

## **THE PROMISE OF REGIONAL GOVERNANCE FOR ABORIGINAL AND TORRES STRAIT ISLANDER COMMUNITIES<sup>1</sup>**

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The national interest requires a new relationship with Aboriginal and Torres Strait Islander people. There can be no relationship without partnership. There can be no partnership without participation.<sup>2</sup>

From the time the Whitlam Government introduced ‘self-determination’ as its policy framework for Aboriginal and Torres Strait Islander people, there have been many legislative versions of what this means in practice. This debate about how Indigenous people’s interests and needs can be best represented in legislation has re-emerged after the Federal Government’s announcement of the abolition of ATSIC and its Regional Councils.<sup>3</sup> Both Indigenous peoples and governments continue to struggle with the question of representation in the context of policy formulation, funding arrangements, accountability, regulation, service delivery and Indigenous peoples’ human rights.

Regional governance for Aboriginal and Torres Strait Islander people is often proposed as a means of addressing disadvantage and disempowerment, and as better reflecting the priorities and aspirations of Indigenous communities than national or state-based structures. In the wake of the abolition of ATSIC, both the Federal Government and Opposition indicated their support for working with

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<sup>2</sup> Sam Jeffries, Chairman, Murdi Paaki Regional Council, the *New Agenda: Re-connecting government and Aboriginal and Torres Strait Islander Peoples*, paper given at the AIATSIS native title Conference, 3-4 June 2004, Adelaide,

See: <http://www.aiatsis.gov.au/rsrch/ntru/conf2004/papers/pdfs/SamJeffries.pdf> , 22.

<sup>3</sup> Transcript of the Prime Minister the Hon. John Howard MP, Joint Press Conference with Senator Amanda Vanstone, Parliament House, Canberra, 15 April 2004,

See: <http://www.pm.gov.au/news/interviews/Interview795.html>

regional structures for Indigenous people,<sup>4</sup> as did other state and territory government leaders.<sup>5</sup> Indigenous community leaders and organisations have also expressed their support for the notion of regional governance as more akin to traditional governance arrangements and as potentially providing more effective and targeted representation and service delivery.

The paper firstly establishes the importance of Indigenous governance. It then describes the emergence of regional governance as the preferred model of governance for many Indigenous communities. The main body of the paper examines existing legislative frameworks that enable some form of Indigenous governance; their history, functions, powers, constituencies, funding bases, associated organisations and representative mechanisms. These legislative frameworks are the *Native Title Act 1993 (Cth)*, the *Aboriginal Land Rights Act 1983 (NSW)*, the *Aboriginal Councils and Associations Act 1976 (Cth)*, the *Local Government Act 1978 (NT)* and the *Aboriginal Land Rights Act 1976 (NT)*. The paper reflects on the legislation that establishes governance in Australia's external territories, with a particular emphasis on the *Norfolk Island Act 1979(Cth)*. It also examines the recently repealed *ATSIC Act 1989 (Cth)*, the most comprehensive national and regional governance structure that has existed for Aboriginal and Torres Strait Islander people in Australia. Finally, the paper explores the Torres Strait Regional Authority, the only part of the ATSIC regional governance structure that remains and the model that many other Indigenous communities refer to in their aspirations for regional governance.

In exploring these legislative frameworks, the paper will identify the possibilities and limitations of such frameworks as vehicles for Indigenous aspirations to regional governance, the lessons to be learned for the development of future models and for government policy at all levels.

The impetus for regional governance for Indigenous communities raises important challenges regarding representation, power, jurisdiction, capacity and resourcing. Some of these issues can be responded to through legislation; others have political, social and cultural dimensions that are matters for Indigenous people to negotiate within their own communities as well as with governments.

The paper recognises that legislation is only one possible mechanism for facilitating Indigenous governance, and by no means the best. Other mechanisms

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<sup>4</sup> For example, see Amanda Vanstone, Minister for Indigenous Affairs, 'Minister announces new Indigenous representation arrangements', 29 June 2005,

[http://www.vanstone.com.au/default.asp?Menu=vips\\_22.05](http://www.vanstone.com.au/default.asp?Menu=vips_22.05); Robert McLelland, ALP member for Barton, speech, *Aboriginal And Torres Strait Islander Commission Amendment Bill 2005*: Second Reading, 15 March 2005, House Hansard, 31, See: <http://www.robertmcllelland.com/speeches/atsic15mar05.htm>

<sup>5</sup> For example, see Northern Territory Government, 'Facilitating Indigenous Development', *Strategic Directions 2005-2007*, <http://www.nt.gov.au/dcm/strategic/indigenous.shtml>; Western Australian Department of Indigenous Affairs, 'New voice for Indigenous people fostered by Gallop Government', 2 July 2005, See:

[http://www.dia.wa.gov.au/News/News\\_190.aspx](http://www.dia.wa.gov.au/News/News_190.aspx)

include constitutional recognition of Indigenous sovereignty and rights to self-determination, the establishment of a treaty or treaties between Indigenous and non-Indigenous Australians, and the assertion of Indigenous governance rights outside of any official recognition of such rights. However, since legislation has been the primary means for formally recognising Indigenous governance and other rights in the past 30 years, it remains an important avenue for facilitating Indigenous regional governance aspirations. With the abolition of ATSIC in 2005, it is an important time to take stock of existing legislative approaches to recognising and facilitating Indigenous governance.

## **I. THE IMPORTANCE OF INDIGENOUS GOVERNANCE**

Aboriginal and Torres Strait Islander people have distinct rights relating to their identity as the first peoples of Australia. As colonised peoples, they assert ownership and authority over traditional lands and sites of cultural significance – rights that have been recognised to varying degrees by Australia’s Parliaments, Executive governments and the High Court.<sup>6</sup> Indigenous Australians identify as sovereign peoples who never ceded their land and continue to feel separate, both in identity and in the way they are treated differently from other Australians.<sup>7</sup> They also aspire to greater autonomy and control in the provision of appropriate services in the areas of health, housing, and education, and recognition of Aboriginal law, jurisdiction and self-government. Such aspirations are often expressed in the language of ‘self-determination’, an internationally recognised right of all peoples to freely determine their political status and pursue their economic, social and cultural development.<sup>8</sup> Various international human rights treaty bodies have identified self-determination as a right that is held by Indigenous peoples as distinct groups - a right to participate in decision making over their traditional lands and natural resources.<sup>9</sup>

The two main expressions of the Whitlam government’s policy of self-determination for Indigenous peoples were direct Commonwealth funding of incorporated Indigenous organisations and communities, and the establishment of elected Indigenous advisory or policy-making bodies within the government bureaucracy.<sup>10</sup> This remained the bipartisan Federal Government policy framework

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<sup>6</sup> For example, see *Mabo v Queensland (no 2)* (1992) 175 CLR 1 and *Wik Peoples v Queensland* (1996) 187 CLR 1.

<sup>7</sup> Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia’s Future*, 2003, 95.

<sup>8</sup> Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Cultural and Social Rights; Article 3 of the Draft Declaration on the Rights of Indigenous Peoples.

<sup>9</sup> See for example, Human Rights Committee, Concluding observations on Australia, UN Doc CCPR/CO/69/AUS, 25/4/2000, paragraph 10; Committee on Economic, Social and Cultural Rights, List of Issues: Australia, UN Doc E/C.12/Q/AUSTRAL/1, 23/05/2000, Issue 3.

