

## **CONSTITUTIONAL AND LEGISLATIVE FRAMEWORKS FOR PUBLIC POLICY**

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I would like to thank the ATSIC Board of Commissioners for hosting this National Policy Conference. The first of its kind and, after twelve years, not before time. I think it is a very important occasion and over the next three days I hope that we are able to take from the Conference the importance of the inclusion of Aboriginal and Torres Strait Islander peoples in our policy making processes and in our national life.

As I will demonstrate, during the course of my presentation, and I am not going to stand up here all the time. Later, I am going to pull the white board over and I am also going to walk around which is why I'm hooked up on this mobile mike and I want you to be involved in the dialogue. Basically, what I intend to do this morning, is just give you a brief overview of our constitutional system and the treatment of Aboriginal and Torres Strait Islander peoples within our society. I would also like to take a look at the role of ATSIC and, in closing, have a look at what some of the future possibilities might be in relation to policies and how they might benefit Indigenous Australians.

Last week, I got an e-mail from Canada from the Form of Federations which is an organisation that is interested in working with countries around the world that have Federal systems, including ours, and they are convening a workshop in a couple of weeks and they asked me if I would be able to attend, and the workshop is on Indigenous government's fiscal systems and basically, it is going to look at revenue raising, including through taxation, for indigenous communities in Canada and the United States.

But, I thought to myself when I received this invitation, "My God, have we got a long way to go." And we might be well pleased with the progress that was made since the 1960s, but I think that anybody who is directly involved in working with Aboriginal and Torres Strait Islander peoples in this country today, would have to acknowledge that we do have a long way to go. Even in the Constitutional systems of Canada and the United States, the aboriginal peoples were treated very differently to what they were in the Australian Constitutional system.

Let me talk first of all, about the Australian Constitution and then, I will get into the broader aspects of the Constitutional system. The Commonwealth Constitution is a document that provides and protects the framework for the Australian system of government. It is our most important founding document and a symbol of our national life. Australians are very proud of the way that the Australian Constitution was formed and say it was one of the most democratic processes in formulating a national Constitution. Because, in fact, there were a series of conventions held in the 1980s, to formulate the Australian Constitution and those conventions were - the people who were at those

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conventions, were the elected representatives from the colonial administrations that later became the states, and a series of those was held.

Of course, if you were Aboriginal or a woman, or a Torres Strait Islander, you would probably have thought it was not very democratic because you were largely excluded. Women, of course, got the vote in 1902, even though they had been given the vote earlier in South Australia. The Commonwealth Constitution is not the only Constitution in Australia. Each of the six states also have a Constitution, which provides for the system of government within those states, and the Northern Territory and the Australian Capital Territory have self government acts which have a similar function.

All of those, however, are subject to the Commonwealth Constitution, and they must be consistent with it and if they are not, the Commonwealth Constitution prevails. So, I think that that just gives you the broad sort of thing in terms of the Constitutional arrangements. What many of you may not know, was, because Australia at the time that the Commonwealth Constitution was being put together, was still essentially six colonial administrations of the British Empire. And so, after the founding fathers had put together the Commonwealth Constitution, and in fact, there were votes held in each state to pass it. Western Australia, in fact, was the last state to do that and if you read the pre-amble of the Commonwealth Constitution, Western Australia isn't mentioned because its vote wasn't held at the time that the bill was taken to the British Parliament to be passed.

The Australian Constitution is actually a document contained within the Commonwealth of Australia Constitution Act 1900 which was passed by the British Parliament and that was necessary as I said, because we were colonial administrations, or we came under colonial administrations at that time. And what the Constitution did, was bring together each of those six original states that became states on the passage of the Commonwealth Constitution. It is easy to forget the role that the British Empire had and how important they were. And, in fact, I think it was only in 1986 when the Australia Act was passed, that the final sort of ties with Britain being able to legislate on matters affecting Australia was put to finality. So, that wasn't really very long ago. And there were a number of other acts before that, but, I think the Australia Act was the most important one.

