

Submission to the Senate Select Committee on the Administration of Indigenous Affairs

**Regarding the Aboriginal the Aboriginal and Torres Strait
Islander Commission Amendment Bill 2004, the proposed
administration of Indigenous programs and services by
mainstream departments and agencies and other relevant
matters.**

Jumbunna Indigenous House of Learning

University of Technology, Sydney

Level 17, Tower Building, City Campus
PO Box 123
BROADWAY NSW 2007

Phone: (02) 9514 1902

Fax: (02) 9514 1894

1. THE ABORIGINAL AND TORRES STRAIT ISLANDER COMMISSION

ATSIC was established to provide an Indigenous voice in the federal government system. Although it is often criticised as not being “self-determining” in the terms that many Indigenous communities aspired to, it is a national advocacy voice that is able to, through its regional planning processes, provide Indigenous input into decisions about policy-making and program delivery.

ATSIC is an experiment in public administration. With an elected arm and an administrative arm, ATSIC has a delicate balancing act to play as the primary representative voice for Aboriginal and Torres Strait Islander peoples at the national level while also operating as a government agency.

Although much political rhetoric has been made of it being a “failed experiment”, ATSIC is deserving of greater scrutiny of its successes and failures in order to better and more honestly review the effectiveness of a national representative structure for Indigenous peoples in Australia.

1.1 ATSIC’s Strengths

1.1.1 A Broad Legislative Mandate

The objects of the *ATSIC Act 1989 (Cth)* in s.3 articulate a regime that gives a greater role for Aboriginal and Torres Strait Islander peoples to deal with the issues facing them through elected representation. The objects include:

- “maximum participation”;
- “the development of self sufficiency and self management”;
- “furtherance of the economic, social and cultural development”; and
- “coordination in the formulation and implementation of policies ... without detracting from the responsibilities of ... governments”.

The functions given to ATSIC in s. 7 of the Act set out a range of legislative mandates to meet these objectives, namely to:

- formulate and implement programs;
- monitor the effectiveness of programs conducted by all bodies and agencies;

- develop policy proposals, to assist, advise and cooperate with all and sundry;
- advise the Minister on all matters;
- provide advice to the Minister when requested;
- protect cultural material and information; and
- collect and publish statistical material (if the Australian Bureau of Statistics approved).

The objects and function, when read together, established a framework of responsibilities that conferred to ATSIC the *primary role* of advising the Federal Government on any matters relating to Aboriginal and Torres Strait Islander peoples and for the oversight of all government effort in policy development and the provision of services to Aboriginal and Torres Strait Islander peoples. That is, ATSIC was tasked to:

- (1) Maximise the participation of Aboriginal and Torres Strait Islander peoples in the formulation and implementation of programmes; and
- (2) Provide an effective voice within the government.

Changes to the Act since 1989 have left the objects and functions of ATSIC unaltered. The *ATSIC Act* articulated the functions of the Commission and the powers it had to implement them in clear and broad terms. The functions were relatively broad and the powers that the Commission had been given to achieve these functions should have been adequate enough to allow the Commission to effectively fulfil its mandate. That this did not occur raises the question as to why such a generous set of objectives and functions were not used more effectively.

1.1.2 A National Representative Body that Reflects the Views of Indigenous Peoples

ATSIC was able to develop policy on some key areas that reflected the position of Indigenous peoples. This was a strength, particularly in areas where it strongly advocated on issues often conflicting with the Government's position.

One such area is native title. ATSIC's strategies and policies on native title often conflicted with the federal government position and it funded Native Title Representative Bodies to litigate native title claims in matters where the Federal Government is a party.

Another area of strength has been ATSIC's ability to lobby in the international arena where it frequently advocated positions contrary to the Federal Government's.

ATSIC was also able to maintain a focus on the rights agenda in a period where Federal Government policy has been one of "practical reconciliation." Although attempting to focus on socio-economic issues, the Government's agenda ignores broader social, cultural and economic issues facing Indigenous communities. ATSIC's position has always been that the recognition and enjoyment of rights are required if any real, meaningful and sustainable progress is to be attained. The "rights agenda" advocated by ATSIC is a position that has been directly opposed by the Federal Government, but ATSIC was able to continue to focus on structural, long-term rights issues. This broader and structural focus saw ATSIC take the lead on the national treaty debate as a way of maintaining a dialogue about rights protection.

1.1.3 An Interface with the Federal Bureaucracy

ATSIC was the first national representative body whereby Indigenous peoples had a role in both an advisory and decision making capacity. The dual role provided ATSIC with a legitimate seat at the table, with leverage and with an actual role in determining the direction and priorities in respect of Commonwealth programs, albeit within fairly tight constraints in terms of actual dollars and programs. This very real power provided ATSIC with a capacity to negotiate on the playing field and, although not level, this was a far cry from the powerless positions experienced in negotiations by Indigenous representative bodies up until that time.

From this position, ATSIC was able to make positive contributions to a broad range of agendas and initiatives including the response to the Royal Commission into Aboriginal Deaths in Custody, the National Aboriginal Health Strategy additions and the response to the Bringing Them Home report. ATSIC was also able to take a seat at the MCATSIA table and was influential within COAG (twice) putting forward the National Commitment to Improved Service Delivery to Aboriginal and Torres Strait Islander People. It also was actively involved with the COAG Reconciliation Agenda. These were positive initiatives emanating from COAG and had substantial merit. These gains were hard fought and marked significant advances in attempting to reform the way

government conducted business in the Indigenous portfolio. These points of interaction and influence must not be cast aside.

1.1.4 The Use of Regional Planning Processes

There has been recognition of the importance of governance for Indigenous communities at the regional level to capture differences in policy and program needs across the country. This focus recognises that a one-size-fits-all approach to Indigenous policy-making and program delivery is not as effective as an approach that distinguishes between the priorities of different Indigenous communities.

The ATSIC structure sought to give effect to this level of governance through the Regional Councils. Regional Councils are able to respond to the needs of local communities and they can achieve these outcomes through policy development and advocacy. The Regional Councils are required to formulate a Regional Plan and then to assist, advise and co-operate in the implementation of that plan. Importantly, this process of implementation requires broad consultation and negotiation, not just with ATSIC, but also with various levels of government. The Regional Councils also had a legislative obligation to receive and to pass on to the Commission and the Torres Strait Regional Authority the views of their constituents about the activities of government bodies in their region and to represent and advocate on behalf of their constituents.

These powers and functions provided a governance structure at the regional level and served as an important source of advice on policy and priorities at the national level to assist with the allocation of resources and participation in decision-making processes.

1.1.5 An Appropriation: Financial Leverage

The control of economic resources is the most significant factor in the capacity of any organisation to influence its environment. For too long Indigenous organisations have been subject to the benevolence of government and have had to negotiate without power or influence. Program resources provide that power and influence. For the organisation to be effective it must be at least retained if not expanded.

ATSIC's responsibility for policy and advocacy and its responsibility for program/service delivery is one that resulted in tensions between these two mandates.

However, without the appropriations for its program responsibilities, ATSIC would not have had the capacity to negotiate with any power with other agencies and governments.

That is not to say that ATSIC has to deliver the services directly; this function can and should be a strategic mix of direct and delegated service delivery processes and mechanisms aimed at maximising the effectiveness of delivering those services. That is, maximising access to services for Indigenous peoples and improving the outcomes for the ultimate beneficiaries.

The positive and meaningful involvement of Indigenous people in the development and delivery of programs to Indigenous peoples can only be a reality when, Indigenous peoples have explicit, effective and significant control over resources.

1.2 Weaknesses

1.2.1 Competing Advice to Government

ATSIC was established as an advisor to government. At the same time, the Office of Indigenous Affairs was also established as a source of alternative advice. This may have been an initiative to ensure that non-Indigenous interests that may have been affected as a consequence of Indigenous initiatives were considered. It quickly became a source of friction between government and ATSIC.

This duality of advice was only one way in which government sought alternative advice to ATSIC. Each level of government and each agency with some responsibility for Indigenous matters had an advisory mechanism and these arrangements remained after the commencement of ATSIC. With these multitudes of forums and advice, unstructured and uncoordinated policy and program development resulted. Agencies and governments are entitled to seek additional and expert forum advice with respect to specific programs. While this is both logical and rational the processes adopted have been neither transparent or cooperative.

The health program is perhaps the best example of the friction created by the lack of strategic and lateral thought on the part of both government and ATSIC. Just prior to ATSIC being established, the NAIHO (National Aboriginal and Islander Health Organisation) had been instrumental in negotiating the National Aboriginal Health Strategy (NAHS), a significant and long overdue initiative to address the problems in

health including environmental health. Some \$250M plus was provided and NAIHO was the primary advisor. With the advent of ATSIC, their role was usurped in respect of the bulk of the monies. The Indigenous health lobby campaigned to have the responsibility for the health program transferred from ATSIC and into the Department of Health, effectively mainstreaming the health program. It should be noted that when the transfer was made, a significant increase in funding was also given to the Department of Health, providing it with resources that were not made available to ATSIC.

This example highlights a situation where each program specific area, be it a peak body or a community organisation, is focussed on the needs of their program or their community and see it as paramount. While this is an understandable position for a lobbying body to take it is the task of the organisation overseeing the distribution of funding across the many competing program and policy areas to make an assessment and allocate resources according to that assessment.