<sup>10</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Fifth Report 1997*, 1998, 39.

for Indigenous affairs until the election of the Howard Government in 1996, when the Government indicated that it would no longer support the principle of self-determination as the basis of Indigenous policy formulation and in particular, that it would actively oppose recognition of Indigenous peoples' entitlement to such a right in international negotiations.<sup>11</sup> The Minister for Foreign Affairs, Alexander Downer stated, 'We don't want to see a separate country created for [I]ndigenous Australians. We will ... be arguing ... that it might be better to use the term self-management rather than leaving an impression that we are prepared to have a separate [I]ndigenous state.'<sup>12</sup> This move away from 'self-determination' by the government confuses legitimate Indigenous claims for greater community autonomy within Australia with an agenda for separatism that is rarely sought by Indigenous people.<sup>13</sup>

Aboriginal and Torres Strait Islander people share a number of common experiences as a result of colonisation and subsequent government laws, policies and practices that discriminated against Indigenous communities.<sup>14</sup> There are a range of issues relating to Indigenous collective rights, identity and welfare that are negotiated at a national level – such as those relating to policy frameworks and benchmarks for programs and service delivery. There is also an important role for Indigenous leadership at a national level around issues relevant to Aboriginal and Torres Strait Islander people across Australia, such as reconciliation, a treaty, the impacts of government policy and associated political and media debates.

However, Aboriginal and Torres Strait Islander peoples are culturally and demographically diverse peoples, facing a range of social and economic priorities. Some Indigenous communities in Australia are formed around connections to traditional lands, others to areas where governments forcibly moved Indigenous families; some communities have emerged in connection with regional or urban centres, others to sites of political or cultural significance. Not surprisingly, then, there is a diversity of views amongst Indigenous people about self-determination and its connection to issues of sovereignty and rights.

Aboriginal and Torres Strait Islander people have long advocated for greater participation in the decision-making institutions of the state and for more autonomy in the form of devolved authority across a wide range of jurisdictions, including land ownership and management, health, welfare, economic

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<sup>11</sup> Mick Dodson and Sarah Pritchard, 'Recent Developments in Indigenous Policy: The Abandonment of Self-Determination?', *Indigenous Law Bulletin* 21, 1998.

<sup>12</sup> Dodson and Pritchard, above n 15.

<sup>13</sup> Behrendt, above n 11, analyses Indigenous claims to self-determination and sovereignty and argues that they are aspirations for greater community autonomy within the Australian state. Behrendt also argues that there is very little interest in the notion of a separate Aboriginal state within Australia.

<sup>14</sup> Megan Davis and Hannah McGlade, 'International Human Rights Law and the Recognition of Aboriginal Customary Law', *Background Paper No. 10*, Law Reform Commission of Western Australia, March 2005, 7.

development, law and education.<sup>15</sup> Despite many years of official policies of ‘self-determination’, such aspirations remain current.

The incorporation of Indigenous organisations that has occurred over the past thirty years has brought political and other advantages to Indigenous communities, and has been described as providing ‘ample evidence that Indigenous organisations deliver more effective services than those available in the mainstream’.<sup>16</sup> However, others have described the incorporation of Indigenous organisations as leading to ‘silos of factional power within communities’, as organisations have been required to compete with each other for local legitimacy, scarce funds and staff.<sup>17</sup> John Ah Kit has criticised the lack of transfer of skills and capacity that accompanied the ‘transfer 30 years ago of management of communities to so-called self-management and self-determination’.<sup>18</sup>

Community-based structures and processes are crucial to any Indigenous governance system. However, as noted above, community-based organisations and representative mechanisms face significant challenges and, for various reasons, many do not have the capacity to adequately represent and serve their constituencies. As our survey of legislation will demonstrate, the internal governance, auditing and administration requirements in legislation establishing Indigenous governance bodies and mechanisms are burdensome, and take valuable time and resources away from the core representative functions and responsibilities of Indigenous organisations.

Indigenous governance arrangements supported by governments to date have tended to reflect jurisdictional and bureaucratic imperatives rather than Indigenous aspirations and priorities. On the one hand, this is not surprising, given that Indigenous peoples are chronically under-represented in the mainstream government institutions that create these arrangements.<sup>19</sup> On the other, the lack of mainstream representation means that governments need to pay particular attention to Indigenous priorities in establishing legislative mechanisms to facilitate them.

## **II. THE IMPETUS TOWARDS REGIONAL GOVERNANCE FOR INDIGENOUS COMMUNITIES**

Policy formulation and leadership at a national, state and territory level in

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<sup>15</sup> Diane Smith, ‘Jurisdictional devolution: Towards an effective model for Indigenous community self-determination’, *CAEPR Discussion Paper No. 233*, 2002, 6.

<sup>16</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 14, 39.

<sup>17</sup> Diane Smith, ‘Jurisdictional devolution: Towards an effective model for Indigenous community self-determination’, *CAEPR Discussion Paper No. 233*, 2002, 9.

<sup>18</sup> John Ah Kit MLA, Northern Territory Government Minister for Community Development, ‘Building stronger regions – stronger futures’, speech to Local Government Association of the Northern Territory, Alice Springs, 14 May 2003, 7.

<sup>19</sup> See for example, Alexander Reilly, ‘Dedicated Seats in the Federal Parliament for Indigenous Australians: The Theoretical Case and Its Practical Possibility’ (2001) 2(1) *Balayi: Culture, Law and Colonialism* 73 – 103.

Australia has a history of not adequately reflecting the diversity of experiences and priorities of different Indigenous communities. Equally, while past and current initiatives represented as ‘self-determination’ or as having ‘grass-roots’ legitimacy have been focused at the community level, community-based structures face considerable political and practical drawbacks. Many Indigenous people are of the view that their needs and aspirations may be most effectively negotiated and managed on a regional level.

In elaborating on the role of regional governance structures for Indigenous communities in Australia, it is important to investigate what support such authorities would need to represent and serve a particular group of Indigenous people. Indigenous communities have been exploring such issues, including how such groups may identify themselves; how jurisdictions may be recognised, and be assigned power and responsibility; how such structures may function for remote communities as distinct from Indigenous communities living in urban or regional areas; how they may intersect with traditional owners in those areas; how non-Indigenous people living in those areas may be affected by the establishment of such structures; how such structures would be funded; how regional authorities or such bodies may engage with other levels of government; whether they could enact and police by-laws; and whether they would have a policy development and/or service delivery role.

In New South Wales, the Murdi Paaki Regional Council has expressed the desire to develop a regional governance capacity to improve access to resources and opportunities through the region they represent in western New South Wales.<sup>20</sup> The Murdi Paaki Regional Council proposes that a regional authority would represent and advocate for the interests of Aboriginal and Torres Strait Islander communities and people in the region; provide regional coordination to ensure the equitable distribution of funding to communities; negotiate funding arrangements and agreements with government agencies to meet the needs of communities; and enter into service contracts with Aboriginal organisations; formulate a regional development plan.<sup>21</sup>

The Central Land Council (CLC) in the Northern Territory has also proposed a ‘new and innovative model’ of regional governance for Aboriginal communities in Central Australia that would deal directly with the Federal Government for funding, and in turn, deal directly with individual communities.<sup>22</sup>

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<sup>20</sup> Murdi Paaki Regional Council, Submission to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs’ Inquiry into Capacity Building in Indigenous Communities, 27 August 2002, 2.

<sup>21</sup> Murdi Paaki Regional Council, above n 24, 12-13.

