection forms will be available from all AEC offices in Tasmania and Service Tasmania shops following publication of the provisional roll.

The only ground for objecting to a provisional ATSIC elector is a belief that the elector is not of Australian Aboriginal or Torres Strait Islander descent. Forms with insufficient information (i.e. names and addresses not supplied) will not be processed. The objection period opens on Monday 3 June 2002, and completed objection forms must be lodged with the Independent Indigenous Advisory Committee no later than 5.00 p.m. on Friday 28 June 2002.

**Q13. Do I have to have all the documentation to prove my Aboriginality to enrol on the Tasmanian Indigenous Electoral Roll?**

A. No. You will only be required to provide evidence if someone objects to you being included on the Roll. The only ground for objection is a belief that a person is not an Aboriginal person or Torres Strait Islander.

**Q14. I turn 18 after the Tasmanian Indigenous Electoral Roll closes, and I understand the ATSIC Regional Council Elections are due to be held in the second half of 2002 date, can I enrol to vote in the ATSIC elections?**

A. Yes. The next round of Regional Council elections must take place after 1 July 2002 but before 31 December 2002. It is expected that the elections will take place in October 2002, but this will not be confirmed until later this year. Any eligible person who will be turning 18 years of age in the period between 31 May 2002 and 31 December 2002 should enrol to vote in this election.

**Q15. Will the Tasmanian Indigenous Electoral Roll be used to decide who is eligible for housing loans?**

A. No. The Roll will only be used for the purposes of the 2002 ATSIC Regional Council elections in Tasmania. It is an offence for anyone to misuse the Roll or to give it to someone else.

**Q16. What will happen to the Roll after the 2002 ATSIC Regional Council elections?**

A. The Roll will be held securely by AEC until the evaluation of the trial has been completed.

**Q17. If the Tasmanian Indigenous Electoral Roll is successful, will it be used for the next ATSIC elections?**

A. Changes to the Electoral Rules would be required before the Roll could be used again. The Section 141 Review Panel review panel which evaluates the trial would need to decide to make a recommendation to the Minister that this should happen and the Minister would need to agree.

**Q18. I am an Aboriginal person/Torres Strait Islander, but my family is not from Tasmania. Can I enrol on the Tasmanian Indigenous Electoral Roll and vote in the 2002 ATSIC Regional Council elections in Tasmania?**

A. Yes. Any Aboriginal or Torres Strait Islander person who is 18 or over on election day is eligible to enrol and vote in the ATSIC Regional Council elections in Tasmania, provided they are resident in Tasmania. If a valid objection to your enrolment is received, you will be required to produce evidence from your home area.

**Q19. Who will assess the objections received?**

A. An Independent Indigenous Advisory Committee (IIAC), will be appointed by the Minister for Immigration and Multicultural and Indigenous Affairs to assess objections received.

**Q20. Who will make up the membership of the IIAC?**

A. The IIAC will comprise nine Aboriginal or Torres Strait Islander people who will be assisted by an archivist and a historian (who are not members of the Committee). Broad representation will be ensured by a requirement that there will be at least two representatives from each of the three ATSIC wards in Tasmania. ATSIC will advertise for expressions of interest for membership of the committee. The Minister will decide the membership of the Committee following consideration of the expressions of interest.

**Q21. How will the IIAC make its decisions?**

A. The IIAC will apply a balance of probabilities test on the evidence before it and will have the option to seek further information from the applicant. The Committee's decision will be made by a majority vote of the members present and voting

**Q22. How will I know if I have an objection lodged against me?**

A. The IIAC will write to advise you that an objection has been lodged against you.

**Q23. Will people know if I have objected to their inclusion on the roll?**

A. Yes, your name will be given to the applicant.

**Q24. If I am objected to, is there anywhere I can go to seek help in preparing my ancestry details?**

A. There will be an archivist and an historian available, through the IIAC, to help you prepare your ancestry details.

**Q25. If I am objected to, what evidence will I need to be able to provide to the IIAC in support of my claim that I am an Aboriginal or Torres Strait Islander person?**

A. Documentary evidence will generally be required in the form of:

- a verifiable family tree, or archival or historical documentation that links a person to a traditional family or person;
- an applicant affirming their self-identification as an Australian Aboriginal person or Torres Strait Islander; and
- signed statements from 3 members of the Aboriginal or Torres Strait Islander community to the effect that the applicant is accepted as an Aboriginal or Torres Strait Islander person by members of that community.

**Q26. How will the vote for the 2002 ATSIC Regional Council elections in Tasmania be conducted?**

A. Voting will be by postal vote only. The AEC will mail a ballot paper to each person on the final Tasmanian Indigenous electoral roll approximately two weeks before polling day. There will be no voting at polling booths on election day.

**Q27. If I am visiting Tasmania from mainland Australia on election day, can I submit an absentee vote in Tasmania?**

A. No. You will need to apply for a postal vote, or cast a pre-poll vote with the Regional Returning Officer in your ward of residence.

**Q28. If I wish to nominate as a candidate in the 2002 ATSIC Regional Council elections in Tasmania, do I need to be enrolled on the Tasmanian Indigenous electoral roll?**

A. Yes.

**Q29. What are the key dates that I should be aware of?**

Opening of Tasmanian Indigenous Electoral Roll	Monday 4 February 2002
Enrolment Period for Indigenous Roll closes	Friday 31 May 2002
Provisional Indigenous Roll may be inspected	Monday 3 June 2002
Objections period opens	Monday 3 June 2002
Close of objections to enrolments	Friday 28 June 2002
People who have been objected to advised	by Friday 5 July 2002
Evidence produced by people who have been objected to	Monday 29 July 2002
Indigenous Advisory Committee meets	Monday 29 July 2002
Indigenous Advisory Committee determines all objections	by Friday 9 August 2002
Roll final	Monday 12 August 2002