Submission

to

SENATE SELECT COMMITTEE ON THE
ADMINISTRATION OF INDIGENOUS AFFAIRS

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Signed:

Introduction

This paper deals with the inquiry's terms of reference point (c.) "related maters" and aims to explore the issues that have emerged as a consequence of the establishment of Aboriginal and Torres Straits Islander Commission (ATSIC) and its subsequent proposed abolition by the current Federal and opposition Governments.

It is a well known fact that the Commission, since its establishment had been plagued with a plethora of Governmental limitations in funding and regulation of program activity to a degree where ATSIC programs struggled to succeed. As a consequence, political observers could not be blamed for their negative perceptions of ATSIC, particularly if awareness of these issues is based purely on what one is fed by the predominately non-indigenous media.

Through this misrepresentation, non-indigenous Australians believe the ATSIC was the political representative body for all Aboriginal and Torres Strait Islander people in Australia, yet this is clearly not so in principle or in practice. Under the auspices of the Ministry for Aboriginal and Torres Strait Islander Affairs with a non-indigenous Minister, ATSIC did not have any real political status, as it was primarily a welfare service delivery department.

While ATSIC did have a political arm, its primary function was maintaining welfare, as it did not have a mandate in education, health or employment, apart from work for the dole. Therefore ATSIC elections were in essence, elections to determine local, regional and national representatives to manage the delivery of supplementary welfare services and not necessarily the political representatives of Indigenous people.

As we will discover, the ineffectiveness of ATSIC programs and the disjuncture in the representative mandate of ATSIC Councillors and Commissioners is due to the inconsistencies drafted within the ATSIC Act and in correlation to other Acts, rather than emerging from an apparent wholesale lack of character in Indigenous or ATSIC leaders. In addition to these factors the following paper demonstrates that the ATSIC Act already contains the necessary provisions to evolve into another entity and that the intent to do so is evident within section 113 subsection 6 & 7 of the ATSIC Act.

Thus in response to both Federal party alternatives, this submission proposes a model for discussion to establish the most appropriate form of Indigenous Local State and Federal Indigenous representation in the context of the ATSIC *experience* and the operation of other State, Territory and Commonwealth Acts relative to Indigenous interests and the self determination thereof.

To this end, this submission proposes the Federal Government, pursuant to section 113 subsection 6 & 7 of the ATSIC Act fully review and remedy the operation of the Act in relation to other Acts and instruments identified inconsistent with the intent of the ATSIC Act, and that the pursuant to this intent, the Government formally adopt the required reforms and or repeals to the Act to establish an alternative elected Federal Indigenous representative body how so ever named and one which embodies the principles of democracy and Indigenous self determination.

What is “Self Determination”

In defining “self determination” Professor Erica-Irene Daes Chairperson of the United Nations Working Group on Indigenous Population in relation to Indigenous people's and Nation States says:

> 'The right of internal self-determination is best viewed as entitling a people to choose its political allegiance, to influence the political order under which it lives, and to preserve the cultural, ethnic, historical and or territorial identity'.
>
> 'Here again self-determination does not resolve the question of what constitutes the term 'a people' for the purposes of self-determination. Governments have often sought to narrow the definition of 'peoples' in order to limit the number of groups entitled to exercise a self determination claim'.

More to the point though,

> 'States enjoying full sovereignty and independence, and possessed of a government effectively representing the whole of their population, shall be considered to be conducting themselves in conformity to the principles of equal rights and self-determination as peoples as regards to people belonging to a territory without discrimination to race, creed or colour'.
>
> 'Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair totally or in part the territorial integrity of such sovereign and independent states, conducting themselves in compliance with the principle of equal rights and self determination of peoples'[1].

The meaning of this is plain. Once an independent state has been established and recognised, its constituent people must express their aspirations through the national political system and not through the creation of new states. That is, unless the national political system becomes so exclusive and non-democratic that it no longer can be said to represent the whole population. This is the case in Australia as the percentage of Indigenous eligible voters is so small, that participation in mainstream elections provides little if any agency for Indigenous political aspirations and imperatives.

Indigenous Representation

The recognition of this issue represents the justification for an Indigenous specific representative body and election process and forms the basis for the establishment of ATSIC. Thus Section 113 Subsection (6) of the ATSIC Act pertaining to the conduct of ATSIC elections states,

(6) In making rules under subsection (1), the Minister shall have regard to the desirability of providing for Regional Council elections to be conducted in a manner similar to the manner in

[1] Professor Erica-Irene Daes’ Chairperson of the United Nations Working Group on Indigenous Population -1990

which elections for the Parliament are conducted with a view to increasing Aboriginal and Torres Strait Islander understanding of, and participation in, elections for the Parliament.