<sup>22</sup> Central Land Council, Evidence to Senate Select Committee on the Administration of Indigenous Affairs, *Proof Committee Hansard*, 24 August 2004, 67, quoted in Martin Mowbray, ‘If Indigenous Governance = local government, what are the options?’, 2005 Seminar Series: *Indigenous Governance – Challenges, Opportunities and Outcomes*, 11 May 2005, 11, <http://naru.anu.edu.au/papers/2005-04-11Mowbray.pdf>

The CLC has outlined certain key principles to guide the development of an Aboriginal regional governance structure, including that it must be ‘based in, or compatible with, Aboriginal law’; have control over areas such as ‘funding allocations, economic development, service delivery’; have the ‘power to enter into agreements with all tiers of government, and third parties’; have the capacity for ‘monitoring, control and coordination of service delivery’; and ideally, ‘be provided for by a Commonwealth statutory regime’.<sup>23</sup>

John Ah Kit, the Member for Arnhem, has also advocated regional over individual community governance and identified the key advantages of Regional Authorities to be achieving a critical mass of competent, professional service delivery personnel with proper support and guidance; informed engagement of communities in decisions about what kind of services are appropriate and how and where they will be delivered; accountability on the part of communities for the decisions and the demands they make on service delivery organisations; and avoiding the money for the delivery of services being wasted on administration and duplication.<sup>24</sup>

The Northern Territory *Building Effective Governance Conference* recommended that Regional Authority structures and processes should be driven by Indigenous people; recognise and build upon customary law and values; build upon existing community strengths and capacities; and build upon the foundations of both Indigenous culture and contemporary best-practice in order to achieve the most legitimate and effective forms of Indigenous governance.<sup>25</sup> Peter Yu has argued that regional governance is central to Indigenous participation in the nation’s society and economy.

Regional empowerment is ... the key ingredient to a reconciled Australia. When I raise the concept of regional governance I am not advocating some form of separatism, but quite the opposite. It is a mechanism that will empower Aboriginal people to negotiate our inclusion and participation in the society and economies we share with our non-Indigenous neighbours.<sup>26</sup>

The Aboriginal and Torres Strait Islander Social Justice Commissioner’s *Social Justice Report 2000* identified the development of governance structures and regional autonomy as having the potential for a successful meeting place to integrate the various strands of reconciliation. In particular, it found that it is able to tie together the aims of promoting recognition of Indigenous rights, with the

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<sup>23</sup> Central Land Council, above n 26, 11.

<sup>24</sup> Central Land Council, above n 26, 14.

<sup>25</sup> ‘Final Recommendations’, *Building Effective Governance Conference*, Jabiru, Northern Territory, 4-7 November 2003, See:

[http://www.nt.gov.au/cdsca/indigenous\\_conference/web/html/Final\\_Recommendations.pdf](http://www.nt.gov.au/cdsca/indigenous_conference/web/html/Final_Recommendations.pdf)

<sup>26</sup> Peter Yu, ‘Unfinished Business – National responsibilities and local actions’, in Sam Garkawe, Loretta Kelly and Warwick Fisher (eds), *Indigenous Human Rights*, Federation Press, 2001, 251.

related aims of overcoming disadvantage and achieving economic independence.<sup>27</sup>

This support by a range of Indigenous people and organisations for regional governance structures is in line with a range of policy statements made by various non-Indigenous leaders and governments. In his announcement regarding the abolition of ATSIC, the Prime Minister indicated his commitment to ‘service delivery and coordination at a grassroots level’ through establishing ‘different mechanisms at a local level through consultation with communities and with local government and with state governments’.<sup>28</sup> In the introduction of its ‘new mainstreaming’ arrangements in Indigenous Affairs, the Federal Government noted that it would focus on ‘regional need’:

Initially the ATSIC Regional Councils will be consulted but, over time, the intention is to work with regional networks of elected and representative indigenous organisations in planning the delivery of government support to community endeavour.<sup>29</sup>

The negotiation of ‘Regional Partnership Agreements’ is one the Federal Government’s key policy initiatives in working with Indigenous communities.<sup>30</sup> The Federal Government has in the past indicated that one of its priorities is ‘increasing opportunities for local and regional decision making by Indigenous people’.<sup>31</sup>

The 2005 report of the Senate Select Committee on the Administration of Indigenous Affairs emphasised that ‘it is imperative that effective regional representative structures be retained’ for Indigenous communities.<sup>32</sup> The Committee recommended that the life of the ATSIC regional structures be extended to ‘facilitate the establishment of sound regional structures that are supported by Indigenous people’.<sup>33</sup> The 2003 report of the Review of the Aboriginal and Torres Strait Islander Commission, *In the Hands of the Region – A New ATSIC*, noted the need to accommodate the establishment of autonomous regional governance structures in the future that would allow communities more direct dealing with governments and relevant agencies.<sup>34</sup> The *Understanding and*

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<sup>27</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2000*, 2001.

<sup>28</sup> The Hon John Howard MP, Joint Press Conference with Senator Amanda Vanstone, Parliament House, Canberra, 15 April 2004.

<sup>29</sup> Peter Shergold, Department of the Prime Minister and Cabinet Management Advisory Committee, speech to launch ‘Connecting Government: Whole-of-Government Responses to Australia’s Priority Challenges’, *Report No. 4*, 20 April 2004, 4, See: [http://www.pmc.gov.au/speeches/shergold/connecting\\_government\\_2004-04-20.cfm](http://www.pmc.gov.au/speeches/shergold/connecting_government_2004-04-20.cfm)

<sup>30</sup> Shergold, above n 33, 4.

<sup>31</sup> Executive Summary of the Commonwealth Government Response to the Council for Aboriginal Reconciliation Final Report, *Reconciliation: Australia’s Challenge*, September 2002, p. 2.

<sup>32</sup> Senate Select Committee on the Administration of Indigenous Affairs, *After ATSIC: Life in the mainstream?*, March 2005, Chapter 2, para 2.71.

<sup>33</sup> Senate Select Committee, above n 35.

<sup>34</sup> The Hon. John Hannaford, Ms Jackie Huggins AM, the Hon Bob Collins, for Minister for



*Implementing Good Governance for Indigenous Communities and Regions* conference (April 2002), staged by Reconciliation Australia, the National Institute for Governance and the Aboriginal and Torres Strait Islander Commission, recommended exploring and enhancing the powers and functions of regional authorities.

The benefits of regional governance arrangements have been documented in local government reforms around the country, and are evident in areas such as regional development, regional planning, land and resource management, and biodiversity conservation.<sup>35</sup> Regionalism has been associated by Diane Smith of the Centre for Aboriginal Economic Policy Research with effective policy measures such as achieving a critical mass of competent professional personnel; economies of scale in costs, infrastructure and service delivery; the facilitation of cost-sharing and more streamlined financial management systems; transference of best practice; and avoidance of duplication of services and structures.<sup>36</sup> However, in outlining such benefits, Smith also cautions that existing governance challenges – of building governing capacity and internal accountability; finding experienced professional staff; overcoming disruptive factionalism; promoting competent leadership; achieving productive relationships with traditional owners and governments - may simply gravitate from the community to the regional level, with potentially greater consequences.<sup>37</sup>

It is important that a policy shift to regionalism is supported by a thorough understanding of existing models, their limitations and successes, and workable avenues through the current political environment. Investigation of the legal framework for regional governance is particularly important given the demonstrated need for a new approach in negotiating and managing Indigenous affairs. Much of the difficulty associated with past policies affecting Indigenous people and their rights has been the result of onerous legislation imposed from above involving protracted, expensive litigation with little outcome for Indigenous communities, or top-down approaches that do not take into account the priorities and aspirations of those communities.

### **III. LEGISLATIVE FRAMEWORKS FOR INDIGENOUS GOVERNANCE**

The following survey of legislation reveals a wide range of approaches to facilitating Indigenous governance. It is evident from the survey that each

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Immigration and Multicultural and Indigenous Affairs, November 2003.

<sup>35</sup> Diane Smith, 'Building Effective Indigenous Governance, The Way Forward for Northern Territory Regions and Communities: Background Issues Paper', prepared for the NT Indigenous Governance Conference, Jabiru, 4-7 November 2003, 14.

