ATSIC REFLECTIONS

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It is easy to criticise and blame many for the demise of the Aboriginal and Torres Strait Islander Commission (ATSIC). Much of the blame, wrongly, has been placed at the feet of the last Chairperson and other personalities at the Commission level for the public loss of faith in the institution. Little analysis has been made of the role that the media, politicians (from both the Labor party and Coalition) and so called Indigenous "leaders" or organisations played in the immediate months before the eventual abolition of our only national representative body.

This reflection piece will not look at personalities or the politics that led to the demise of ATSIC. Instead, this article will focus on some fundamental design flaws in the *Aboriginal and Torres Strait Islander Commission Act* (1989). These design flaws ultimately were used as either justification for the abolition itself, or have subsequently been touted as the way forward in Indigenous affairs. These issues are: the lack of State or Territory interaction in the ATSIC Act and the ad hoc nature of State Advisory Committees.

The legislative history of the ATSIC Act itself provides for useful insights into the difficulties that ATSIC as a body were to encounter. The most striking aspect of the transition was the concept - in the form of the *Aboriginal and Torres Strait Islander Commission Bill* 1988 – to what we actually ended up with in the ATSIC Act.[1] The parliamentary debates as seen in the HANSARDs both in the House of Representatives and the Senate tell a story of hostility and down right racism by the opposition at the time. It is not surprising that John Howard was the Leader of the Opposition at the time of the debates. He clearly was against the establishment of ATSIC when he said:

> I say to the Minister and to his guilt-ridden Prime Minister that the present generation of Australians has every reason to be concerned about the fact that the Aboriginals are the most disadvantaged cultural group in our midst. We on this side of the House will yield to nobody in this Parliament or elsewhere in our concern to improve the lot of Australia's Aborigines. I also say to the Government and to the Minister that they will never improve the lot of Aborigines in 1989 and beyond by empty symbolic gestures such as treaties. I take the opportunity of saying again that if the Government wants to divide Australian against Australian, if it wants to create a black nation within the Australian nation, it should go ahead with its Aboriginal and Torres Strait Islander Commission (ATSIC) legislation and its treaty. In the process it will be doing a

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[1] For a detailed history of Indigenous representative structures and the history of the ATSIC Act, from conception to reality, see: Parliament of Australia, *Make or Break, A Background to the ATSIC Changes and the ATSIC Review*, Current Issues Brief No. 29 (2002-03) authored by Angela Pratt at http://www.aph.gov.au/library/pubs/cib/2002-03/03cib29.htm at 6th November 2007.

> monumental disservice to the Australian community.[2]

Two very interesting facts from the 'Bill' to "Act' phase is that it took just under two years to make its way through both houses of the commonwealth parliament, and in that time there were no less than 91 amendments to the Bill.[3] The most telling aspect of the proposed Bill and the legislation that was eventually enacted is that the Bill sought to have the central issue of this reflections piece embedded in the legislation. That is, that ATSIC have the power and responsibility to directly interact with the States and Territories.

Legislative framework for interaction with state and territory governments

The ATSIC Act highlighted the very complicated constitutional problem of sharing power and responsibility between the Commonwealth and States. Such is the nature of the power sharing arrangements under our constitution that during the debates the Commonwealth government emphasised the difficulty when it sought to clearly articulate the Commonwealths' power yet remind States of their responsibilities to "share" responsibility (spending) for Indigenous affairs.[4] Minister Hand made specific reference to the issue of the Commonwealth-State relations when he said:

> Ever since the 1967 referendum, Aboriginal affairs has been a concurrent responsibility of the Commonwealth and the States; that is, the States are not exempt from responsibility for their Aboriginal citizens. They have an important role to play, in co-operation with the Commonwealth.