The main purpose of the Commonwealth Constitution was to bring together the six Australian colonies into federation. And to do this, it needed to do at least two things. The first was to create the new level of government at the federal level, or at the Commonwealth level, and the second, was to set down the rules between the Commonwealth and the six colonies which became the states.

The Australian Constitution by any measure, is a relatively short Constitution with only 128 sections and for those of us who've had a long history of involvement in Aboriginal and Islander affairs, will know that there were only two mentions, or two provisions in the Australian Constitution as they related to us, and that was Section 51(26), which is the section in the Constitution - or Section 51 in the Constitution deals with the powers of the

Commonwealth and Section 51(26), is the sub-section that deals with the power of the Commonwealth to make laws for people of any race. Prior to 1967, the Commonwealth could not legislate for Aboriginal people, even though if you have a look at the legislation, particularly the Commonwealth Franchise Act and Social Security Act, you'll see that Aborigines again, were dealt with in an exclusionary manner. And, in fact, that effected our rights as citizens in this country right up until the 1960s.

The Commonwealth Constitution deals with the new structures that it created and it outlines the role of the Commonwealth Parliament in terms of what it can do and the Commonwealth executive, or often referred to also as the government, and the Commonwealth judiciary, the High Court and other federal courts. The remaining chapters of the Australian Constitution deal with finance and trade in chapter four. In chapter five, new states and territories and that's what gives them the power to create the Self Governing Acts of the Northern Territory and the ACT in chapter six.

'Miscellaneous', chapter seven, also dealt with the Section 127, which was about the counting of the people in the census, but, also for the purpose of electoral boundaries. And that was repealed in 1967 and, of course, chapter eight, which deals with the alteration of the Constitution. And as we know, the Australian Constitution can only be amended by referendum and it requires a majority of votes in a majority of states. One of the interesting features about the Australian Constitution is, in fact, that it provides very little protection for individual rights unlike Constitutions in other countries. But, there are a few sections in the Australian Constitution that directly protect individuals and they relate to compensation for property under Commonwealth law, which is in Section 51(31), Trial by Jury in Section 80, Freedom of Religion in Section 116 and Freedom from Discrimination on the Grounds of State Residence in Section 117. Although, if you actually have a look at the treatment of Indigenous peoples, they weren't always considered to be citizens.

With a few exceptions, rights in the Australian system are protected by the common law - as it is developed and applied by the Courts and legislation that's passed by the parliament. It's important, I think, to understand that no written Constitution stands alone, although it contains important matters, as I have said in relation to outlining the functions of the parliament, the executive and the judiciary, it doesn't give you a complete understanding of the whole Australian constitutional system. For that, you need to also take into account the Constitutions of the state governments and the Self Government Acts of the territories, the internal territories. Some legislation, for example, the Racial Discrimination Act of 1975, or the legislation that set up the Electoral Commission and the Commonwealth Grant's Commission, as independent bodies, some common law principles, for example, the need for taxation to be approved by parliament, and other constitutional practices, or conventions. For example, the requirement for a head of state to act on the advice of the elected government, in most cases. In most cases, I suppose, because there's a lot of controversy about the role of the Governor-General, in 1997. It gives probably one of the most detailed accounts I have seen of the role of the Constitution and

how - there are a lot of myths surrounding the Australian Constitution - and what it did, or did not do. For example, how many people in this room believe that Aborigines got the right to vote as a result of the 1967 referendum? Put your hands up. How many don't? Okay. And there's a lot who are unsure. Because, that was about even. In fact, the 1967 referendum did not give Aborigines, or Torres Strait Islanders, the right to vote. It had nothing to do with voting.

All it did, was remove two negative clauses from the Australian Constitution. And the negative clauses were, as I said, whether Aborigines could be counted in the census and for electoral purposes, for boundaries and whether the Commonwealth could make laws for Aboriginal people. So, the right to vote, at least at the federal level, came into effect in 1962 by virtue of amendment of the Commonwealth Franchise Act. Now, in creating the constitutional structures, and the role of the parliament, the executive and the judiciary have all had a significant impact on the way we have been included, or excluded, from participating on an equal level with other Australians.