<sup>36</sup> Smith, above n 39, 14.

<sup>37</sup> Smith, above n 39, 14.

legislative scheme responds to a particular political challenge at the time of its creation, and that there is a considerable overlap and a lack of coordination between the schemes. The ad hoc nature of legislation facilitating Indigenous governance has been exacerbated by the abolition of ATSIC which, as a central agency, offered a consistent national approach to Indigenous governance, and regional governance in particular. However, the point of the survey is not to criticise the existing legislative schemes but to learn from them. At the end of the survey, we look to how the legislative schemes might facilitate Indigenous governance in the future.

### **A. Aboriginal Land Rights Act 1983 (NSW)**

New South Wales was the first State in the Commonwealth to implement a statewide land rights regime for Aboriginal peoples. The regime that was implemented in New South Wales was the Aboriginal Land Rights Act 1983 (The Act) remains structurally the same in 2005. The Act provided for a representative structure that was local, regional and state wide in scope. The preamble to the Act acknowledges the place of land and its relevance and significance to the Aboriginal peoples of NSW. Notably, the preamble accepts that land set aside for Aboriginal people has been progressively reduced without compensation.<sup>38</sup>

The Act establishes four bodies: the New South Wales Aboriginal Land Council (NSWALC), Regional Aboriginal Land Councils (RALC), Local Aboriginal Land Councils (LALCs) and the Registrar of Aboriginal Land Rights. Local Aboriginal Land Councils are mandated to ‘improve, protect and foster the best interests of all Aboriginal persons within the Council’s area and other persons who are members of the Council.’ To this end, they can acquire land and use, manage, control, hold or dispose of, or otherwise deal with, land vested in or acquired by the Council and seek to protect lands of cultural significance to National Parks and Wildlife Services. Regional Aboriginal Land Councils are mandated to improve, protect and foster the best interests of all Aboriginal persons within the Council’s area and other persons who are members of Local Aboriginal Land Councils in that area. They have functions that focus on assisting Local Aboriginal Land Councils within its area and to the NSW Aboriginal Land Council in the management, acquisition, use, control and disposal of land and promoting the protection of Aboriginal culture and the heritage of Aboriginal persons in its area.

The NSW Aboriginal Land Council is mandated to improve, protect and foster the best interests of Aboriginal persons within New South Wales and ‘to relieve poverty, sickness, suffering, distress, misfortune, destitution and helplessness of Aboriginal persons within New South Wales’. It is charged with the responsibility for the funding and administration of the land council system, but can also acquire land to provide a limited range of benefits to Aboriginal

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<sup>38</sup> Aboriginal Land Rights Act 1983 (NSW) – Preamble at p 2.

people in NSW and to advise the Minister on matters relating to Aboriginal land rights. The Registrar's roles include keeping a register of claims made under the act, approving the rules of the land councils, monitoring compliance and mediating disputes.

The Act and Regulations have been amended numerous times since 1983 and the NSW Minister for Aboriginal Affairs announced a new review into the NSW land rights system in May 2004 to 'overhaul the NSW Aboriginal Land Council system'.<sup>39</sup>

## **1. Regional Governance under the NSW Land Rights Act**

Of the three bodies established under the Act, it is RALCs that are modelled on the concept of regional governance, and will be the focus of this analysis. Under the current Act, the role of NSWALC and the LALCs are dominant over those of a RALC since amendments over time, particularly in 1990, took powers that were originally vested at the regional level and placed them with either the local or state land councils. The role of the RALCs was very much focused on the protection of culture and the realignment of Aboriginal people in NSW with their land base and have continued to participate in forums for the development of regional strategies ranging from water reform, regional forestry agreements, and issues relating to fisheries to name a few.<sup>40</sup>

The benefits of expanding the role of RALCs are numerous. Firstly, governments are geared towards regional service delivery models and therefore governments do not have to expend funds on the establishment of networks that disappeared when ATSIC was abolished. Secondly, the tiered system of Aboriginal land councils allows certain 'checks and balances' by virtue of the fact that Regional representatives are elected by LALC members to enable downward accountability to the people at the local level. Further, the NSWALC has fiscal oversight. Through reporting requirements there may be greater transparency of RALC decision-making and planning processes. Thirdly, and extremely important, is the fact that these are truly representative bodies. The RALCs are elected officials and accordingly they are there to ensure outcomes for Aboriginal people. If outcomes are not forthcoming then there is an election that may remove the under-performing representative.

The Act is currently being reviewed and possible changes include realignment of the boundaries of the RALCs with the previous ATSIC regional councils system, thereby making regional governance more acceptable to service delivery agencies. The NSW Land Rights Act has provided for some form of regional governance since its inception in 1983. Since no other state in Australia

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<sup>39</sup> NSW Department of Aboriginal Affairs, See: <http://www.daa.nsw.gov.au/daanews/2/LCRupdate.html>.

<sup>40</sup> NSW Department of Aboriginal Affairs, above n 4, 39

has a representative structure as complete as that which is created under the Land Rights Act in NSW, it remains an example of a legislated structure that includes regional governance bodies to articulate the views of its constituents in designated areas.

### ***B. The Aboriginal and Torres Strait Islander Commission (ATSIC) Act 1989***

Despite its abolition in 2004, we include a brief appraisal of ATSIC in this review because it was the most comprehensive legislative model of self-representation for Indigenous people in Australia. Furthermore, the regional council areas and representative structures are likely to remain the site for future claims to regional governance.

The ATSIC Act created a Board of Commission and regional councils (who at the time of ATSIC's demise numbered 35). All the bodies created by the ATSIC Act were separate legal entities. Aboriginal and Torres Strait Islander people decided membership of the regional councils through election. Each regional council would elect their Chair. The ATSIC Act clustered the regional councils into zones for the purpose of them electing a Commissioner to the Board.

Under the objects of the ATSIC Act, the Board of Commissioners and the Regional councils are required to:<sup>41</sup>

- Ensure maximum participation of Aboriginal and Torres Strait Islander people in government policy formulation and implementation;
- Promote self-management and self-sufficiency of Indigenous Australians;
- Further the economic, social and cultural development of Indigenous Australians; and
- Ensure co-ordination of Commonwealth, state, territory and local government policy affecting Indigenous Australians.

The ATSIC Board of Commission had legislated functions and powers. Section 7 of the Act states a broad function for the Commission.<sup>42</sup> However, three key functions of the Commission were to advise government at all levels on Indigenous issues; to advocate for the recognition of Indigenous rights on behalf of Indigenous peoples regionally, nationally and internationally; and to deliver and monitor some of the Commonwealth government's Indigenous programs and services.

## **1. Regional governance under the *ATSIC Act***

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<sup>41</sup> Aboriginal and Torres Strait Islander Commission Act 1989 (Cth), s 3.

<sup>42</sup> ATSIC Act, s 7

Section 94 of the Act sets out the functions of regional councils. These included formulating, revising a regional plan and assisting the Commission in implementing the plan, acting as a representative for people in the region and to act as an advocate for their interests.<sup>43</sup> One of the major differences between the functions of the Commission and the regional councils was that the regional councils had a legislated representative function that was not mirrored at the Commission level. However, both levels of ATSIC had advocacy roles and this meant that there was a representative voice at the national level, as well as the regional level.

The devolution of planning and funding decisions to the regional councils was a recognition that they were in a better position to identify local resource needs than a national body. However, limited resources meant that councils were forced to allocate the resources in accordance with priorities set out in the regional plan and many of the larger programs, such as the Community Development Employment Project (CDEP) and the Community Housing and Infrastructure Program (CHIP), although delivered through the regional council system, gave very little discretion to regional councils to fund on the basis of their stated needs.