Given the intention of the government to let the States and Territories know that it was going to push ahead with the ATSIC legislation and would do so in a co-operative sense, the Bill that was introduced to the Commonwealth parliament on 24 August 1988 alluded to ATSIC having the ability to deal directly with State and Territory agencies.[5] The second reading speech for the Bill saw the Minister re-state his insistence that the States' and Territories' carry out their responsibilities under the constitution to the Indigenous people living in their State. He said:

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[2] Commonwealth, *Parliamentary Debates,* House of Representatives, 11 April 1989, 1328 (John Howard, Bennelong, Leader of the Opposition). <http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=208554&TABLE=HANSARDR> at 6 November 2007.

[3] Michael Keating *Reshaping Service Delivery* in Glyn Davis and Patrick Weller ARE YOU BEING SERVED? STATES, CITIZENS and GOVERNANCE, 2001, Allen and Unwin, Sydney at p.134.

[4] Commonwealth, *Parliamentary Debates,* House of Representatives, 10 December 1987, 3152 (Gerry Hand, Melbourne, Minister for Aboriginal Affairs).

[5] Aboriginal and Torres Strait Islander Commission Bill 1988 (Cth).

> It must be remembered, however, that the constitutional responsibility of Aboriginal and Torres Strait Islander affairs is a concurrent one shared between the Commonwealth and the States. Nothing in this legislation detracts from the responsibility of State governments to make provision for the needs and requirements of the Aboriginal and Torres Strait Islander citizens of those States, particularly in relation to basic services such as water, sewerage and education which all other Australian citizens take for granted.[6]

During a parliamentary speech the year before the Bill was introduced the Minister outlined what the powers and functions of the Commission would be. He said *inter alia* that the Commission would: 'negotiate and co-operate with other Commonwealth, State, Territory and local government agencies.'[7] When discussion regarding administration arose, Minister Hand also envisaged that 'State Offices would have a considerably reduced involvement in programmes, with a major emphasis on policy liaison and with State and Territory Governments…'[8]. The clear intention was that the Commission would be dealing with State and Territory governments and, in addition, to deal with the agencies of those governments.

The Bill was substantially amended between its introduction and its enactment. As part of the amendments, the clauses that required interaction with States were removed. However, Section 3 (d) of the Act (the Objects) gave a legislative form to the aspirations for ATSIC. Section 3(d) stated:

> (d) … to ensure co-ordination in the formulation and implementation of policies affecting Aboriginal persons and Torres Strait Islanders by the Commonwealth, State, Territory and local governments, without detracting from the responsibilities of State, Territory and local governments to provide services to their Aboriginal and Torres Strait Islander residents.

What then became a design flaw is that the objects are what is hoped to be achieved by the Act. Even though it was an aspiration to achieve section 3(d), the Act gave no power to the Commission to actively achieve it (Section 3(d)). Section 7 and 10 of the Act related to the functions and powers of the Commission. The power to achieve the functions is found in section 10. The design flaw is that it was not a function of the Commission to deal with State governments, nor did the Commission have the power to deal or interact with State Governments. What power the Commission had with respect to State and Territory entities was to "… to negotiate and co-operate with other Commonwealth bodies and with State, Territory and local government bodies."[9] State bodies are NOT the State or Territory governments.

This design flaw did not just apply to the Commission. The flaw also applied to the ATSIC Regional Councils. Part 3 of the Act created the ATSIC

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[6] Commonwealth, *Parliamentary Debates,* House of Representatives, 24 August 1988, 251 (Gerry Hand, Melbourne, Minister for Aboriginal Affairs).
[7] See above n 4.
[8] Ibid.
[9] s 10(2)(a) of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth).

Regional Councils and Zones. Like the Commission, the 35 Regional Councils also had legislated functions and powers. Sections 94 and 95 of the Act set out the functions and powers of Regional Councils. One of the functions of the Regional Councils made reference to States and Territories only to the extent that the Regional Council can "…assist, advise and co-operate with the Commission, the Torres Strait Regional Authority (TSRA), other Commonwealth bodies and State, Territory and local government bodies in the implementation of the regional plan."[10] That meant that it could only deal with "bodies" NOT the government, and only to the extent that it was to assist that Regional Council with respect to the implementation of the Councils' regional plan.