The states are all powerful in the Australian system. It was the states that decided that we should become - or who were then colonial administrations until 1901 - a federal system and in defining the powers of the Commonwealth in the Constitution. Practically all they did was say what powers the Commonwealth could have, and the state constitutions outlined what powers the states could have. The importance of the thing about the Commonwealth Constitution was to deal with national issues and Indigenous peoples were not considered to be of such a priority to be considered a national issue. Certainly not in the 1890s. In fact, the policies of the day were that we were a dying race and that all of us were nomadic savages. They referred to us as in the parliamentary debates and we had no rights, according to the values and the attitudes of the Australian people at the time.

In setting up the federal system, the powers of the states remained really critical, because the states were the level of government that provided the services in the main to the people. And as we know, if you ask any Aboriginal person in this room, they will be able to recount to you stories of how Aboriginal people were systematically excluded from receiving those services. I think when Mick Dodson did the *Bringing them Home* report, he recounted that in looking at government legislation, there was some 67 different definitions of who was an Aboriginal. And any reading of that sort of report, the Royal Commissions, will also demonstrate these issues very clearly as do Galligan and Chesterman in their book, *Citizens without Rights*.

So, we had the legislative barriers removed from Aborigines being able to vote in 1962. Chesterman and Galligan in their book, I think, proved, or argued quite persuasively that it was not the Constitution itself that was responsible for the treatment of Indigenous Australians, but, rather it was through legislation and the actions of the bureaucrats and the politicians that excluded Indigenous Australians. And the marginalisation of Indigenous Australians is something that people might choose to think has been eradicated

from our system. But, those of us who work closely in this field know, that that's still not the case.

Just in looking at the structures of the parliament, the executive and the judiciary, the parliament as you know, has two Houses, the House of Representatives where the government is formed, and the Prime Minister is the Leader of the House and of the party that has the majority of people in it. The executive is headed up by the Governor-General, the government and the public service that is responsible for implementing the policies. Over here, you have the High Court and the other federal courts. They deal with things like, family law and so on. Now, if you look at the parliament and the political parties within the parliament, we've had two Aboriginal Australians who have been representatives in 101 years. Not really a good track record.

We've got in the Australian Public Service. There's only ever been one Aboriginal person whose been the secretary of a Commonwealth department and then later, myself as the CEO of ATSIC. A statutory appointment, not the same status as the secretary of a department. We've got increasing numbers of indigenous people involved in the public service. But, in these other areas, a lot is left to be desired. No Aboriginal or Torres Strait Islander judges in the federal system. Bob Bellear is a judge in New South Wales under the state system and Pat O'Shane is a magistrate and in Western Australia, Sue Gordon. Is that it, three? She is a special magistrate in WA. So, that's just in terms of the presence of the thing.

But the Australian government has since the 1960s, started to enact legislation beneficial to Indigenous Australians and you look at that in terms of the establishment of the Aboriginal Development Commission; ATSIC; the Aboriginal Land Rights Northern Territory Act; the ILC and the Native Title Act. But, the Native Title Act wasn't an initiative of the government. The Native Title Act arose out of a common law decision taken in the High Court of Australia in the Mabo case. That was in 1992. For the first time in Australia's legal system in 1992, ten years ago we're talking about, there was legal recognition within the Australian constitutional system, that Aboriginal people and Torres Strait Islander people, retained property rights, or legal rights to land following colonisation of Australia.

As a result of that decision taken in the High Court, it created, as you know, one of the most unsavoury political and public debates for six months on the front of every newspaper. Every morning there was an argument raging about native title. So, the government agreed that it would legislate to create certainty, to ensure that the property rights of Indigenous Australians could be accommodated along with the property rights of other Australians, basically. Certainty was what was needed and, of course, we had the Native Title Act, soon to be amended and the lawyers will - and we had a number of institutions created as a result of that, including the National Native Title Tribunal, which is now a part of the infrastructure, if you like, that exists within our system for the benefit of indigenous Australians.