Other government agencies with responsibility for providing Indigenous programs commonly deferred to regional councils when issues affecting the service delivery to Indigenous peoples were raised within their agency. This attested to the effectiveness of regional councils as an institution of government. Ironically, it may also have led to criticism of councils for failing to deliver these services themselves, despite the responsibility lying squarely with the mainstream agencies. The delivery of services to Indigenous peoples on how such programs were designed and administered was closely scrutinised by the Commonwealth Grants Commission. In 2001 the Commonwealth Grants Commission released its *Report on Indigenous Funding 2001*. One of the major findings of the report was that mainstream programs provided by Commonwealth agencies did not meet the needs of its Indigenous constituents.<sup>44</sup>

Two lessons for future regional governance models emerge from the experiences of the ATSIC regional councils. Firstly, the regional councils were not equal in size to the constituency that they represented. The number of Indigenous people being represented did not correlate into the number of regional councils and zone areas and the boundaries of these bodies were not decided on a *per capita* basis. This was particularly true in Western Australia and the Northern Territory. The number of Indigenous people represented by one 'metropolitan' council and zone had equal weighting to regional councils and zones in remote and rural areas where the Indigenous population numbers would be much less. A system of representation whereby all Indigenous people are getting equal representation should be a fundamental starting point in any regional governance

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<sup>43</sup> *ATSIC Act*, s 94(1)(a)-(e).

<sup>44</sup> Commonwealth Grants Commission, *Report of Indigenous Funding; Main Findings*, 2001, xvi.

model that purports to be ‘representative’.

The second lesson to be learned from the demise of ATSIC is that service delivery and models of governance cannot ignore the States and Territories. The ATSIC regime was structurally deficient in that it did not provide for adequate liaison between the Commission, regional councils and State and Territory governments. No regional governance model can be successful at overcoming Indigenous disadvantage by shutting out a crucial piece of the service delivery model. The COAG trial sites may highlight the inherent issues of co-ordinating service delivery to Indigenous peoples that cross boundaries, not only interdepartmentally, but also across jurisdictions.

The lessons from the regional governance model that was developed under the ATSIC regime are many. During the course of its very politicised life, ATSIC regional councils developed many strategies that assisted in the effective delivery of services to its constituents. The role of regional governance is being expanded across all spheres of the Australian community. Despite some teething issues, regional councils achieved significant outcomes for their constituents and provide a good model for future regional governance structures.

### **C. The Torres Strait Regional Authority**

The Torres Strait Regional Authority (TSRA) was the only part of the Aboriginal and Torres Strait Islander Commission to be maintained after the repeal of the *ATSIC Act* on 24 March 2005.<sup>45</sup> A number of Indigenous groups on the mainland, such as Murdi Paaki Regional Council, have pointed to the TSRA as a model for regional governance.<sup>46</sup> In this section of the paper, we analyse the strengths and weaknesses of the TSRA as a governance model for the Torres Strait.

The TSRA was established as Part 3A of the *ATSIC Act* in 1994, and now exists as Part 3A of the *Aboriginal and Torres Strait Islander (ATSI) Act* 2005. The Division and Section numbers of Part 3A of the new Act mirror Part 3A of the *ATSIC Act* in all respects. Part 3A sets out the functions (Div 2, 142A – 142E), funding powers (Div 3, 142F – 142Q) and constitution of the TSRA (Div 4, 142R – 142S), as well as detailed provisions for the holding of elections for positions to the TSRA (Div 5, 142T – 143H) and for the administration of the Authority (Div

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<sup>45</sup> Aboriginal And Torres Strait Islander Commission Amendment Act 2005 No. 32, 2005.

<sup>46</sup> ‘We see the structure being translated into a Regional Authority or similar institution, along similar lines to the Torres Strait Regional Authority which grew out of a regional council under the *Aboriginal and Torres Strait Islander Commission Act 1989*. The reason for this is that we believe regional institutions are better able to assist communities, individuals and families if they have greater powers of negotiation, coordination and agreement making which are recognised by all spheres of government.’ Murdi Paaki Regional Council, *Submission to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs’ Inquiry into Capacity Building in Indigenous Communities*, 27 August 2002, 3.

6, 143J - 144F). Division 7 of Part 3A (s144G – 144Q) established the position of a General Manager for the TSRA. The General Manager is appointed by the Minister and is responsible for the day-to-day administration of the TSRA. The staff required to assist the General Manager are engaged under the *Public Service Act 1999* (Cth) (Div 8, s144R). The relationship between the elected and administrative arms of the TSRA is discussed in more detail below.

From the 1998-1999 financial year, the TSRA has negotiated its appropriations as a separate agency. The increasing degree of autonomy of the Torres Strait represented in this legislative history, has been a long-term goal of Torres Strait Islanders. Advocacy for greater autonomy led to the establishment of a House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *A Report on Greater Autonomy for Torres Strait Islanders: A New Deal (A New Deal)* in 1997. The Committee accepted criticisms about the operation of the TSRA, and recommended that the TSRA be replaced by a Torres Strait Regional Assembly which represented all people in the region and was not a dedicated representative body for Aboriginal and Torres Strait Islander people. The Committee's view was that the move to greater autonomy must be for all people living in the Torres Strait, and not only Torres Strait Islanders:

Suffice to say here, that the concepts of equality: a full electoral franchise; equal opportunity; mutual respect and non-discrimination; provide the best basis for achieving democracy, accountability and greater autonomy.<sup>47</sup>

The TSRA itself has called for a restructuring of governance in the Torres Strait. In 2003, the TSRA submitted to the Minister for the Department of Immigration, Multicultural and Indigenous Affairs (DIMIA) a proposal to Improve Regional Governance in Torres Strait.<sup>48</sup> Also, during hearings before the Senate Select Committee on the Administration of Indigenous Affairs (2005), many submissions called for the abolition of the TSRA, and for an alternative governance structure to take its place.<sup>49</sup>

## **1. The Legislative Context of the TSRA**

The function and membership of the TSRA cannot be properly understood without first explaining the pre-existing legislative framework for local government in the Torres Strait upon which it was built. There are 18 Island Councils in the Torres Strait established under the Community Services (Torres Strait) Act 1984 (QLD).<sup>50</sup> Anyone

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<sup>47</sup> House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *A Report on Greater Autonomy for Torres Strait Islanders: A New Deal*, 1997, 12.

<sup>48</sup> TSRA, *A Proposal to Improve Regional Governance in the Torres Strait – Proposed TSRA Bill: A Submission to the Minister for Immigration, Multicultural and Indigenous Affairs*, July 2003.

<sup>49</sup> See Official Committee Hansard, *Administration of Indigenous Affairs*, Thursday Island, 26 August 2004.

<sup>50</sup> Community Services Act 1984 (Qld), ss37-47.

eligible to vote in Commonwealth or State Parliament elections is eligible to vote in Island Council elections. In other words, eligible voters are not limited to Aboriginal people or Torres Strait Islanders.<sup>51</sup> However, only Torres Strait Islanders can stand for election to an Island Council. Island Councils are funded through grants from Commonwealth and Queensland governments. The functions of local government including road maintenance, construction of public housing, water and sewage, childcare, parks and outdoor facilities. Councils also employ police, administer island courts and control entry onto land granted in trust to Torres Strait Islanders.<sup>52</sup>

The Torres Shire Council (TSC) provides local government services to all areas of the Torres Strait not covered by Island Councils. The TSC was created under the *Local Government Act 1993* (Qld). According to the *Report on Greater Autonomy for Torres Strait Islanders* (House of Representative, 1997), the TSC represents more than half the resident population of the Torres Strait region, including the majority of the non-Torres Strait Islanders in the Torres Strait, primarily people on Thursday, Prince of Wales and Horn Islands.<sup>53</sup> People can vote either in the Island council election or the election for the TSC, but not both.