Attempts to amend legislation to include state interaction

During the 13 years of the life of the Commission, the ability for the Commission or even Regional Councils to interact effectively with the State and Territory governments seriously impeded ATSIC in achieving some of its functions. It can also be demonstrated that during the life of ATSIC this deficiency had been identified by ATSIC itself. Pursuant to the ATSIC Act, Section 26 allowed for a 'review' of the operation of the ATSIC Act. The first review to occur was in 1993. Some three years after the commencement of ATSIC and the Regional Councils. One of the recommendations made by ATSIC was to amend section 3(d) that related to the reminder that State and Territory governments shared the responsibility over Indigenous affairs. ATSIC wanted the amendment to remove portion of section 3(d) which stated "without detracting from the responsibilities of State, Territory and local governments to provide services to their Aboriginal and Torres Strait Islander residents."[11] This view, held by ATSIC, felt that the Objects of the Act should be "expressed in more positive terms".[12] The political nature of this statement meant that the Commission felt that the existing section 3(d) was antagonistic to the ideal that the Commission was able to deal with State and Territory Governments, principally because it offended the State and Territory governments.

The next Section 26 review occurred in 1997. ATSIC in its submission to the review made a recommendation that the functions of the Commission be amended to include, this meant adding to existing functions: "to assist, advise and co-ordinate with Commonwealth, State and Territory governments in recognising, promoting and protecting Aboriginal and Torres Strait Islander cultures, traditions and heritages, including customary laws".[13] Again, the Commission wanted legislated involvement with State and Territory

[10] s 94(1)(b) of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth).

[11] ATSIC *Strengthening ATSIC - the 1997 Review of the ATSIC Act - Report to the Minister* , Canberra, ATSIC, 1997 at p.6 at http://pandora.nla.gov.au/pan/41033/20060106-0000/ATSIC/about_atsic/atsic_act/Section_26_Review/section26.pdf at 12 November 2006.

[12] Ibid.

[13] Ibid at p.10.

governments. Both the 1993 and 1997 "reviews" did not result in amendments to the Act that would have resulted in the ability for the Commission, or the Regional Councils to interact directly with the State and Territory governments.

The ATSIC Review announced by the federal government in December 2002 was not a review under section 26 of the Act. Instead it was a "Reassessment of Indigenous Participation in the Development of Commonwealth Policies and Programs."[14] Moreover it was designed at increasing the capacity and use of the Regional Councils. Therefore the focus was moved away from State/Territory interactions with ATSIC. The Review was conducted by Ms Jackie Huggins, Mr John Hannaford and Mr Bob Collins. The Review submitted its findings in November 2003. The following quote is taken from the ATSIC Review. [15]

> In its *Public Discussion Paper* the panel canvassed the option of creating legislatively a state advisory council in each State/Territory to provide an interface with the State/Territory governments. The panel does not support the establishment of such a statutory body. If the focus of the new ATSIC is to be the community through regional councils then the objective must be to encourage the State/Territory governments and their agencies to deal directly with the regions. The creation of a state advisory council could result in governments and their agencies dealing directly with the council to the detriment of the regions. That is to be discouraged.
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> It is open to the State/Territory governments to establish their advisory councils drawing on the ATSIC regional structure. The panel also acknowledges that the State/Territory governments may wish to have an advisory body that is broader than representatives of the ATSIC regions.

The Public discussion paper expected organisations and individuals to address this specific topic. Not surprisingly, many organisations and governments addressed this topic. Notably ATSIC in its' submission to the Review stated, "possible amendments that could be considered include: bringing the State Advisory Committees under the umbrella of the Act…"[16]

The Review ultimately did not accept that a legislative entrenched interface was required. Given the abolition of ATSIC against the views of the Review panel where they did not think that a legislated interface was needed, my view is that the Review got it wrong.

State Advisory Committees

The *ad hoc* nature of State Advisory Committees (SACs) led to the ineffectiveness of them as a group. However, the main deficiency of the SACs was their design.