Now, prior to the 1960s, in terms of the position of Indigenous people as citizens, the most blatant exclusions related to the right to vote until 1962 and the payment of social security benefits. I now work for Centrelink and we pay the social security benefits out and, in my opinion, there are still issues of access for Indigenous Australians to the social security system, and it's my job to try and turn that around, to make sure that our people - and I'm doing this, in 2002. So, if you stop and think about what's happening in your organisations, and how involved, or included Indigenous Australians are in those processes, I'm sure that you'll be able to identify a lot of gaps.

Now, I think the last remaining obstacle in the Social Security Act was removed in the late 50s, early 60s. And it had all of these regulations that were administered by the bureaucrats who could decide whether you were civilised enough, or you were exempt from the State Protection Acts, to be eligible to receive a social security payment. And the voting rights and the social security payments are the most vivid examples of citizenship entitlements being denied to Indigenous Australians. We're talking 40 years here. We're not talking much longer than that.

And contrast that against the fact that if Indigenous Australians have occupied this continent for 50,000 years and a generation constitutes 25 years, you have 2000 generations of a presence in this country by Indigenous people. Two thousand generations. If you have, what, 214 years of European occupation, 8.6 generations. So, there's a whole cultural heritage to be valued in this country, that was systematically marginalised by the actions of politicians, by the actions of bureaucrats.

The federal system is to many, a system that shares power between the Commonwealth and the states and under the states systems, you have also local government. And each of those levels of government have different responsibilities, different roles and different responsibilities. Now, the all too powerful role of the states - the federal government by the way, in following the amendments to the Australian Constitution in 1967, did not accept sole responsibility for Aboriginal affairs. It never has and probably never will. Aboriginal and Torres Strait Islander affairs is considered to be a shared responsibility between the Commonwealth and the states. And as a Commonwealth bureaucrat it is so frustrating. When you have the political parties, is there the political will? Politicians always just have an eye to the next election. They're not really concerned about the long-term agenda that other people may be concerned with, and particularly Indigenous leaders. So, it's very difficult.

Now, ATSIC. Let us have a look at ATSIC. ATSIC has a lot of characteristics of a government. It has elected representatives and it has a public service. ATSIC staff are public servants. If you were to be - if you were to try to explain what ATSIC does, or did, in a sense it democratised Indigenous affairs. For the first time ever, it enabled Indigenous Australians to elect their representatives and it gave some powers to the elected representatives that did not exist under the advisory arrangements that had

preceded it. Like, the NACC and the NAC, they were advisory only. They had no control over the budgets.

But there were other ways to control ATSIC, and one such way is in terms of the allocation of funds by programs. Of course, we've seen the effects of that. ATSIC's budget doesn't come down in one sort of big pool for ATSIC to then decide how it will spend it. ATSIC gets money appropriated for CDEP, for community housing and infrastructure and then other programs, legal services and so on and so forth.

I have to say that even in the last few weeks when I was discussing some changes that were being proposed in Commonwealth arrangements (nothing to do with ATSIC - this was another department) and I asked about the impact of this on Indigenous Australians living out in remote areas, I was jumped on by a colleague who said, "Well, what's ATSIC's role?" I said, "Excuse me, you're not suggesting that we don't have an interest in what impact this might have on Indigenous Australians? ATSIC is not the be all and end all, and we shouldn't expect it to be." But, I think it has become a convenient scapegoat for everybody to say, "Well, if it's Indigenous, it's ATSIC's." So, I think that there are still lots of remnants of the attitudes that you might say were highly prevalent over this period up until the 1960s, that are still present in our dealings today.

I do not know how many times ATSIC has been reviewed since it started 12 years ago. A very young institution by Commonwealth standards when you look at the creation of the other departments and so on. So, I was going to get you involved in this exercise in relation to the relationship between the impact, where the High Court, for example, makes a common law decision that requires the government, to decide how to handle it and the parliament to enact it. But, I have been concentrating a bit on the role of the executive, in a sense, in terms of the public service and the influence of bureaucrats.

But, most of the state government regimes of the Aborigines Protection Boards, or whether it was the Native Welfare Act, or whether it was this or that, were as any Aboriginal person, or Torres Strait Islander person will tell you, among the most oppressive regimes that you could ever imagine, in the way that they controlled whether you could work, whether you could marry, or whom you could marry. In Queensland they used to go into the reserves and check the cleanliness of the houses and - I mean, there was state legislation that even said you had to love your children if you were an Aboriginal. It was extremely controlling and oppressive.