An Island Coordinating Council is set up under sections 139 -148 of the *Community Services Act 1984* (Qld). Membership consists of all the Island Council Chairs and one person representing the Tamwoy community of Torres Strait Islanders living on Thursday Island.<sup>54</sup> The Council is established, among other functions, ‘to consider and advise any person on matters affecting the progress, development and wellbeing of Islanders’;<sup>55</sup> and ‘to recommend to the Minister and the chief executive concerning matters affecting the progress, development and wellbeing of Islanders and the administration of this Act’.<sup>56</sup> As will be seen, in this role, the Council has similar functions to the TSRA.

## **2. Governance under the TSRA**

The TSRA has an elected arm and an administrative arm. The elected arm has 20 members: the 18 chairpersons of the Island Councils (elected under the *Community Services Act 1984* (Qld)) and 2 persons elected through TSRA elections. The TSRA electors must be Aboriginal or TSI peoples and not have voted in the Island Council elections (in other words, they are Aboriginal and TSI peoples governed by the Torres Shire Council). Prior to the abolition of ATSIC, the TSRA elected one of its members to be an ATSIC Commissioner. The Commissioner was also the Chairperson of the Torres Strait Islander Board (TSIAB) which is concerned with the interests of Torres Strait Islanders who

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<sup>51</sup> *Community Services Act 1984* (Qld), s43; *Local Government Act 1993* (Qld), ss266-267.

<sup>52</sup> *Community Services Act 1984* (Qld), s34-43, and ss63-68.

<sup>53</sup> House of Representatives Standing Committee, above n 51, 20.

<sup>54</sup> *Community Services Act 1984* (Qld), s140.

<sup>55</sup> *Community Services Act 1984* (Qld), s141(1)(a).

<sup>56</sup> *Community Services Act 1984* (Qld), s141(1)(b).



reside on the mainland, and who make up about 75% of the total Torres Strait Islander population.<sup>57</sup> The TSRA plays a lead agency role, monitoring and advising governments on the implementation of programs in the region outside the normal departmental structures. Under S142A(1)(f)(ii) of the *ATSIC Act 1989 (Cth)*, the TSRA had the power to advise the Minister on ‘the coordination of the activities of other Commonwealth bodies that affect Torres Strait Islanders, or Aboriginal persons, living in the Torres Strait area.’

A Government appointed General Manager is the head of the administrative arm of the TSRA.<sup>58</sup> The General Manager is supported by staff elected under the *Public Service Act 1999 (Cth)*. The General Manager is responsible for the administration of all Commonwealth appropriations to the TSRA. The General Manager and the members of the TSRA Board have an agreement called the ‘Charter of Representation, Performance and Accountability’ which helps define their roles and keeps lines of responsibility between them clear. It is designed to ensure appropriate separation between policy-making by the elected arm and financial management by the administrative arm. The agreement gives formal effect to arrangements in place within the TSRA to ensure there are no conflicts of interest between the elected arm and administrative arm and that the administration responsibly advises and supports members of the Authority, and implements the priorities and strategic directions that the Authority identifies.

ATSIC was based on a mixture of group identity and regional representation. That is, it represented only ATSI peoples. But eligibility to vote was based on location within an ATSIC region and not on identification with a particular Aboriginal community. This model of representation has had a particular impact on Torres Strait Islander peoples living on mainland Australia. The 2001 census data shows that there are approximately 49,000 Torres Strait Islanders in Australia. Of these, approximately 88% live outside of the Torres Strait.<sup>59</sup> Until the abolition of the ATSIC Act, the interests of these Torres Strait Islanders were represented by ATSIC through the TSI Advisory Board and the Office of TSI Affairs. One of the problems for these Torres Strait Islanders under the ATSIC structure was that they constituted a minority group in all mainland ATSIC regions, and thus had never been represented through a regional commissioner on the ATSIC Board. The report of the Review of ATSIC, *In the Hands of the Regions* (2003), recommended that the place of the TSRA on the ATSIC Board of Commissioners be replaced by the Chair of the Torres Strait Islander Advisory Board to overcome this lack of representation. One of the gaping holes left by the abolition of ATSIC is any dedicated representation for the interests of Torres Strait Islanders on the mainland.

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<sup>57</sup> Australian Bureau of Statistics, *Census*, 2001.

<sup>58</sup> *ATSIC Act*, s144G.

<sup>59</sup> Australian Bureau of Statistics, above n 61, see also Alison Murphy, ‘Prescribed Bodies Corporate in the Post-Determination Landscape’ (2002) 5 *Balayi: Culture, Law and Colonialism* 162, 164.

Torres Strait Islanders have criticised the current structure of the TSRA from various perspectives. While recognising the importance of separating the policy and administrative arms within government, some members of the TSRA Board have expressed concern that the degree to which TSRA funding for the Torres Strait is controlled by a government appointed General Manager. The degree of external control is exacerbated by the fact that the Island Councils, though established and empowered under Queensland legislation, rely on the TSRA for a majority of their funding.<sup>60</sup>

A related concern is the relationship between the TSRA as the regional representative body for the Torres Strait and the Island Coordinating Council. As described above, the functions of these two bodies overlap to a considerable extent. According to their legislative functions, the TSRA ‘recognises and maintains the special and unique *Ailan Kastom* of Torres Strait Islanders’; formulates and implements programs’; ‘monitors the effectiveness of programs and develops policy proposals to meet national, State and regional needs’ (*ATSIC Act* s142(1) (a) – (d)). The Island Coordinating Council oversees ‘progress, development and well-being for the purposes of State funding’ (*Community Services Act 1984* (Qld), s141). There is clearly a duplication of responsibilities here, which is the product of the joint responsibility of State and Commonwealth governments for funding development in the Torres Strait. The inefficiency of the duplication is arguably lessened by the fact that the membership of the TSRA and the ICC is substantially the same. In fact, some Councillors were of the opinion that the overlap of membership and the overlap of legislative responsibilities under the State and Commonwealth legislation meant that the current structure was particularly effective. However, others argued before the *Senate Select Committee (2005)* that the ICC was the most appropriate body to oversee the operation of Island Councils as it is more directly accountable to the councils, and therefore to the people.<sup>61</sup>

Overall, testimony before the Senate Select Committee revealed a tension between the strengths and weaknesses of the current governance model. There was strength in the mirroring of regional and local representation as regional representatives had knowledge of local needs and therefore of funding priorities. On the other hand, some argued that the mirroring of regional and local representation directed the focus of representatives away from local needs, and also led to funding being controlled by a Commonwealth administrator (the General Manager) who was likely to have no local knowledge of the Torres Strait.

The Torres Shire Council operates outside of the oversight of both the TSRA and the ICC which are Indigenous specific organisations. The *Report on Greater Autonomy for Torres Strait Islanders* (House of Representative, 1997)

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<sup>60</sup> House of Representatives Standing Committee, above n 51,

<sup>61</sup> Official Committee Hansard, *Administration of Indigenous Affairs*, Thursday Island, Thursday, 26 August 2004.

recommended a restructuring of the current arrangements such that the TSRA be replaced by another elected organisation, separate from ATSIC, which was representative of all peoples in the Torres Strait, and thus focussed on development in the Torres Strait as a region, and not just the ATSI peoples in that region. The report pointed out that since ATSI peoples made up by far the majority of peoples in the region, they would maintain effective control of regional governance in the Torres Strait.

