

CHAPTER 19

Separation of Powers

An issue which was to impact on the Murdi Paaki Regional Council's development of new governance arrangements leading to a Regional Authority model with powers similar to ATSIC was what became known as 'separation of powers.'

On 12 November 2002, the Government announced a three-member panel to review the role and functions of the Aboriginal and Torres Strait Islander Commission. While the review team was still consulting with Aboriginal and Torres Strait Islander people, the Federal Minister for Indigenous Affairs, Mr Philip Ruddock, on 17 April 2003 announced that the Commonwealth Government would be taking action in the forthcoming Budget to separate the roles undertaken within ATSIC.¹

The action was seen as an interim measure to promote good governance and accountability by removing the potential for conflicts of interest in decision making over funding. Mr. Ruddock said that while some might argue that the government should await the outcome of the Review of ATSIC before making any changes to ATSIC's operations, there were compelling reasons to take early action concerning the conflict of interest issue.

From 1 July 2003, all individual funding decisions for programs delivered by ATSIC would now be made by officers of ATSIC's administrative arm. ATSIC Commissioners and Regional Councillors would continue to determine policies and priorities for the spending of the money, in line with the original intention behind the establishment of ATSIC.

Mr. Ruddock explained:

In the Westminster system of government, Ministers normally decide policy and officials implement it. ATSIC is unique in that it effectively exercises Ministerial policy powers.

However, there has been no separation between this role and decisions to enter contracts or allocate funds to particular organisations or individuals, resulting in the potential for perceived or actual conflict of interest.

This is contrary to good governance. The micro-management focus on ATSIC's own spending has also distracted the elected arm from more significant policy issues.

Mr. Ruddock said that while he had taken steps to reduce conflicts of interest within ATSIC, continuing concerns about ATSIC's operations had led the Government to the conclusion that further action was needed. 'The current breakdown in community confidence in ATSIC,' he said, 'is a threat to the longer term interests of Indigenous Australians.'

To implement the arrangements, a new Executive Agency, Aboriginal and Torres Strait Islander Services (ATSIS) was to be established under the *Public Service Act* to manage ATSIC's programs and to make individual

¹ 'Good governance and conflicts of interest at ATSIC', Press Statement by the Minister for Indigenous Affairs, Phillip Ruddock, 17 April 2003 (IPS0228/2003).

funding decisions. It would be required to operate in conformity with policies and priorities established by the ATSIC Board and Regional Councils and to report on performance to the ATSIC elected arm.

The agency was to be staffed by existing members of ATSIC's administrative arm.

Mr. Ruddock said:

ATSIS will be subject to checks and balances in its decision-making, including internal and external reviews, to ensure that the administration exercises its responsibilities on a transparent, merit basis without external interference.

Mr Ruddock went on to emphasise that the decision did not entail 'mainstreaming' ATSIC's programmes, nor their transfer to a Department. The new Executive Agency would be independent and required to operate in conformity with the Board's policies and priorities. There would be very little change for ATSIC's elected arm, its staff, and the organisations which received funding or services from ATSIC.

In particular:

- ATSIC would remain the Government's chief Indigenous source of policy advice;
- Regional Councils would continue to play a central role in this process;
- The overall budget would remain unchanged;
- Existing funding for organisations would continue subject to normal conditions; and
- The new structure would free ATSIC's elected arm to focus on big picture policy issues.

Mr. Ruddock said:

I look forward to supporting the ATSIC Board and Regional Councils in their taking a more strategic approach in future so that their influence is extended - not only with regard to the programs for which they are directly responsible, but also by enabling them to engage with mainstream agencies with greater credibility and authority.

Aboriginal and Torres Strait Islander Services was established on 1 July 2003. Its absorption of ATSIC's administrative arm resulted in the transfer to it of staff who had previously served the Regional Councils directly.

A Ministerial Direction established the relationship between ATSIC and ATSIS. ATSIC, in effect, remained responsible for policy and ATSIS managed the funding of Indigenous specific programs, a responsibility previously shared by ATSIC and Regional Councils. ATSIS was charged with assisting the Indigenous elected representatives in ATSIC to develop a strategic role beyond the programs for which ATSIC-ATSIS was directly responsible. At the regional level, this involved staff working with Regional Councils to formulate and implement comprehensive Regional Plans as a basis for all

government inputs to a region.

Though ATSIC and ATSIIS were two separate legal entities, they shared offices and functioned to all intents and purposes as one agency, but with differentiated powers.

ATSIC criticised the Government's move to establish ATSIIS as pre-emptive. Its formal position was that the two agencies, ATSIC and ATSIIS, should be reintegrated in the longer term. For the Murdi Paaki Regional Council the new arrangements meant regional Councils re-defining themselves.²

A briefing paper considered by the Council, while critical of the separation, argued that how the new arrangements impacted on the operations of Regional Councils would depend on how the Councils responded to them and how, in turn, the Minister accommodated their wishes. Obviously, it argued, it was a time for regional Council advocacy.³ The immediate implication for the Murdi Paaki Regional Council was that without funding and staff the basis of a regional authority was removed.