1.2.2 Program Delivery Versus Policy Making

ATSIC was an agency delivering programs – particularly the CDEP and CHIP programs – while at the same time being the primary national advocate for Aboriginal and Torres Strait Islander peoples, the effective voice. The competing aims of delivering programs and developing policy seemed to be a tension that saw program delivery become a focus at the expense of policy-making.

There are practical difficulties in trying to provide services and achieve policy outcomes at the same time. One takes priority over the other. Ultimately, ATSIC's preoccupation with the service delivery function has been to the detriment of its policy development responsibilities. As a result it has become trapped in a constant funding cycle making ATSIC incapable of developing anything but program policy.

1.2.3 No Executive Power

Under its enabling legislation, ATSIC was given the function to monitor the effectiveness of other agencies, to coordinate the development and implementation of policies and to formulate and implement program proposals. To fulfil this responsibility ATSIC required the active cooperation and involvement of Commonwealth agencies and

State and Territory governments. This in turn required an interface backed by executive authority from the Department of Prime Minister and Cabinet. This executive authority was never given to ATSIC and the activities of Prime Minister and Cabinet were often to the contrary to ATSIC's stated policies and intentions. An interface backed by legislation and parliamentary oversight would seem to be the only avenue to ensure real and meaningful cooperation within the Commonwealth sphere to develop the required levels of discipline and professionalism. A pertinent point that needs to be made is that the executive authority needed in the Indigenous area has only been granted now that ATSIC has been effectively removed.

1.2.4 Lack of a State, Territory and Local Government Interface

Where the ability of ATSIC to effectively fulfil its mandate seemed to be most impeded under its current structure was with its inability to impact on State/Territory governments and to more effectively monitor how they spend money on key areas of Indigenous socio-economic disparity, namely, health and education.

Although there was an attempt to remedy this through the establishment of State Advisory Councils, these bodies were not legislated by the *ATSIC Act*. Currently, State Advisory Council's exist as part of a 'convention' or policy rather than having the recognised force of legislation. Therefore, individual State and Territory Governments do not treat each State Advisory Committee with the requisite legitimacy and respect. The failure to impose a structure that can act as the state representatives of Aboriginal and Torres Strait Islander peoples has broken a critical link in ATSIC's advocacy role.

The reports of the Commonwealth Grants Commission and the Productivity Commission attest to the parlous state of coordination and cooperation at the Commonwealth, State and Territory levels. ATSIC has been condemned for being unable to achieve an aspiration which to date eludes all levels of government, especially within Indigenous portfolios.

1.2.5 Undefined Relationships Between the ATSIC Board, CEO, Minister and Regional Councils

Another shortcoming of the *ATSIC Act 1989*, was its failure to define key relationships. These include the relationship between the Board and the CEO and the relationship between the Board and the Minister.

Before the split in the agency resulting in the creation of ATSIS and the appointment of a separate CEO, the CEO of ATSIC was answerable to and directed by the Board of Commissioners. However, the CEO of ATSIC is also responsible to the Minister for Immigration, Multiculturalism and Aboriginal and Torres Strait Islander Affairs. The agenda of Board and the Minister could be very different creating difficulties in governance.

The legislation is silent about the relationship between the Regional Councils and the ATSIC Board. The workability of this arrangement and other administrative, structural and governance issues of the organisation need to be reviewed and clarified within the legislative framework.

1.2.6 Public Perceptions

ATSIC has too often been portrayed as being responsible for every Indigenous issue. It is not widely appreciated that it did not have fiscal responsibility for the areas of health and education and was only a supplementary funding provider on issues such as domestic violence, languages, heritage protection and housing. In addition to this, there has also been a failure to appreciate that a large percentage (almost 80%) of the ATSIC budget was quarantined for programs such as CDEP and CHIP. These misconceptions directed attention away from government departments (federal and state and territory) with responsibility for Indigenous policy and service delivery.

The ability to treat ATSIC as the source of inadequate policy and ineffective service delivery stemmed from the media coverage of allegations against senior ATSIC board members. There is no doubt that the continued presence of Board members who were subject to continuing allegations and questioning undermined the credibility of the institution. This was exacerbated by the misinformation about ATSIC and its responsibilities that were prevalent in comments within the media and by politicians. These attacks not only accused ATSIC of ineptitude in relation to policy-making and program delivery, but also criticised its governance processes.

Not only was this misinformation unfair to ATSIC, who is not in some cases responsible for the policy areas it was accused of failing in, it deflected criticism from the governments and agencies that were responsible for those shortcomings.

1.2.7 Failure to Build Governance Capacity

The ATSIC Board was, on the whole, comprised of men and women who were extremely committed to and passionate about the people they represented and the issues they were engaged in. However, the inability of the ATSIC Board to build an appropriate level of governance capacity despite the attempts of administrative staff, must be acknowledged. To some extent this was understandable given the lack of trust between the Board and the administration and we note that this is a factor inherent in any interface between government and the community.

The Board was comprised of members with diverse priorities, opinions, perceptions and views. The needs and demands they represented were high and the resources to meet them relatively low. In that environment every decision of the Board involving resource allocation was and will be contentious and conflict is to be expected. In those circumstances good governance is essential to ensuring that the decision-making, activities and the performance of the board is beyond reproach. The lack of unity, transparency and the behaviour of certain members of the Board tarnished ATSIC's reputation.

It should be noted, however, that the problems of the Board did not inhibit the effective delivery of the programs, nor did Indigenous peoples miss out. In spite of the machinations of some members of the Board it continued to deliver on program issues.

A greater focus on the importance and primacy of good governance is an issue to be addressed in the reform process; it is not a rationale for the abolition of an institution.

1.3 Conclusions

When looking at the key strengths and weaknesses of the ATSIC structure, the first thing that becomes apparent is that most of its limitations are problems inherent within its enabling legislation. These could have been fixed to strengthen the governance structure enshrined within the ATSIC legislation rather than simply abolishing it.

It also becomes clear that much public attention on ATSIC failed to address the key issues of governance that were weakening ATSIC as a structure and, instead, concentrated on the personalities of the Board or engaged in misinformation that highlighted the negative public perceptions of ATSIC while masking the failures of other government agencies to develop effective policies and programs for Indigenous peoples.

In light of this, it is unfair to describe ATSIC as a failed experiment in Indigenous representation. The flaws are directly linked to the legislative framework in which it was structured and in the failure of governments and the media to provide honest commentary on the true limits of ATSIC's responsibilities.

The other key observation from this analysis is the importance of retaining appropriations through the national representative Indigenous structure. A seat at the table, without influence and leverage, is a regressive policy that is paternalistic and of little use and value to Indigenous peoples.

2. A NEW REPRESENTATIVE STRUCTURE

Aboriginal and Torres Strait Islander peoples need a national representative structure for several reasons:

- On many issues – land, heritage protection, human rights protections, resource management – Indigenous peoples will have a policy perspective that is contrary to that of the Federal Government.
- The Federal Government is responsible for the development of policy and programs for Indigenous peoples. Those policies and programs will work better with the input of Indigenous people, both to identify policy and funding priorities and to ensure Indigenous participation and ownership of those policies and programs.
- A national body provides for a unified Indigenous voice across Australia. Although the priorities of Indigenous communities across Australia may vary, advocacy through a national body will be more effective than a number of competing regional voices.
- A national body will lessen the growing trend in policy-making to divert resources to remote communities at the expense of rural and urban communities who also have a plethora of socio-economic issues to confront.

2.1 Guidance from Existing Structures

In developing a national representative structure, we believe that the strengths and weaknesses of the ATSIC structure should provide some guidance:

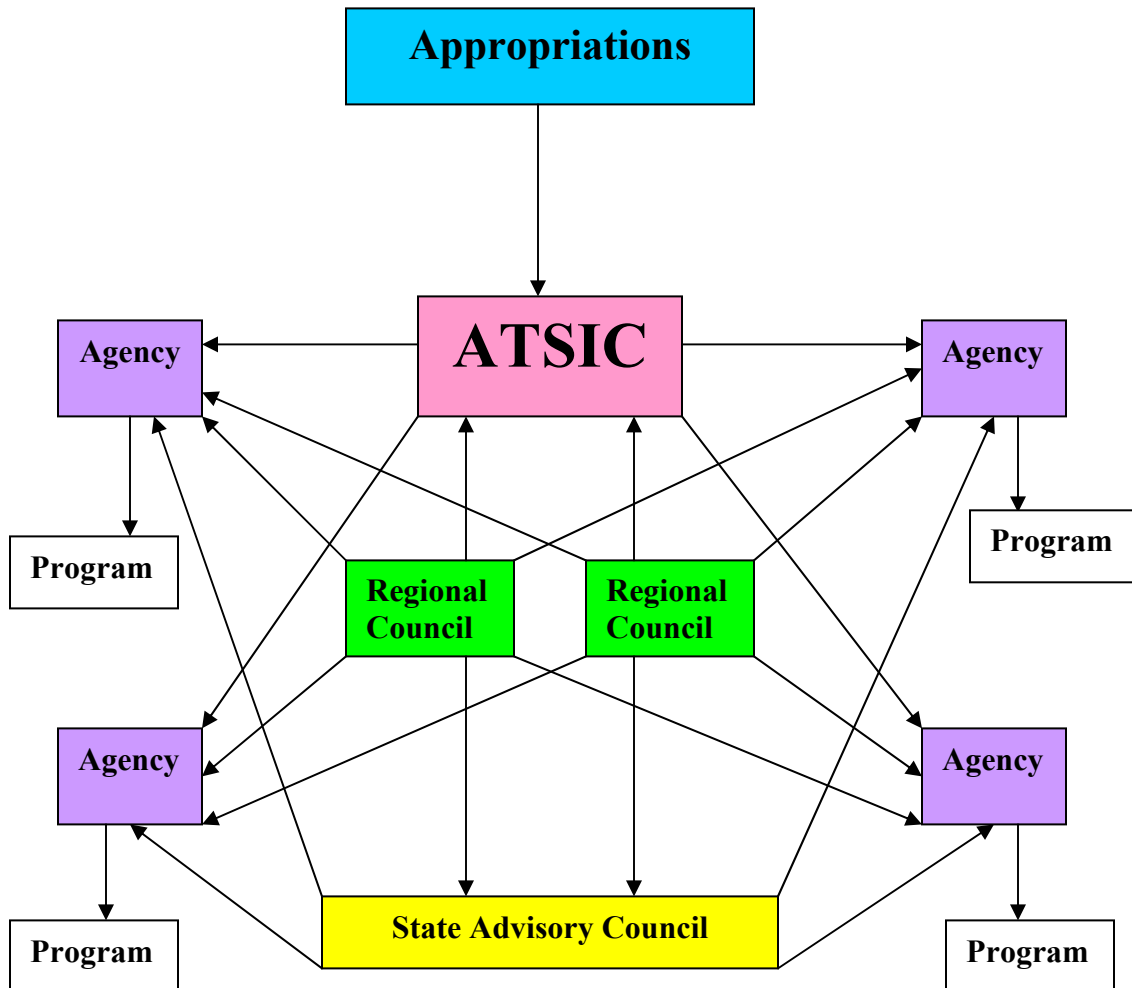
- A national body with links to regional bodies. The relationship between the two should be articulated with the national body being guided by the priorities set by regional bodies.
- Regional bodies should reflect existing representative structures, not set up a competing advisory body.
- A state and territory government interface. Each state and territory should have an advisory body to advise on Indigenous policy and programs and to co-ordinate policy and programs from the federal level. Currently State and Territory Governments set up various and numerous Indigenous advisory

committees on different matters. They could seek alternative advice from other bodies if they do not like the advice being given from ATSIC. An improved cohesiveness of ATSIC to provide policy advice would assist in preventing the forum shopping by state governments.

- An appropriation that provides the national body with leverage in its policy and program priorities. Significant appropriations – attached to high transparency requirements – allow a national body to have more power of persuasion when it comes to deliverables to government and Indigenous peoples.
- The outsourcing of programs to other agencies so the core business of the national body is policy-making and monitoring of program delivery. The outsourcing of the service delivery functions would increase capacity within the national body as it would be focused only on policy development rather than diverting focus to service delivery programs.
- The active co-operation of other agencies and the support of COAG for the role, policies and decisions of the national body; and,
- Education of public agencies and stakeholders, particularly the Indigenous community, about the roles, responsibility and processes of the national representative body.

2.2. Structure

Using these principles, we believe a national structure would build upon the strengths of the ATSIC model and alleviate some of its weaknesses. It would preserve the important role of the Regional Councils, increase the leverage the national body has through their appropriations, allow focus on policy and monitoring by outsourcing programs and service delivery and provide for a state/territory government interface within the structure.



2.3 Principles of Representation

In reviewing the effectiveness of the national representative structure we would offer the five following principles:

- Representatives should be elected, not appointed. The national representative structure is a political model and as such it should have representatives that the community chooses, rather than appointees of government. Election will ensure greater community ownership and participation in the representative structure providing access to a wider diversity of views.
- Representation within the national representative structure should be done on a per capita basis. While this approach requires constant monitoring of populations and the redrawing of boundaries as that population alters, it also ensures the fairest weighting of voting across Australia. Further analysis of the implications of this appears at Appendix 1.
- Despite observations about low voter turnout in ATSIC elections, evidence supports the reality that as people see more relevance in ATSIC's role, their participation rates in elections is higher. More discussion of this appears at Appendix 2.
- There should be direct election of national representatives. Under the ATSIC system, the Regional Councils within designated zones elect Commissioners. This has meant that the person who ends up in the Commissioners position may not have been the person who most people within the area voted for. Direct election has two benefits. It ensures a stronger democratic process on the basis that people will have a greater sense that the person elected Commissioner is selected through a process they have been allowed to participate in. Secondly, while many women have been elected to Regional Councils not many have been elected as Commissioners. Direct election would negate political manoeuvring, unlock the numbers games within the Regional Councils and Zones and open the election process to a broader range of candidates who appeal to the constituency.
- Representative structures within the state level should seek to incorporate and compliment, not compete with existing structures. This would be a matter for each

state through an appropriate consultative process with Indigenous peoples in each jurisdiction. An example of how this approach could work in New South Wales appears at Appendix 2.

Recommendation 1.

That the *Aboriginal and Torres Strait Islander Commission Amendment Bill* be rejected and the current structure be retained and reformed.

Recommendation 2.

Reform the current representative model to improve the ability for ATSIC to influence policy and program delivery for Indigenous Australians by:

- **increasing the appropriations to ATSIC so it can direct and monitor all key areas of Indigenous program delivery and policy-making;**
- **creating a state government interface within the ATSIC structure;**
- **providing ATSIC with executive authority;**
- **defining the relationships between the CEO, Board, Minister and Regional Councils in its enabling legislation;**
- **outsourcing program delivery to agencies so that ATSIC can concentrate on its policy-making and monitoring functions;**
- **providing for the direct election of Commissioners.**

3. THE ATSIC REVIEW, THE ABOLITION OF ATSIC AND THE ATSIC BILL

In November 2003, the Federal Government had announced a review that would: *examine and make recommendations to government on how Aboriginal and Torres Strait Islander people can in the future be best represented in the process of the development of Commonwealth policies and programs to assist them. In doing so the reassessment will consider the current roles and functions of ATSIC.*”

While a cursory reading this mandate would imply a whole-of-government review with particular attention given to ATSIC, the review focused almost exclusively on ATSIC. This was evident in its Discussion Paper that read as a litany of complaints about the agency without analysis or context.

The review, in its Final Report, recommended a regional approach. Although there are inherent advantages to the focus on regional governance, there was little data to support this as a more effective and efficient model of governance. It would seem that many of the complaints that the Review Panel received about the lack of accountability and transparency in governance and, of nepotism and dissatisfaction with funding decisions, were just as likely at the regional level as they were at the national level. If the review recommendations were to be revisited, they would warrant greater scrutiny and analysis about the proposed regional approach. It is hoped that the COAG trials that are currently underway will provide some of that analysis.

The Review was used by the Federal Government to support its assertion that ATSIC was a “failed experiment” and did not have community support. This analysis conveniently misread dissatisfaction with ATSIC and calls for its reform with calls for its abolition. It must be emphasised that the Federal Government has not waited for the legislative changes. Instead, it moved the programs out of ATSIC/ATSI and effectively neutered the agency while the Bill remains in the Senate.

Government rhetoric that their new arrangements are based on the COAG trials requires further analysis. While a whole-of-government approach is one that is an innovative and necessary exercise for the improvement of service delivery and policy development, the trials have yet to be assessed so their results are unknown. It should be the cornerstone of any further policy direction that there be clear evidence that benefits

will arise as a result of new processes. Until there is clear evidence from the COAG trials that this approach does generate improved results for Indigenous families and communities, it is fair to say that arrangements made on those unassessed initiatives are a greater “experiment” than ATSIC is.

The *ATSIC Amendment Bill* has not yet passed the Senate, however, this has not stopped the Federal Government effectively ending the role of ATSIC Commissioners and, through Ministerial direction, the role of the Regional Councils. It also contains further changes to the arrangements that have already been put in place by the Federal Government and are worth noting:

- The Bill, by abolishing the ATSIC Board, the Regional Councils and the Torres Strait Islander Advisory Board, removes the representative voice of Indigenous peoples from effective participation in policy-making, service delivery and monitoring the performance of government programs. The Bill removes any legitimate representative Indigenous voice in the government.
- The Bill removes key assets – the Housing Fund and the Regional Land Fund – from the direction of Indigenous led priorities to the control of the Minister. Although the Housing Fund is being transferred to Indigenous Business Australia and the Regional Land Fund is being transferred to the Indigenous Land Corporation, both of those bodies have boards that are appointed by the Minister and therefore cannot be said to be representative.
- Although the Regional Councils are retained for a further twelve months under the Bill, their roles during this transitional period in both advice and resource allocation, have been diminished.
- The Bill proposes to remove any involvement of Indigenous peoples from eleven separate pieces of legislation ranging from receipt of notice, to advice and/or nomination on board membership, to direct program administrative roles. This extension of the eradication of the ATSIC Board and Regional Councils are a further way in which the voice of Indigenous peoples is being removed from the deliberations and decision-making in the realm of the Commonwealth. Positions that were formally filled by members of the elected arm are now to be filled by Ministerial appointments.