It is important to note that there are differences between the Torres Strait and other Indigenous regions in Australia which mean that the governance model in the Torres Strait might not be appropriate elsewhere. The first difference is that Torres Strait Islanders account for a large percentage of the overall population of the Torres Strait. A second important difference is that Queensland legislation already implements a comprehensive Indigenous specific governance model upon which the TSRA was able to build. To a large extent, in fact, the TSRA simply mirrors the existing governance structure of the Island Councils and Island Coordinating Council. No similar governance structure at the local level exists elsewhere in Australia. As a result, the TSRA is the only regional council for which the ATSIC Act did not govern the election of regional representatives and ultimately the Commissioner for the Torres Strait on the ATSIC Board.

As some parties argued before the House of Representatives in 1997, the existing level of autonomy within the Torres Strait might mean that the TSRA is not the most appropriate governance model for the Torres Strait, though it may be elsewhere in Australia. The *Report on Greater Autonomy for Torres Strait Islanders* (House of Representative, 1997) concluded that ultimately (and perhaps ironically) more profound autonomy for the Torres Strait will be possible if the governance model represents all people in the Torres Strait and not just Aboriginal and Torres Strait Islanders. On the mainland, on the other hand, dedicated Indigenous representation remains a priority given the minority population status of most Indigenous communities.

It is perhaps surprising that mainland Indigenous communities are looking to the TSRA as a model for regional governance, when Torres Strait Islanders view the TSRA as an interim arrangement leading eventually to a greater degree of autonomy for the Torres Strait. Nonetheless, there are a few clear lessons to be taken from the TSRA governance model: First, the importance of strong community representation on the body which is ultimately responsible for funding; and second, the importance of a clear distinction between advocacy for local development priorities and representation at the national level for the needs of the region as a whole.

An unresolved question in relation to the Torres Strait is whether there would be any advantage in abandoning the current model which focuses on the special needs of Aboriginal and Torres Strait Islanders in the Torres Strait (through the Indigenous specific Island Coordinating Councils) and, in its place, adopt a governance and funding model that applies to all people resident in the

Torres Strait. The *Report on Greater Autonomy for Torres Strait Islanders* (House of Representative, 1997) was firmly of the view that this was the future for the region, and that a possible way forward was to create a new Australian territory in the Torres Strait.<sup>62</sup> If the Torres Strait were to become a territory, the region as a whole would move from block funding from the Commonwealth and Queensland governments to untied grants to the region as a territory, possibly within the Commonwealth Grants Commission funding model for the States and Territories. Careful research into the impact on the levels and control of funding would need to be done before agreeing to such a model.

#### **D. Native Title Act 1993 (Cth)**

There can be no doubting the importance of the recognition of native title to Indigenous aspirations for self-determination and self-government. As more claims have been finally determined under the *Native Title Act 1993 (Cth) (NTA)*, an initial emphasis on establishing the nature and extent of native title rights has given way to an emphasis on forming agreements. The strength of native title lies, then, in the leverage it provides communities in negotiations with governments and others.

Native title has a few clear advantages as a platform for regional government. Its regional focus means that power is concentrated in local communities. Its basis in land rights provides communities with an independent foundation for negotiation with other parties with an interest in the land. Its foundation in Indigenous law and custom is a recognition that Aboriginal peoples have rights to land in Australia that predate non-Indigenous rights. The origin of native title in Indigenous cultural institutions encourages communities to value and protect those institutions, as the continuance of native title depends on them. Finally, native title is pragmatic in focus. As native title coexists with other interests in land, there is necessarily a focus on agreements.

There are certain inherent limits to the extent of self-government that can be supported by native title. First, native title is held by distinct community groups over distinct areas of land with fixed boundaries. This limitation has been overcome to some extent through the lodging of joint claims under s61 of the *NTA*. Second, native title is inalienable, and remains based on a relatively fixed, pre-colonial relationship to land. The inalienable nature of native title means that every agreement which sacrifices native title rights for some other benefit diminishes native title irrevocably. The source of native title rights in the common law means that it is vulnerable to future extinguishment by government, and a diminution of the negotiating power of native title holders *vis-à-vis* co-existent statutory rights.<sup>63</sup>

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<sup>62</sup> House of Representatives Standing Committee, above n 51, 2.

<sup>63</sup> See for example, Sean Brennan, 'Native Title and the "Acquisition of Property" under the Australian Constitution', (2004) 28 Melbourne University Law Review 28, Alexander Reilly,

Because native title is only a right to land and waters, agreements are necessarily framed around these concepts. Finally, the focus on land and economic benefits rather than on a right to self-government means that there is a risk of creating institutions for the management of native title that are not suitable for the broader governance needs of Indigenous communities. Despite these limitations, native title has been significant in focusing the site of Indigenous claims at the local and regional level rather than the national level. Good community organisation has been vital to the success of native title claims and the success of agreements which use native title as a platform.

The *NTA* establishes two forms of organisation through which native title is claimed and managed: Native Title Representative Bodies (NTRBs) under Part 11 of the Act<sup>64</sup> and Prescribed Bodies Corporate<sup>65</sup> (PBCs) under Part 2, Division 6 of the Act.<sup>66</sup> NTRBs are primarily service delivery organisations, assisting claimant groups to run their native title claims. They are regionally based, but can assist distinct communities to bring separate claims. There are currently 15 NTRBs. They do not cross state borders, and in some States, cover the whole State (for example, in South Australia). PBCs are land holding and land management organisations. Under sections 56 and 57 of the *NTA*, native title holders are required to form a PBC for the purpose of managing their title. Both NTRBs and PBCs are required to be incorporated under *The Aboriginal Councils and Associations Act 1976 (Cth)* (the ACA Act).<sup>67</sup>

## **1. Native Title Representative Bodies**

NTRBs have a wide range of functions, which are in addition to any functions that may be conferred on them under other legislation.<sup>68</sup> Their primary function is, on request<sup>69</sup>, to assist potential native title holders in the preparation of native title claims<sup>70</sup>, and to assist PBCs, native title holders, or potential native title holders ‘in consultations, mediations, negotiations and proceedings relating to’ native title related matters.<sup>71</sup> In addition to their functions under the *NTA*, NTRBs have statutory responsibilities under the ACA Act, and until its abolition, the *ATSIC Act 1989 (Cth)*. NTRBs perform this wide range of functions under a high level of legislative scrutiny. Among other duties, NTRBs must prepare a

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‘From a Jurisprudence of Regret to a Regretful Jurisprudence: Shaping Native Title from Mabo to Ward’, Murdoch University E-Law Journal Vol 9(4) 2002.

<sup>64</sup> *NTA*, Sections 201A - 203FH.

<sup>65</sup> PBCs are also referred to as Registered Native Title Bodies Corporate.

<sup>66</sup> Sections 55 – 60AA

<sup>67</sup> Section 201B requires the registration of NTRBs; and section requires the registration of PBCs.

<sup>68</sup> Section 203B.

<sup>69</sup> Section 203BB (2).

<sup>70</sup> Section 203BB (1)(a).

<sup>71</sup> Section 203BB (1)(b)(i) - (v).

comprehensive strategic plan which is approved by the Minister, keep good accounting records, prepare annual reports with financial statements, and be available for inspection and audit.