So, how just in a few generations, we're now wanting to participate on an equitable basis in the life of the country and people say, "Oh look, I don't want to know, you know, I know all about the past. I don't want to go there. It's boring or that's history." Well, one of the reasons that I'm interested in history, is because we never want to repeat it and we have to be ever mindful of the effect of those oppressive pieces of legislation and the way that the bureaucrats interpreted them. I don't think there would've been too many Indigenous bureaucrats in those days, to the best of my knowledge. So, generally, with non-Indigenous Australians interpreting the regulations and deciding whether

you were an upstanding enough citizen in order to get your unemployment benefits, or your maternity allowance, or your whatever.

Now, a lot of this has happened in the lifetime of people like myself. This is not something that is so distant and remote. I talked about the early policies of smoothing the dying pillow. And then we had the abhorrent period of the assimilation policy and the removal of Aboriginal children from their families. Probably the darkest stain on the life of the nation. We as Indigenous Australians, can't divorce ourselves from our history, because our history informs us who we are and our future.

Now, that might be hard for other people to understand, but, our history is not our history alone. I mean, it wasn't the Aboriginal people who made the half-caste children. There must have been someone else involved there, you know. I mean, the whole sort of actions that occurred during the earlier part of this century, are things that cannot be divorced. Now, what is it that we are unique for? We occupied the country for 50,000 years. We owned it. We were dispossessed of it; we didn't have our rights to our native title recognised until 10 years ago. So, we've got a lot of issues that we have to deal with.

And what I wanted to try to do, was just weave together elements of constitutional and legislative framework, the impact of the federal system. Some of the developments that have occurred. I think ATSIC has enormous potential. It is affected by the political kudos it is given, or not given. But, that doesn't mean to say that there isn't a responsibility to be engaged with ATSIC and for ATSIC to be engaged with everybody else. Now, it can't be all things to all public service departments, or all men and women who work in the Commonwealth, or the state public service. But, it can decide what its priorities are and work with those organisations that are instrumental in addressing those priority areas and having a more cooperative approach and collective approach to what's going on.

How long is it going to be before we can be in our conference on revenue raising for Indigenous communities and the powers of taxation with Indigenous governments, have the power to tax and raise revenue through taxation? Now, there are a number of developments along these lines. One is that we were talking - I was talking to Preston - Commissioner Preston Thomas about last night, with the Ngatatjara Council in Western Australia, which is a fully fledged local government council.

Do you want to tell the story about how the Ngatatjara Council became the Ngatatjara Council, with the Wiluna Shire?

**Commissioner Preston Thomas:** There was the Wiluna Shire up there and it was the Warburton community was under the shire and if you have a look at the sort of geographic of the places, like, Wiluna to Warburton is roundabout 1000 kilometres and where we was and what was happening, all the roads wasn't even getting serviced and the same like any - the sort of white people in the shire, they sort of - and even the pastoralists, they were getting all their boundary.



You know, the shire was all graded and we were missing out on the services. So, what happened was, all the people decided that when the election was on, they all sort of left Warburton and went down to Wiluna and they sort of took over the shire and all the sort of pastoralists and everybody else was sort of saying, "Oh jingoos, this is no good, all the blacks came down and took over our shire."

**Patricia Turner:** But, they got voted on.

**Commissioner Preston Thomas:** All the Aboriginal people got voted on and the pastoralists and that never even got a sort of look in, it was all Aboriginal in the shire. So, how it goes - like, even the - what we was talking about here, native title. High Court say they've got native title. So, they go back again and have another re-think and say, "How're we going to beat them?" So, that's what they did. What they did was, they went and wrote to the government and the government sort of took their pleas first and say, "Well, this can't happen. The Aboriginals are taking over a town." So, that's how we got our sort of shires up there. They said, "Okay, we'll put it through that you have your own shires." So, that's how it came about.