At the time the Regional Council was in the midst of preparing a comprehensive submission to the ATSIC Review. There was thus an opportunity for the regional Council to participate in the refinement of the 'interim' structural arrangements in the context of the wider ATSIC Review.

The strategy briefing observed:

The new arrangements could have both positive and negative outcomes. While not being able to make decisions on individual grants may be seen as a reflection on the ATSIC system, the new arrangements have the potential to ensure greater responsiveness and accountability by all agencies for their program and service delivery, given that regional Councils have a limited discretionary funding pool. Thus, being able to extend their influence could be an important aspect of the new arrangements.

Murdi Paaki is further down the track than most in ensuring accountability for all services -- mainstream and specific -- through its regional planning process and regional governance arrangements. The Government's decision now gives a new dimension to the regional plan and the process of regional service agreements to identify and hold accountable all agencies responsible for programs and services and bring them under the influence of the Council's policy-making and strategic setting role. An initial focus of these arrangements would be the new Indigenous Services agency.

At issue for Regional Councils now was whether the new portfolio structure presented an opportunity to establish a new framework of good governance that might better serve Aboriginal and Torres Strait Islander people. A central feature of such a framework might be to promote accountability of all agencies to Indigenous people centred on regional outcomes. Of particular interest for further consideration were the implications for the creation of regional authorities if monies were not appropriated to them.

² Murdi Paaki Regional Council, *Annual Report, 2002-2003*, p.5.

³ Briefing note for the Chairman.

Since the new arrangements were the result of a government decision, the aim should be to make the best use of them in the interests of Aboriginal and Torres Strait Islander people. The paper went on to argue:

Indigenous development is not a matter of decisions taken in isolation in the context of the annual budget. It is concerned with the continuing and long-term impact of an increasing number of programs – mainstream and Indigenous-specific – functioning within separate jurisdictions but drawn together in a whole of government response to Indigenous needs. ATSIC could emerge with a more robust and independent advocacy role. Much will depend on access to and participation in government decision-making and the responsiveness of service agencies.

The paper went on:

Regional Councils may now feel disempowered by not being able to make decisions on individual grants. A question for Regional Councils is how important to them is the role of deciding on individual grants in the wider context of advocacy, setting the policy framework, ensuring effective service delivery and coordination of services, and the negotiation of service agreements with agencies, given that their discretionary funds are around 10 per cent of the total regional allocation with a focus on smaller outputs.

In preparing its further submission to the ATSIC Review, the Regional Council saw possible parallels between ATSIIS and Centrelink, the Commonwealth agency which managed programs and payments to individuals on behalf of particular Departments under a process of service agreements and associated financial arrangements.

While the Council held to the view that ATSIC and ATSIIS should be part of the one legislative family, it saw potential in Regional Councils not having to make individual funding decisions but being in a position to influence the direction of ‘whole of government’ funding. This further suggested the possibility of legislation re-establishing the connection between ATSIC and ATSIIS and formalising the Ministerial directions to the CEO of ATSIIS.

Ministerial Directions to the CEO of ATSIS

- In implementing programs and arranging services for Indigenous peoples, the CEO will take all reasonable steps to ensure that ATSIS:
 - Conforms to the policies and strategic priorities set and promulgated by the Aboriginal and Torres Strait Islander Commission (ATSIC);
 - Reflects the priorities set by Regional Councils in their regional plans as the critical guide for interventions and services within a region, giving due emphasis to addressing needs;
 - Facilitates linked approaches with other government agencies (both Commonwealth and State/Territory) to optimise outcomes for clients;
 - Coordinates its activities to achieve effective synergies with overall Government policies and priorities; and
 - Has appropriate regard to overall Government policies and priorities.
- Having appropriate regard to functional priorities and strategies for addressing relative needs determined by the ATSIC Board, the CEO will take all reasonable steps to ensure that resources are apportioned between regions and communities according to demonstrable relative need, taking account of the availability of alternative services in those areas and the supplementary intent of Indigenous specific services.
- The choice of and relationship with individual service providers should be based on best practice, including:
 - Outcome-based funding and performance-based contracts for service delivery;
 - Market testing and competitive tendering wherever appropriate;
 - Assessments based on comparative efficiency and effectiveness, including demonstrated capacity to deliver; and
 - Management structures that reflect principles of sound governance and leadership by fit and proper individuals with a record of effective management.
- The CEO of ATSIS will take all reasonable steps to ensure that ATSIS does not make grants or loans or offer contracts or provide guarantees to organizations in circumstances where such grant or provision would be precluded by my Conflict of Interests Directions issued 24 December 2002 and amended 3 February 2003.
- The CEO of ATSIS will take all reasonable steps to ensure that ATSIS operates in partnership with ATSIC and Regional Councils.
- Where any dispute arises as to ATSIS's interpretation of ATSIC policies and Regional Council priorities, ATSIS should make every effort to resolve these matters, raising any unresolved matters with me where necessary

Source: Commencement of Aboriginal and Torres Strait Islander Services, Press Statement by the Minister for Indigenous Affairs, Mr. Philip Ruddock, 1 July 2003 IPS 045/200.