The purpose of this provision is to increase Indigenous peoples understanding of and participation in Parliamentary elections. On the basis of this intent, it then follows that the Commonwealth also holds the view that Indigenous people should be represented in Parliament by Indigenous people. The way sub section (6) partially achieves this objective is that it only provides those Indigenous people eligible to stand and or vote in ATSIC elections with this experience and as this paper will demonstrate, up to 60% of Indigenous eligible voters did not vote at ATSIC or general elections for the decade after ATSIC was established.

Thus, sub section (6) in effect means that to achieve an increase in Indigenous participation in elections for the Parliament, requires Indigenous candidates that are either Independent or a member of existing Parties, as there is currently no recognised Federal Indigenous Party. In addition to this intent, Section 113 Sub Section (7) ATSIC Act 1990, provides the Minister responsible with the broadest possible powers with regard to the operation of the Act to changes the Act, to a degree where the Minister is in no way confined. Section 113 subsection (7) states;

> *(7) Nothing in subsection (6) prevents the Minister making rules:*
>
> > *(a) that take account of the special circumstances of Aboriginal persons or Torres Strait Islanders; or*
> >
> > *(b) that will enable significant reductions in the costs of conducting Regional Council elections.*
>
> *(8) Rules made by the Minister under subsection (1) are a disallowable instrument for the purposes of section 46A of the Acts Interpretation Act 1901 .*

[Source: ATSIC 2003]

Establishment of ATSIC – 1990

Before we embark on the process of change we need to identify the critical issues arising from the experiences provided by ATSIC over the past decade. To begin, the Australian Electoral Commission's (AEC) concise description of ATSIC, on face value, presents an image of democratic transparency that promotes ATSIC as the legitimately elected representative body for all Indigenous Australians.

The Aboriginal and Torres Strait Islander Commission (ATSIC) was created out of the amalgamation of the Department of Aboriginal Affairs established in1968 and the Aboriginal Development Commission (ADC) established in 1987. ATSIC is an independent statutory authority and is Australia's national policymaking and service delivery agency for Indigenous people. ATSIC comprises both an elected arm and an administrative arm.

Through Regional Councils and the Board of Commissioners, Indigenous elected representatives are brought into the processes of Government. These representatives have power over decision making on policy and funding. The Australian Electoral Commission conducts ATSIC elections, on behalf of ATSIC.

[Source: Australian Electoral Commission 2003]

Yet an examination of the ATSIC Act reveals several key issues relating to ATSIC elections that stem from the original drafting of the Act in 1989-1990 that seriously challenges the legitimacy of ATSIC elected representatives. For example, the ATSIC Act 1990 Section 101 pertains to ATSIC elections and was drafted to be consistent with the Commonwealth Electoral Act amendment of 1984 which made it compulsory for Indigenous enrolment on the Commonwealth roll in order to participate in the non-compulsory ATSIC elections.

ATSIC Act 1990-Section 101

101 Persons entitled to vote at Regional Council elections
A person is entitled to vote at a Regional Council ward election if and only if:

1. the person is an Aboriginal person or a Torres Strait Islander; and

(a) either:

(i) the person's name is on the Commonwealth Electoral Roll and the person's place of living as shown on that Roll is within the ward concerned; or

(ii) the person is entitled to vote at the election pursuant to rules made under subsection 113(3).

[Source: ATSIC 2003]

In addition and in 1962, the Federal Government amended the Commonwealth electoral Act, which gave an Indigenous person who turned 18 years of age before 1984[2], the choice of whether to enrol on the Commonwealth Electoral roll.

It was not until 1962 when the Commonwealth amended the Electoral Act granting all Aboriginal people the Commonwealth vote and at the same time making it illegal to encourage Aboriginal people to enrol to vote[3]. Enrolment was voluntary but once enrolled, voting was compulsory. A failure to vote at either a local State or Federal election after enrolment attracted a fine.
[Source: Australian Electoral Commission 2003]

It is unknown how many Indigenous people have abstained under the 1962 amendment, but figures of Indigenous 'actual voters' in ATSIC elections between 1990-2002 suggests that the majority of Indigenous eligible voters do not participate in either ATSIC or non-indigenous elections.