They were created under section of the Act. Section 13 stated:

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[14] Jackie Huggins et al *IN THE HANDS OF THE REGIONS – A NEW ATSIC. Report of the Review of the Aboriginal and Torres Strait Islander Commission*, AGPS, 2003, Canberra.
[15] Ibid, page 65.
[16] Ibid.

Advisory committees

13. (1) The Commission may establish an advisory committee or advisory committees to advise the Commission in relation to the performance of the Commission's functions.

(2) A member of an advisory committee is entitled to remuneration and allowances in accordance with section 194.

The very fact that ALL the SACs could do was to advise the Commission was, in itself, a glaring hole in the legislation. The Act because of the advisory capacity of Section 13 did not allow for Commission to engage with State and Territory governments for the benefit of all parties – particularly the State and Territories. The advisory nature allowed ONLY for that particular SAC to ADVISE the Commission.

The *ad hoc* nature of section 13 meant that there was not a uniform engagement mechanism across the country. That is, there was not a SAC established for every State and Territory across the country. Even if that did occur, the very nature of the establishment of that SAC under Section 13 resulted in different compositions and therefore different effectiveness. However, the ONLY effectiveness was that those SACs were to advise the Commission. Nothing more. The composition of the SACs across the country varied. The nature and composition of the individual SAC depended on many factors. Of particular note was that all Commissioners in a particular State or Territory were to be included. So places like Tasmania and Victoria had a very small SAC due to the fact there was only one or two Commissioners for those states. However a State like WA and QLD with many zone commissioners had large SACs.

State and Territory governments had the discretion whether to enage with a SAC.. I believe that due to the nature of the section 13 SACs – in that it was only constituted to advise the Commission – there may have been an unwillingness of the State and Territory governments to engage with SACs. If there was State and Territory representation it was rarely at the political/representative level. Given that ATSIC was a national representative structure, the design of the SACs was that the State and Territory governments did not place greater importance on having their own elected representatives in the process. Instead ATSIC and State and Territory governments were more often "represented" by bureaucrats. There was always a need to have bureaucrats in the process, however the notion that this was a representative body, the lack of representative engagement by some SACs led to the diminution of its possible effectiveness.

The personalities of the individual Zone Commissioners was in many cases a determinant of the effectiveness of SACs. This attribute led to not all SACs being as effective as others. In some cases they were practically non-existent. Again, this ability to be guided by factors that should not have been in consideration also allowed the State and Territory governments to equivocate with their possible engagement with SACs. This equivocation was understandable given that nature and functions of SACs – to advise the

Commission. There was two way communication, in that, what did State and Territory governments get out of the SACs? Maybe a report every other month. There was no obligation for the Commission to take on recommendations from the SACs. Nor did the Commission have to engage at a full board level with State and Territories. Despite the existence of other mechanisms for Commonwealth, State and Territory governments to interact over Indigenous affairs – such as the Commonwealth Grant process, Coalition of Australian Governments – there was little if no engagement with the Commission. As a national representative body there was no mechanism for the active engagement at that representative level.

To further frustrate the establishment of section 13 committees was the fact that s13 were broad in nature and content. That is that SACs were only one of the many section 13 committees. By not have a designated legislative interface between the Commission and State and Territory governments meant that the section 13 mechanism was the only viable option for that interface to take place. Many other types of advisory committees were established under section 13. The fact that s13 SACs were not bodies mandated specifically in the Act may be one possible explanation for lack of meaningful engagement between ATSIC and State and Territory governments.

Conclusion

Section 13 committees could have been more useful if there was a specific legislative creation. Given that SACs were only constituted to advise the Commission. This became a serious structural defect of the Act. The lack of inclusion of State and Territory government interaction was seen at the time of the establishment of ATSIC as being in the “too hard’ basket. It is ironic that this lack of interaction created a representative split and in the end was one justification for the abolition of ATSIC. Maybe if States and Territories were more engaged – like they all stated they would like to be in the ATSIC Review – with ATSIC then it may still be in existence.