- Changes to the *Environment Protection and Biodiversity Conservation Act 1999* will mean that provisions requiring the Minister to inform and invite comments from ATSIC after receiving a proposal to take an action have been removed.
- Changes to the *Native Title Act 1993* essentially transfers the roles previously performed by ATSIC to the Departmental Secretary for the responsible agency (DIMIA). These roles include:
 - recognition of bodies as Native Title Representative Bodies; and
 - decisions over the funding of Native Title Representative Bodies.

These changes empower the Federal Government to make decisions about which Native Title Representative Bodies to fund and are of concern for two reasons:

- There is too little separation between the part of government that decides which native title bodies, and therefore which native title claims are to be funded (DIMIA), and the government department that native title claims will be run against (Attorney-Generals).
- There is a view, already expressed by senior 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.

Recommendation 3.

The recommendations in the ATSIC Review should inform the ATSIC reform process with further analysis of the effectiveness of regional governance models. In particular, this analysis should be informed by the assessment and results of the COAG trials. Particular attention should be paid in this process to a full analysis and assessment of the COAG trials.

4. THE NEW ADMINISTRATIVE ARRANGEMENTS

The parliament has not had to pass the *Aboriginal and Torres Strait Islander Commission Amendment Bill 2004*, for the government to embark on its new direction. The arrangements now being put in place have usurped the intent and scrutiny of the legislature and its processes. This new direction is testament to the assertion that determined bureaucracies do not need the mandate and primacy of the parliament. Also in this process, ATSIC has essentially been bypassed and neutralised as a relevant and legitimate voice of Indigenous Australia.

The strength of the new administrative arrangements lies not in its replacement of Indigenous voice, but with its attempts to seek to better coordinate agencies who have responsibility for service provision to and policy development for Indigenous peoples and their communities. For this reason, the eight COAG trials offer the promise of the development of innovation in inter-agency coordination.

However, there are several major problems with the new administrative arrangements as they currently exist. We highlight the following:

- The changes to the administration of Indigenous affairs at the national level have been done swiftly. They were made without vision, planning or consultation. The development of the new regime has been ad hoc, reactionary, and without solid evidentiary foundation. There is no evidence that the assumptions underpinning the new arrangements are workable. The COAG trials, which may provide some support for a new approach, are yet to be assessed; their outcomes, at this stage, are purely speculative. In fact, the failure of governments to make significant changes to the socio-economic indicators in areas where they have had sole fiscal responsibility – health and education – shows that there is much reason to be sceptical about the mantra of mainstreaming.
- The replacement of elected representatives at the national level by a group of handpicked appointees fundamentally changes the nature of the advice given. While appointees may come from diverse backgrounds and bring a range of expertise and skills, they are not in positions where they have the legitimacy of being able to put forward views on behalf of Indigenous peoples. The elected positions within the ATSIC system were, at their heart, political positions. The

Commissioners, Regional Council Chairs and members of the Regional Councils, all had some legitimacy from the people who elected them and were accountable to that constituency for views they expressed at the regional and national levels. This independent and accountable Indigenous voice has been lost with the move towards an appointed group of advisors.

- The removal of Regional Councils will take away a key level of representative Indigenous governance. Regional Councils, through their planning processes, offered a key way in which Indigenous communities across Australia could identify and present their priorities to be considered in the allocation of programs and the development of policy. The announcement of the structural changes provide for the Regional Councils to be retained for an interim basis until 30 June 2005, and explicitly identifies the Regional Councils as transitional vehicles to smooth the introduction of the revised arrangements. In short, Regional Councils have been tasked to facilitate and smooth their own demise - a task many to their credit have taken to ensure that the impact on the Indigenous communities and individuals they represent is minimised.
- The new arrangements focus more on service delivery than policy development. The singularity of the focus on the machinations of program delivery, although vitally important, are emphasised at the expense of serious consideration about the development of effective policy. In this way, the new arrangements only replicate the inability of ATSIC to find the appropriate balance between service delivery and policy development. In addition, the political aspects of ATSIC – the advocacy, representation and lobbying roles – have been cast aside in the rush for primacy in the rhetoric on program delivery.
- There has been little consultation with Indigenous peoples about the new arrangements. This is not only reflective of the way in which the new arrangements have been a form of “policy on the run”, it also shows how little interest there is in including Indigenous views within the development of these new arrangements. It will ensure that Indigenous people feel no ownership of the new arrangements. The failure to include the broad and representative views of Indigenous peoples into the new arrangements and into the policies and programs

that will result from them shows how little value is given to the perspectives of the key stakeholders – those who will be most affected by – these new arrangements.

- The transfer of staff from ATSIS to other agencies has resulted in a loss of corporate knowledge that will not be replaced. The public service lost most of its senior Indigenous bureaucrats as part of the transfer. The five senior members of staff at the Office of Indigenous Policy Coordination are non-Indigenous.
- The Federal Government has explicitly indicated that it sees the needs of remote and discrete communities as having a greater priority than the needs of those Indigenous Australians residing in urban and rural areas. The implicit rationale being that Indigenous Australians residing in non-remote communities should be serviced by the mainstream and Indigenous specific effort should be directed toward the remote and discrete communities. The needs of Indigenous Australians across the whole of Australia are great and the resources available are insufficient to meet the demand. The terms of reference for the Commonwealth Grants Commission Report on Indigenous Funding were explicit and when questioned, were vigorously defended. The focus of that inquiry was to develop a relative needs index, and not, to identify absolute needs. The only possible rationale being to provide a measure by which to redirect resources. This very policy position was explicit in the recent dialogue around the negotiations in respect of the Commonwealth State Housing Agreement. The move to mainstreaming or direct service delivery by line agencies is a further mechanism by which this implicit policy direction can be pursued. The potential for the escalation of cost shifting initiatives is enhanced under the mainstreaming focus and needs careful monitoring to ensure that in governments' pursuit of this objective, the needs of all Indigenous Australians are considered. The potential for some sectors of the Indigenous community to be sacrificed during disputes with governments is high and should be monitored diligently.
- These new arrangements are based on a regionalised focus in which Regional Partnership Agreements are negotiated with communities (that are yet to be revealed), but in reality will be the amalgam of existing organisations. These

Partnerships are to scope and customise the Government's investment strategies in respect of each region and comprise a schedule of principles and priorities. Regional Partnership Agreements are to be supported by Shared Responsibility Agreements at the community level, which are to be detailed statements of mutual obligations, agreed priorities and shared responsibilities. Who these agreements are to be negotiated with is yet to be revealed. Whilst this approach does have merit in terms of engineering the desired response to an investment by government, it cannot by itself address the complexities of Indigenous disadvantage. It amounts to a 'carrot and stick' approach to interventions and can only have impact while the 'arrangement' is in place. The examples identified to date have only focussed on interventions aimed at the symptoms. By its very nature the arrangement is short term in focus and unsustainable with respect to the medium to long-term impact. Development strategies and approaches have not as yet been evident in any of the Government's information on the new arrangement.

Recommendation 4.

If the Bill is to be passed, it should be amended to ensure that the new national arrangements include the following elements:

- **a national Indigenous representative body of elected, not appointed representatives;**
- **retention of regional representative bodies and their planning processes;**
- **a mandate for the national body to develop policy and monitor government implementation and control over program direction even though the delivery of programs is outsourced to other government agencies.**

Recommendation 5.

Equal focus on the needs of urban, rural and remote communities with specific policy and program delivery to all Indigenous communities, not just those in remote locations.

5. CONCLUSION

ATSIC is an innovative structure which attempts to combine both a political and representative structure in the one functional body. The *ATSIC Amendment Bill* now seeks to abolish ATSIC based on the ‘assertion’ that ATSIC has lost the confidence of Indigenous peoples and the ‘assumption’ that ATSIC must be removed to enable government agencies to improve their performance. The current changes to the administrative arrangements for Indigenous people that seeks to abolish ATSIC are driven by two ideologies:

- the elimination of Indigenous representation from effective participation in government policy and program delivery; and
- the transfer of Indigenous specific programs to mainstream agencies.

These changes have taken place without adequate consultation with the Indigenous people who are most effected by the new directions.

The effective abolition of ATSIC has been done swiftly, without any clear plan or direction as to what should replace it and without any consideration of the strengths and weaknesses of the current model. The attempt to put new arrangements in place was done in an ad hoc manner and is an example of “policy on the run.”

Although the ATSIC Review was cited to support the new direction, the new arrangements are not reflective of the general directions recommended by the Review Panel, namely, that the ATSIC structure should be retained and reformed with governance models within the regions strengthened. Too much focus was placed on the personalities on the ATSIC Board rather than on real analysis of what was working and what wasn’t in service delivery and policy-making. Governments contributed to misinformation about ATSIC by perpetuating the myth that ATSIC has responsibility for service provision and policy development in areas where it did not. This scapegoating undermined ATSIC in the eyes of its Indigenous constituency and in the eyes of the broader community. The Federal Government has acknowledged the difficulty of co-ordination between agencies in service delivery and its COAG trials are the most promising initiative it has had to date. It should be noted, however, that the effectiveness of these trials have yet to be assessed and therefore cannot provide a sound basis for the new policy direction that the Government claims.

We argue that the direction that future administrative arrangements should take should be to retain a national representative structure, one that builds on the strengths of the ATSIC model and works to eradicate or alleviate the weaknesses of that structure. This approach rejects the ideology of mainstreaming and embraces the principle that policy and program delivery for Indigenous peoples are more effective if there is involvement and ownership of those programs and policies by Indigenous peoples.