ATSIC Elections1990- 2002

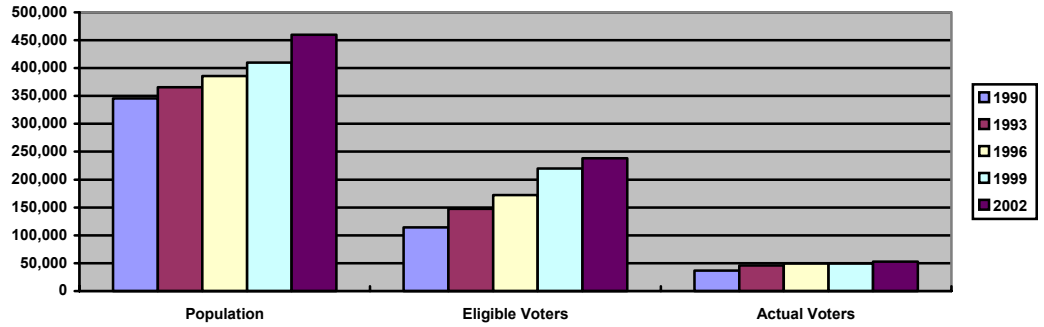
Year	Actual Votes	Eligible Votes	Total Pop
2002	52,280	246,790	428,000*
1999	49,252	219,997	403,000*
1996	49,550	172,305	386,049
1993	45,820	147,500	365,700
1990	37,000	114,000	345,349

*Extrapolated from the trend in Indigenous population growth between 90-96. Census data for 2001 indicates 410,000 Indigenous persons in the total Australian population.

[2] 1984 being the year of the most recent amendment to the Commonwealth Electoral Act making it compulsory for Aboriginal and Torres Strait Islander people to enrol and vote in Local, State and Federal elections.

[3] Western Australia and the Northern Territory extended State votes to Aboriginal people in this same year.

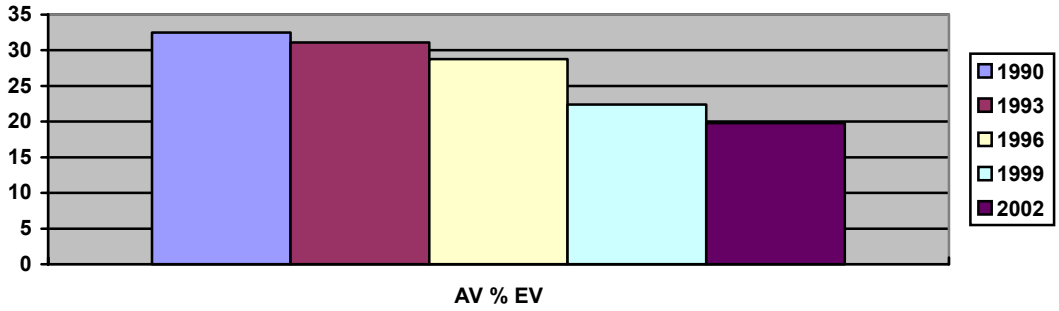
Figure 1. ATSIC Elections Voter participation 1990-2002



Source: ATSIC 2002

The difference between the 'actual voters' and 'eligible voters', approximately a 60% majority, are Indigenous peoples' who have either abstained from enrolling under the Commonwealth Electoral Act amendment 1962 and or are in breach of their obligations to enrol and or vote under the 1984 amendment. The voter turnout at ATSIC elections from 1990 to 2002 (Fig. 2) also demonstrates the degree to which this issue has impacted on Indigenous participation in ATSIC elections.

Figure 2. ATSIC Elections1990-2002 - Actual votes as a % of Eligible Votes



Source ATSIC 2003

Note: The figures for 2002 have been extrapolated from the trend in decline of Indigenous voter participation in ATSIC elections between 1990-99.