**Patricia Turner:** Thank you, Preston. Which leads me to the point about a lot of the changes that occurred. I mean, the changes to the Franchise Act and the social security legislation, didn't happen because of the goodwill of the politicians thinking this is the right thing to do. In fact, there was international pressure being brought to bear on Australia for what was perceived to be the exclusion of Indigenous Australians from their citizenship rights. But, there were also Indigenous activists who were meeting and calling for equity and equality in relation to their rights as citizens of this country. And probably the most famous meeting was the day of mourning held in 1938, convened by Jackie Paton and William Ferguson and William Cooper, who were unionists, trade unionists, learned how to organise and convened this meeting on the 26 January in the town hall, not the town hall but one of the buildings in George Street in Sydney.

They had a 10 point plan too and it came out of that meeting and those of you who are familiar with native title will know my little remark about 10 point plans. So, international pressure was one thing, but, the agitation by Aboriginal people within the Australian system, was equally important. The system now is so complex and there are so many issues that have to be dealt with. I think that there is a general appreciation that it's not just a matter for Indigenous Australians alone to address. We have our knowledge, we have our cultural heritage, we have our expertise, we have our experience, and other people also have skills and experience which need to be brought to bear in finding better solutions than what we've been able to find to date.

I see Andrew Jackamos here and his parents were heavily involved in FCATSI, along with other people like Joe McGuinness and Evelyn Scott and so

on, and that was an organisation of Indigenous and non-Indigenous Australians that campaigned for 10 years, for 10 years, to bring about the 1967 referendum.

Now, why is it that even though the Commonwealth Franchise Act had been amended in 1962, why is it that in 1967, political active, highly intelligent people still believed that Indigenous Australians didn't have the vote? Because there was no action taken by Commonwealth officials, to inform Indigenous Australians that they had the right to vote. So, how can you exercise your rights if you don't know they exist?

In fact, it's taken a while. I mean, the Commonwealth Electoral Commission now conducts the ATSIC elections. ATSIC pays them. But, they still do it. So, that's progress. The Commonwealth Electoral Commission before elections also employs people to go out and encourage people to be on the roll and they do the roll cleansing, because you can be on there - it depends on how you spell your name. If it's Ngamarra, whether you spell it with a g, or a k, or a double m, or a double r. You could be on the roll six times. And that's probably not a bad ploy, but, we won't go down that track. As long as you voted at six different booths. But, anyway, no.

But, they now do that, that sort of work. So, there have been changes and there has been some progress.

The Commonwealth education department believes that there has been a slight increase in school retention at secondary level but education is delivered through the states and it is a long, hard road to hoe. But, obviously, if we don't get our kids through secondary school and preferably into a trade, or a tertiary university education, we're not going to break the back of a lot of the issues that we're dealing with. Just in relation to ATSIC, one of the most successful programs in ATSIC, has been the housing, the home loans program. And what it is enabling is, for Indigenous Australians to own their own homes and that's how wealth is created when you can inherit the proceeds of the sale of the house that your parents had.

My father built our house. He was an Aboriginal man and there will be a number of people in my generation whose parents did. But, not very many. It's mostly my generation that has started to buy our own homes. That's how far behind the eight ball we are when you look at the inherited wealth of other people in this country, including people who migrated here in the 1940s for the Snowy River Scheme and things like that.

So, when you look at those sorts of indicators, you'll see the ways in which our people have been excluded. Now, we have to turn that around. ATSIC has a pivotal role to play in leading that agenda, but, they are not the only people. They cannot do it on their own. They can facilitate better cooperation, only if the only parties are willing to work with them.

We have no other elected representative body at a national level for Indigenous Australians. We ourselves have to encourage our people to participate in the elections in October this year. We have to make sure that we vote for the best representatives and that they are there to do our work and lead our agenda for us. So, I would urge all of you who are involved in either state or Commonwealth administrations, or local government for that matter, to take

a good hard look at how you involve Aboriginal people in the decision making, not in the consultation, thank you, we've done that. "Now, we'll go home and do what we were going to do anyway", phase. But, looking at how we can really take on board the views of Indigenous Australians and how we move the agenda forward.