This is an approach that retains the regional governance structures as important support mechanisms to a national body. It would require enabling legislation that articulated more clearly the relationship between regional bodies and the national body. Ours is an approach that also recognises the need for these levels of governance to be accompanied by State and Territory bodies. These regional and state bodies will be more effective if they work more closely with existing representative models in those jurisdictions. Our preferred direction would also see the national body increasing its focus on policy-making, monitoring and outsourcing the delivery of programs.

Our main concerns about the new administrative arrangements are that they are not based on solid research and analysis. Rather, they are a response to political brinkmanship between the major parties and are based upon ideology that has not produced meaningful outcomes in the past. The removal of Indigenous voice from federal government arrangements has been coupled with the removal of Indigenous people from high level positions within the federal public services.

The new direction, led by ideology and without strong evidentiary basis for the change in direction, sets Indigenous policy and service delivery on a course that is far more experimental than the arrangements under ATSIC.

Further, for the majority of Indigenous people, those of us who live in urban or rural communities, the Federal Government preoccupation with remote community needs and the ideology that those of us in rural and urban centres are able to access mainstream services is the cause of much concern. There is more evidence that mainstream services have failed to meet the needs of Indigenous people than there is to support the view that they produce better outcomes. Urban and rural communities face a plethora of specific socio-economic issues that require commitment to targeted programs and policies from relevant federal government agencies.

In the media feeding frenzy that precipitated the proposed abolition of ATSIC, *The Australian Financial Review* provided insightful commentary when it stated “*that the evidence suggests that much public spending has been wasted because it has been formulated on assumptions that are wrong.*” It added, “*ATSIC only plays a small role in these issues*” and that “*a better course would be to widen the governments review so that the full extent of the programs can be assessed against the full extent of the problems*”.¹

¹ *The Australian Financial Review* 24 March 2003. At p.62.

SUMMARY OF RECOMMENDATIONS

Recommendation 1.

That the *Aboriginal and Torres Strait Islander Commission Amendment Bill* be rejected and the current structure be retained and reformed.

Recommendation 2.

Reform the current representative model to improve the ability for ATSIC to influence policy and program delivery for Indigenous Australians by:

- **increasing the appropriations to ATSIC so it can direct and monitor all key areas of Indigenous program delivery and policy-making;**
- **creating a state government interface within the ATSIC structure;**
- **providing ATSIC with executive authority;**
- **defining the relationships between the CEO, Board, Minister and Regional Councils in its enabling legislation;**
- **outsourcing program delivery to agencies so that ATSIC can concentrate on its policy-making and monitoring functions;**
- **providing for the direct election of Commissioners.**

Recommendation 3.

The recommendations in the ATSIC Review should inform the ATSIC reform process with further analysis of the effectiveness of regional governance models. In particular, this analysis should be informed by the assessment and results of the COAG trials. Particular attention should be paid in this process to a full analysis and assessment of the COAG trials.

Recommendation 4.

If the Bill is to be passed, it should be amended to ensure that the new national arrangements include the following elements:

- **a national Indigenous representative body of elected, not appointed representatives;**

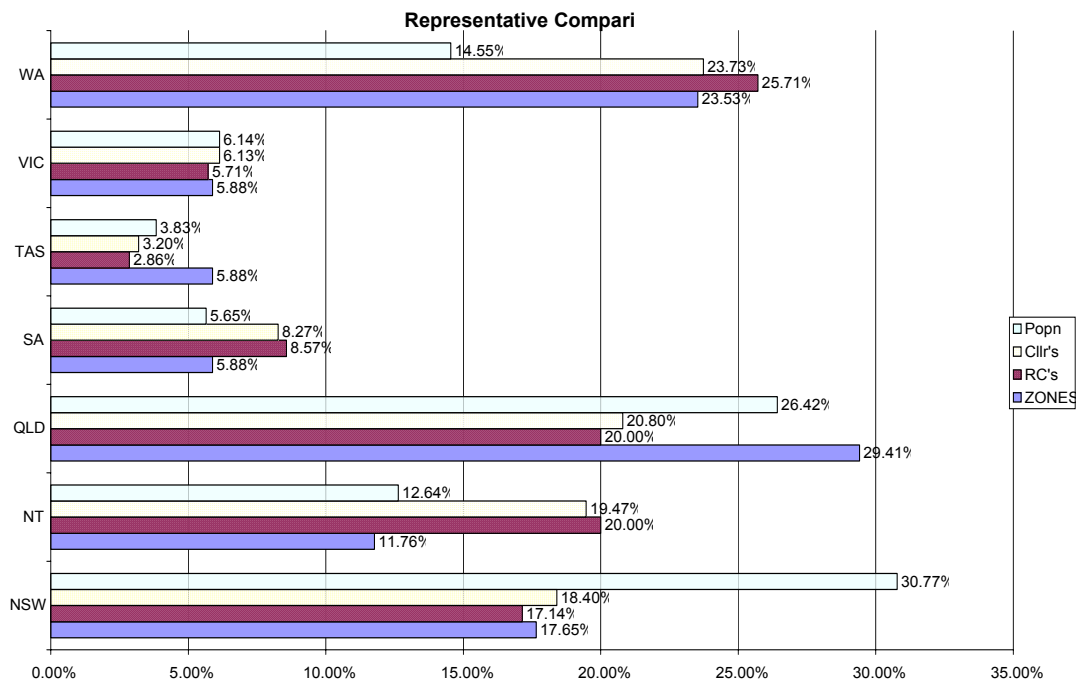
- **retention of regional representative bodies and their planning processes;**
- **a mandate for the national body to develop policy and monitor government implementation and control over program direction even though the delivery of programs is outsourced to other government agencies.**

Recommendation 5.

Equal focus on the needs of urban, rural and remote communities with specific policy and program delivery to all Indigenous communities, not just those in remote locations.

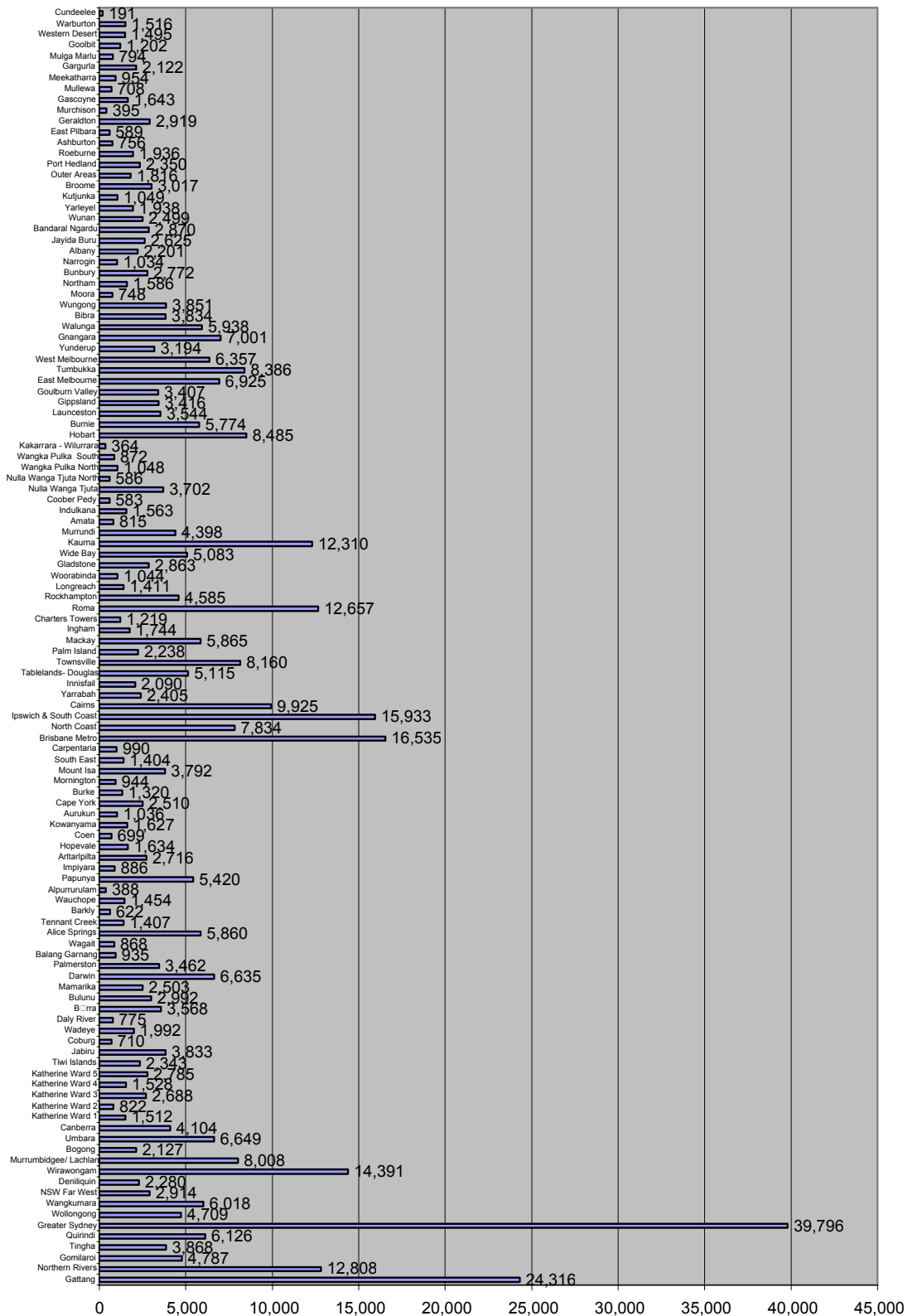
APPENDIX 1. Representative Population Comparisons

Any analysis of a representative structure must include a proper focus on relative population. The basis of all representative structures in Australia is per capita representation. The current ATSIC and Regional Council relativities do very little to give confidence that the representative makeup can be truly legitimate and therefore provide the credibility so vital to the validity of the Indigenous representative structure. The relativities require transparent and rational reassessment. The following graph clearly illustrates the current inequities. The starkest inequities exist in respect of Western Australia (where 14.5% of the population is represented by 23% of the Regional Councillors, 25.7% of the Regional Councils and 23.5% of the Commissioners) and New South Wales (where 31.7% of the population is represented by 18% of the Regional Councillors, 17% of the Regional Councils and just 17.6% of the Commissioners.)