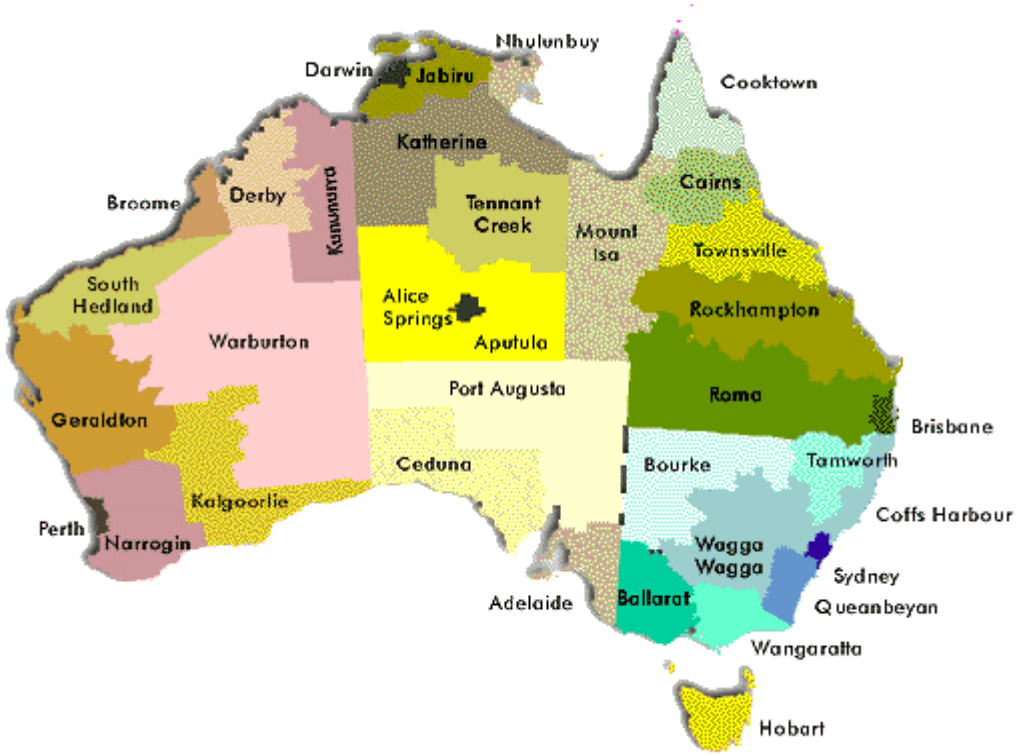
Regional Councils and Indigenous Electorates

Because the Commonwealth Electoral Roll does not differentiate between Indigenous and non-indigenous electors, the AEC was not able to accurately determine how many people were eligible to vote in the ATSIC elections. ATSIC provided estimates that there were for example, at the 1999 election, 219,997 Aboriginal and Torres Strait Islander people eligible to vote, if enrolled, which raises a myriad of concerns critical to transparency that could be addressed with the establishment of an Indigenous electoral roll.

The lack of a Commonwealth Indigenous electoral roll is not only inconsistent with Western principles of democracy, where by all elections require an electoral roll of

constituents eligible to vote, but also in the context of Indigenous relationships to country and kin, and the right to legitimately speak for both, it is also inconsistent with Indigenous representation and self determination. For example, the representative arm of ATSIC comprised 35 regional councils and the Torres Strait Regional Authority, nationally established under the ATSIC Act and is represented below.

Figure 3. ATSIC Regional Councils



Source ATSIC 2003

The Councils and Regional Authority are independent bodies and do not always consult with their local communities and or represent the interests of all Aboriginal and Torres Strait Islander people in their region. This is evidenced in the way ATSIC had facilitated the development of infrastructure critical to local interests such as for example, the Cultural heritage networks and programs resulting from the Commonwealth, State & Territory Cultural Heritage Legislation.

Cultural Heritage Legislation and Native Title Groups

The control of the Cultural Heritage programs are generally vested in incorporated Indigenous organisations established through funding from ATSIC, and these organisations do not always represent the views or interests of all Indigenous people in the community and particularly those who are Native Title claimants.

The resulting scenario is that in some communities Cultural Heritage programs are inconsistent with Native Title aspirations and actually undermine the already limited potential for a successful Native Title claim. This example demonstrates how Indigenous

relative legislation varies considerably in the recognition and interpretation of rights associated with legitimate Indigenous representation and authority.

It is therefore critical that in the development of an Indigenous representative body replacing ATSIC, Native Title groups are recognised as the legitimate Indigenous authority of country and representatives of community to provide the regional framework for national representation.

In addition and as the legitimate authority of country and community, Native Title groups are best placed to negotiate on a collective basis, a national treaty, and are already negotiating regional Indigenous land use agreements (ILUA's) across Australia.

In recognition of these emerging trends, State and Territory Governments are beginning to acknowledge Native Title Groups and the contribution these agreements make to the broader community. Memorandums of Agreement and Memorandums of Understanding have subsequently been established facilitating Indigenous rights in a context more relevant than that provided in current legislation relative to Indigenous interests.