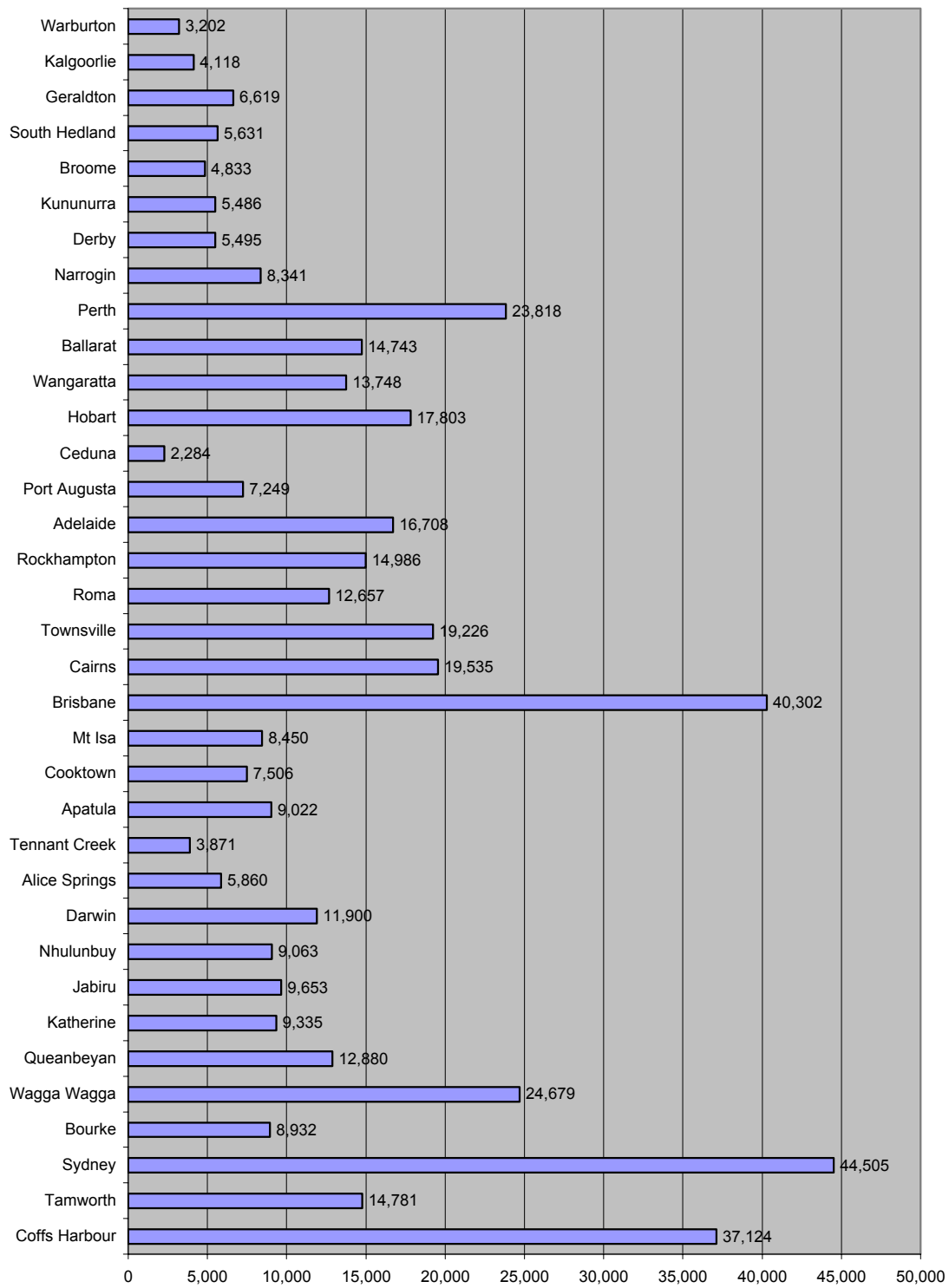


The following data further illustrates how over-representation in the political structures has occurred for the Northern Territory and Western Australia. Under-representation has occurred for the populations of New South Wales and Victoria.