Agreements and a Treaty

This is evidenced in Victoria, where the current State government is proposing to amend the State Parliament Constitution to include a preamble that acknowledges Indigenous rights in the context of the history of the State.

Irrespective of the bills merit in meeting Indigenous socio-political aspirations, the bill demonstrates the contextual evolution of the political relationship between the nation state and Indigenous peoples. The Victorian State Parliament, Constitution (Recognition of Aboriginal People) Bill, Exposure Draft reads as follows;

1) The Parliament acknowledges that the events described in the preamble of this act, occurred without proper consultation, recognition or involvement of the Aboriginal people of Victoria.

2) The Parliament recognises that Victoria's Aboriginal people-

    a. as the original custodians of the land on which the Colony of Victoria was established;
    b. have a unique status as the descendants of Australia's first people;
    c. have a spiritual, social, cultural and economic relationship with their traditional lands and waters within Victoria;
    d. have made a unique and irreplaceable contribution to the identity and well being of Victoria

3) The Parliament does not intend by this section-

    a. To create in any person any legal right or give rise to any civil cause of action or
    b. To affect in any way the interpretation of this Act or of any other law in force in Victoria.[4] [See attachment 1]

Conclusion

[4] Victorian State Parliament, Constitution (Recognition of Aboriginal People) Bill Exposure Draft 2004.

There are many issues that arise from this paper that have significantly contributing to the demise of ATSIC. In order to not repeat the mistakes of the past the replacement for ATSIC must be developed from this experience, which tells us that the imposition of a non-indigenous interpretation of Indigenous self-determination in addressing socio economic disadvantage does not work.

The Commonwealths recognition of Indigenous sovereignty as embodied within Indigenous Cultural Heritage, not only provides the currency for Indigenous socio-economic development and sustainability, but also an opportunity for the Commonwealth Government to legitimise the Australian Constitution, in a trade off through the negotiation of a Treaty with the Indigenous peoples of Australia.

Until this occurs, Australia's Constitution will remain open to national and international criticism and legal challenge and can have far reaching consequences equal to that of the High Courts Native Title ruling.

Recommendations for Discussion

1. **Remove the compulsion to be enrolled on the Commonwealth Electoral roll.**

2. **Indigenous Electoral roll be established and maintained by the Australian Electoral Commission.**

3. **The existing ATSIC Regional wards be designated the Indigenous electorates for the conduct by the AEC of Indigenous regional and national representative body elections.**

4. **Native title groups be recognised as Regional Indigenous Authorities (RIA's)**

5. **The operation of programs under Indigenous legislation or legislation specific to Indigenous interests be vested with the RIA's.**

6. **National body is elected from RIA's.**

7. **National body to negotiate a Treaty.**

End/…

Attachment 1

Minister for Aboriginal Affairs

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3 August 2004

Constitutional recognition for Indigenous Victorians

Dear Community Member,

On 29 May 2004, the Government announced its intention to introduce a Bill to Parliament to amend the Victorian Constitution, giving recognition to Victoria's Aboriginal people and their contribution to the State. Recently

I undertook the first stage in a series of community consultations on a range of issues impacting on the lives of Indigenous Victorians. During these consultations I took the opportunity to ask for your opinion of the proposed **Constitutional amendment**.

Aboriginal people across the state consistently raised the same issue with me. They all stated that the amendment should not say that Aboriginal people **were** the original custodians of the land as they continue to have an ongoing relationship to the land in Victoria. I am considering the following alternative:

1A. Recognition of Aboriginal People

(2) The Parliament recognises that Aboriginal people, as the original custodians of the land on which the colony of Victoria was established æ

(a) have a unique status as the descendants of Australia's first peoples,

(b) have a spiritual, social, cultural and economic relationship with their traditional lands and waters within Victoria, and

(c) have made a unique and irreplaceable contribution to the identity and well-being of Victoria.

The Government intends to introduce the constitutional amendment to permanently entrench Indigenous recognition in the Spring Session of Parliament, which begins on 24 August 2004. Please contact us as if you wish to make any further comments on 1800 762 003 (toll free) or email aav.webpage@dvc.vic.gov.au.

I would like to thank you for attending and participating in one of the state wide forums and in particular for contributing to what will be an important recognition of the contribution of the Aboriginal people to the identity and well being of Victoria.

Yours sincerely

GAVIN JENNINGS MLC
Minister for Aboriginal Affairs