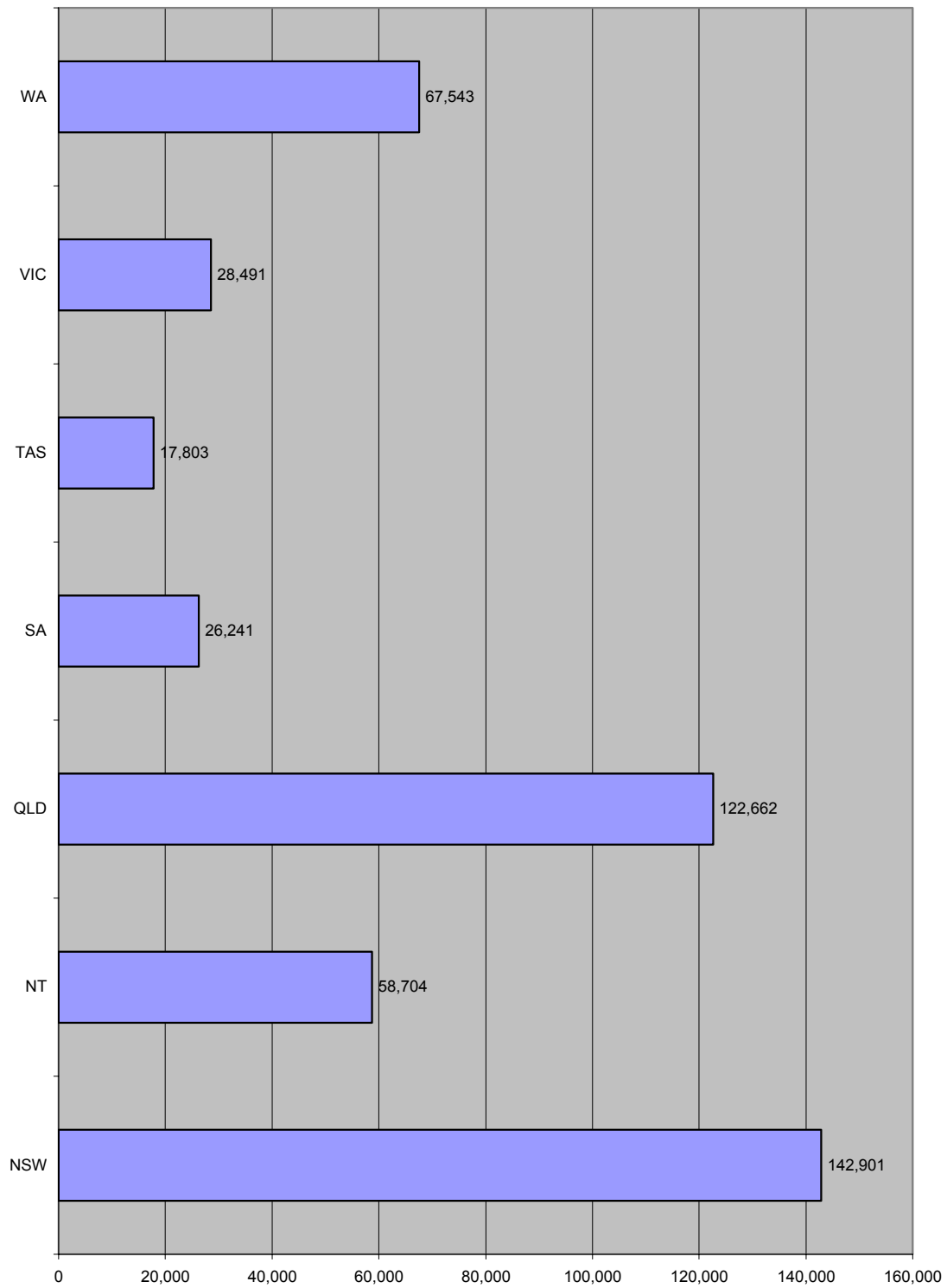
Ward Population Comparison



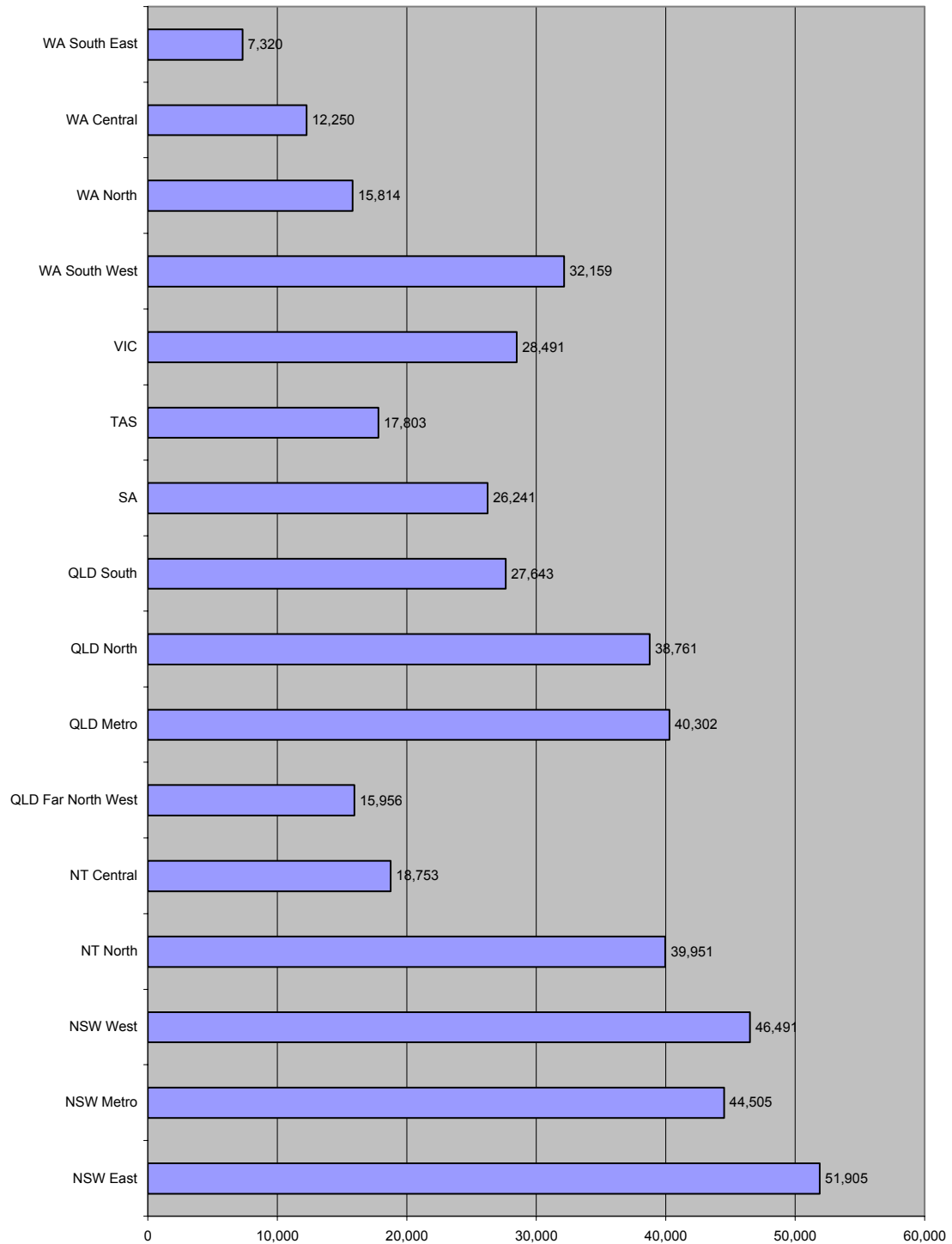
Regional Council Population Comparison



State Population Comparison



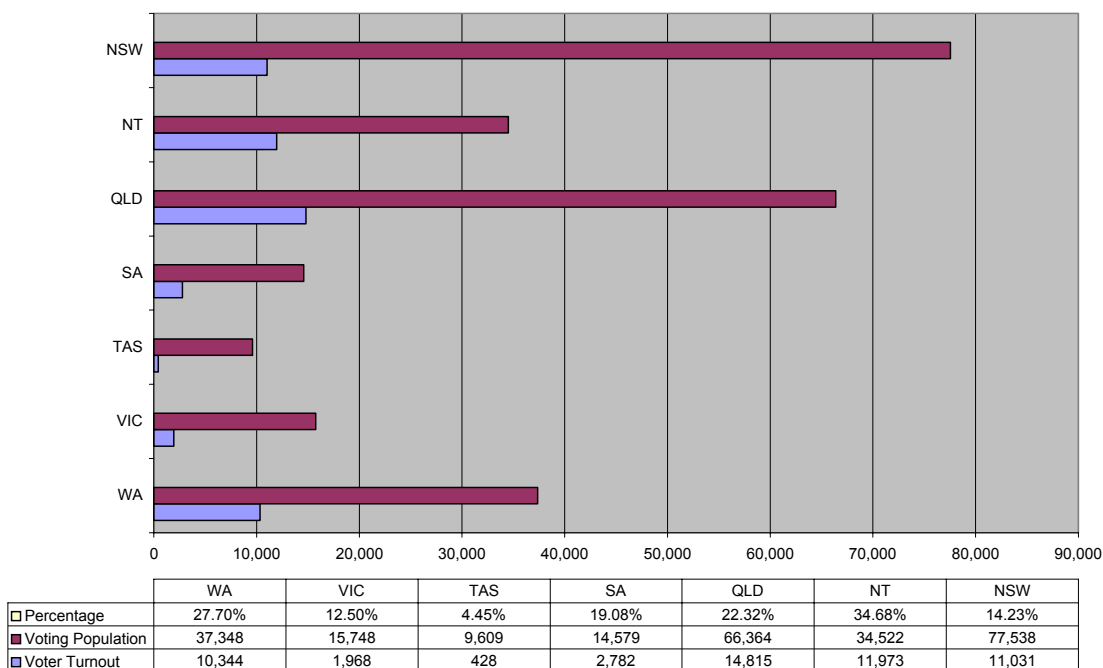
Zone Population Comparison



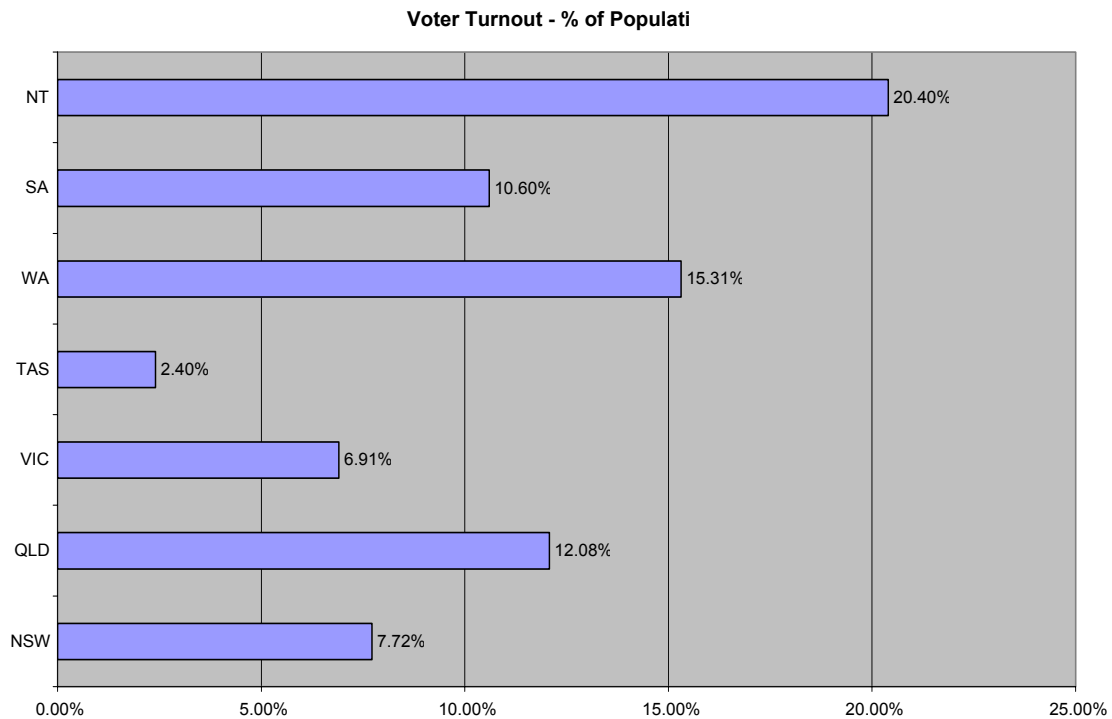
APPENDIX 2. Voting Analysis

The low voter turnout for ATSIC elections has generated much debate, but much of this comment has been without consideration of the facts. The two graphs below identify the actual voter turnout and comparisons between the jurisdictions. The first graph shows that voter turnout was highest in the areas of Western Australia, Northern Territory and Queensland. These are the areas where there are higher proportions of communities who would see the difference ATSIC makes at the ground level – CDEP programs, housing, etc. It should be noted that they are also the areas in which there is over-representation within the ATSIC structure and therefore have had a stronger ability to direct resources and develop policy.

Comparison between Actual Voter turnout and Voting Population

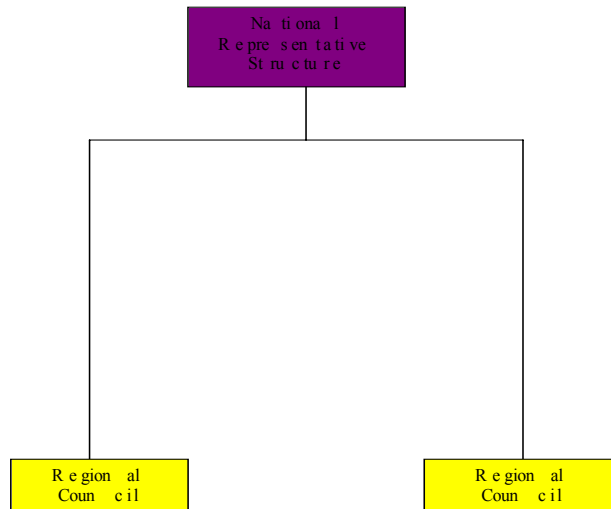


The other point which needs to be made and considered is that ATSIC elections are not compulsory and Indigenous Australians act and behave in many respects as do the rest of the Australian population. That is, they are politically complacent and apathetic. This factor coupled with the low levels of social capital in Indigenous communities all contribute to a low formal participation rate. Of those Indigenous Australians who are politically active some choose not to participate in the “mainstream” political processes.

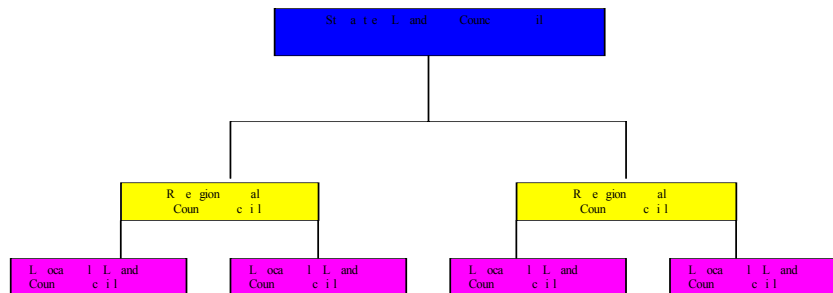


APPENDIX 3. Integrating National Representation into an Existing State Structure: A New South Wales Example.

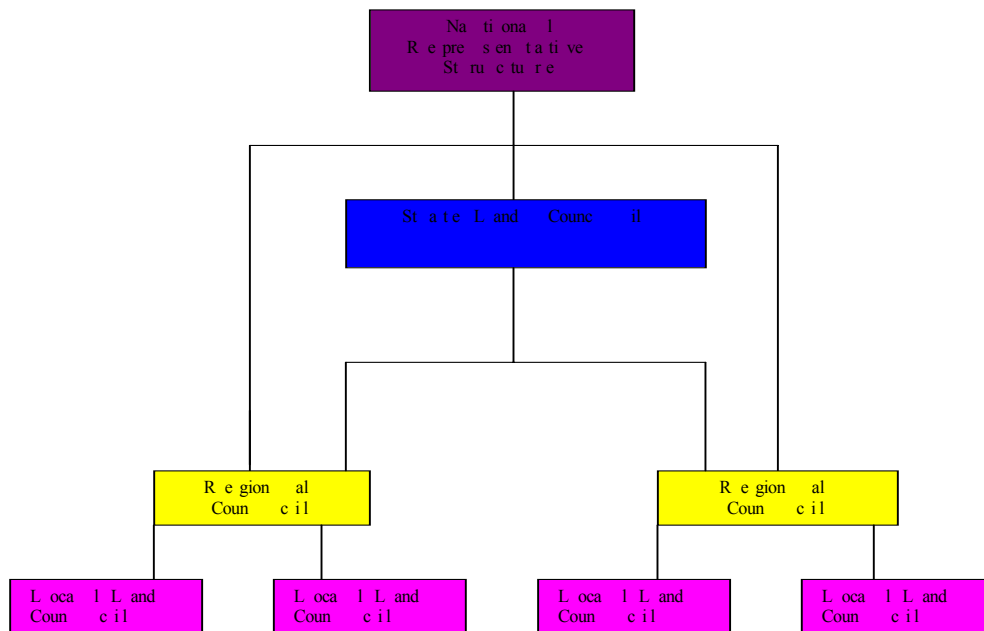
The current ATSIC structure has a regional and a national level:



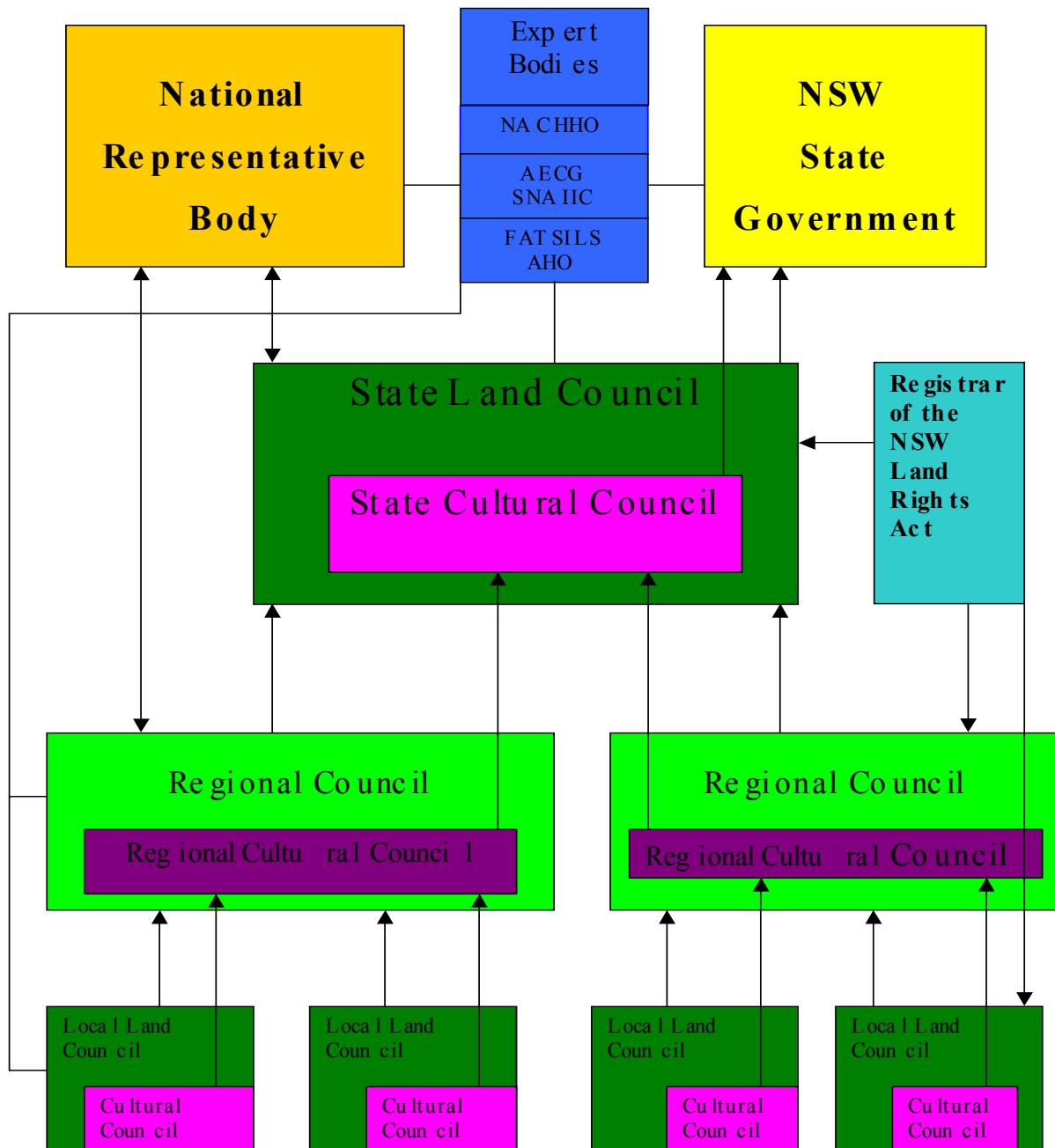
In New South Wales, the primary representative body for Indigenous peoples is the New South Wales Aboriginal Land Council regime. This regime has a three-tiered structure: state, regional and local levels.



Integrating both the ATSIC and the Land Council systems could provide a representative model for New South Wales that would be structured as illustrated below:



Integrated into the national representative body would give a model like this:



This New South Wales model would have the following characteristics:

- It utilises Land Councils that are already in place as a representative structure.
- Land Councils have the potential to create an economic base.
- Traditional owners need to have a structure through which to deal with issues of native title, heritage protection and other cultural matters.
- Regional Land Councils engage in the regional planning processes that are co-ordinated at the national and state level.
- State Cultural Councils advise government on issues of native title, heritage protection, cultural matters and resource management.
- Changes to the *Aboriginal Land Rights Act 1983 (NSW)* would allow Local, Regional and State Land Councils to increase their roles and functions and their ability to deal with land bases.
- The Registrar of the Aboriginal Land Rights Act would have increased powers to investigate complaints about membership and elections, etc. The Registrar would also have a role in approving land deals.
- Expert bodies advise the State Land Council and the National Representative Body by being involved in expert committees on areas such as housing, arts, languages and education. They may also provide advice to government but need to ensure that they are working with a policy agenda consistent with the State and National bodies.