NTRBs apply to DIMIA for funding. Prior to its abolition, ATSIC was also able to supply funds to NTRBs out of its discretionary budget. Being service delivery organisations, NTRBs have limited scope for developing a financial base outside of DIMIA grants. Most of the submissions to the Parliamentary Joint Committee on Native Title, *Inquiry into the Capacity of Native Title Representative Bodies (NTRBs) to discharge their duties under the Native Title Act of 2004 (NTRB inquiry 2004)*, express concern that NTRBs are chronically under-funded.<sup>72</sup> The Report of the Senate Select Committee on the Administration of Indigenous Affairs of 2005<sup>73</sup> noted that with the abolition of ATSIC and the concentration of funding through The Department of Immigration and Multicultural and Indigenous Affairs (DIMIA), there was an increased danger of a conflict between the Commonwealth's role as the funding agency of NTRBs and as a potential adversary in a litigation process.

In addition to their legislative role, NTRBs are also community organisations taking their membership from local communities and representing their interests. In fact, most NTRBs pre-existed the *NTA* as community-based organisations. David Ritter has pointed out that 'there is an inherent contradiction ... between being a statutory body with [specific] functions and being a community organisation requiring a high degree of reflexivity to local community needs and politics'.<sup>74</sup> The hybrid nature of NTRBs is possible because in bodies incorporated under the *ACA Act 1976* (Cth), unlike under other Corporations laws in Australia, the membership controls the corporation, and not a separate board. In its submission to the *NTRB inquiry 2004*, the Office of Indigenous Policy Coordination (OIPC) suggested that this corporate arrangement makes 'governance in NTRBs difficult and unstable since ... control by the membership forms an uneasy partnership with quasi-statutory responsibilities and directors' duties to the corporation'.<sup>75</sup> The OIPC argued that NTRBs ought to be able to incorporate under other Corporations laws with clearer division between those

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<sup>72</sup> This concern was expressed by groups not represented by NTRBs but with whom they are required to negotiate such as the Association of Mining and Exploration Companies, see submission to the Submission to Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, *Inquiry into Native Title Representative Bodies*, June 2004,  
[http://www.aph.gov.au/senate/committee/ntlf\\_ctte/rep\\_bodies/submissions/sub06.pdf](http://www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/submissions/sub06.pdf)

The Association was concerned, in particular, that NTRBs were not allocating funds to future act negotiations.

<sup>73</sup> Senate Select Committee on the Administration of Indigenous Affairs, *After ATSIC: Life in the mainstream?*, March 2005.

<sup>74</sup> David Ritter, 'So What's New? Native Title Representative Bodies and Prescribed Bodies Corporate after Ward' (2002) 21 Australian Mining and Petroleum Law Journal 302, 307.

<sup>75</sup> Submission, 19.

within the corporate structure and the members it represented. OIPC also submitted that non-Aboriginal organisations ought to be recognised as NTRBs.

## **2. Prescribed Bodies Corporate**

When an Indigenous community has successfully made a native title claim, the *Native Title Act* requires that the native title be held on behalf of the native title holders by a Prescribed Body Corporate established under the *ACA Act*.<sup>76</sup> The PBC can be in either a relationship of trust (s56) or a relationship of agency (s57) with the native title holders.

The role of PBCs is to ensure that any dealings between native title holders and others with an interest in the area in which native title exists occurs through a legal personality with perpetual succession.<sup>77</sup> The advantage for non-native title holders is obvious. PBCs provide a legal entity with which to enter agreements over native title related issues without having to find and negotiate with native title holders themselves. The corporate structure of PBCs is in a familiar legal form to non-Indigenous stakeholders, and persons with an interest in the land over which native title is held do not have to do business with native title holders according to the laws of those native title holders.

The advantages for the native title holders are not so obvious. A corporation is able to ‘acquire, hold and dispose of property, including communal property, sue and be sued in its own right, can continue to exist if its membership changes over time; and may protect its members from personal liability for acts undertaken by the corporation.’<sup>78</sup> Any advantages to empowering the corporation to carry out these functions must be weighed against the fact that requiring a corporate structure to administer native title adds a layer of complexity to existing governance structures of traditional owners. The Aboriginal and Torres Strait Islander Social Justice Commissioner noted in his *Native Title Report 2004* that there has been concern that ‘managing the corporate structures prescribed under the NTA draws attention and resources away from building strong cohesive governance within the traditional owner group itself’.<sup>79</sup>

There are particular features of the operation of Indigenous corporations in the native title context which should be mentioned. Firstly, PBC membership is restricted to the native title holding group.<sup>80</sup> In his submission to the NTRB review in 2004, John Basten stated of this requirement, ‘Almost by definition, the people to whom land is being returned are those who are least likely to have the

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<sup>76</sup> *Native Title (Prescribed Corporate Bodies) Regulations 1999*, reg 4.

<sup>77</sup> See generally, Mantziaris and Martin, *Native Title Corporations: a legal and anthropological analysis* (2000), 100.

<sup>78</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2004*, 32.

<sup>79</sup> *Native Title Report 2004*, 31.

<sup>80</sup> Regulation 4(2)(a).

education, experience, resources or skills to administer and manage land properly.<sup>81</sup> He made a comparison between the role of Land Councils under the *NT Land Rights Act 1976 (Cth)* and the *NTA* in this regard. In addition to potentially excluding people who may have relevant expertise in managing a PBC, the restriction of PBC membership might also exclude Indigenous people who have a cultural or geographical connection to the successful claimants, but did not participate in the claim. The membership of a native title claimant group does not necessarily reflect the complex set of relationships that might exist on a claim area. The restrictions on who can and cannot make a native title claim might, for example, mean that a community defines itself more narrowly for native title claim purposes, than it would in relation to other dealings on community land.

Secondly, although all members of a PBC must be native title holders, not all native title holders need to be members of the PBC. So there is flexibility to this extent in how the PBC is structured. It can, therefore, be either a representative body (in a trust relationship) or allow for direct participation of all members of the native title holding group (in which case the PBC is an agent for native title holders).

Thirdly, PBCs are not provided with funding under the *NTA*. A regular criticism of PBCs is their lack of resources.<sup>82</sup> In theory, since native title is meant to provide a means to generate resources for communities through entering agreements with others on native title land, there is no need for independent government funding of PBCs. In practice, however, the ability of native title land to generate income for native title holders is highly variable across the country, and there is not necessarily any income prior to a positive determination being made. In addition, the Fingleton review of the *ACA Act 1976 (Cth)* noted that the cost of maintaining PBCs was both in financial terms and in terms of the human

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<sup>81</sup> Submission to Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, *Inquiry into Native Title Representative Bodies*, June 2004, [http://www.aph.gov.au/senate/committee/ntlf\\_ctte/rep\\_bodies/submissions/sub11.pdf](http://www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/submissions/sub11.pdf), 3.

<sup>82</sup> See, eg, David Ritter, 'So What's New? Native Title Representative Bodies and Prescribed Bodies Corporate after Ward' (2002) 21 *Australian Mining and Petroleum Law Journal* 302. See also, Alison Murphy, 'Prescribed Bodies Corporate in the Post Determination Landscape' (2002) 5 *Balay: Culture, Law and Colonialism* 162, 164; Submission of NSW Native Title Services to the Submission to Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, *Inquiry into Native Title Representative Bodies*, June 2004, See:

[http://www.aph.gov.au/senate/committee/ntlf\\_ctte/rep\\_bodies/submissions/sub06.pdf](http://www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/submissions/sub06.pdf) : 'Many Aboriginal people who are the beneficiaries of determinations that native title exists are not appropriately skilled to manage these organizations. They are unable to pay for external expertise to pay for that assistance. There is however, no financial assistance provided to prescribed bodies corporate to fulfil these obligations.' Submission of the Association of Mining and Exploration Companies submission to Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, *Inquiry into Native Title Representative Bodies*, June 2004, See:

[http://www.aph.gov.au/senate/committee/ntlf\\_ctte/rep\\_bodies/submissions/sub06.pdf](http://www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/submissions/sub06.pdf) 4



resources required to maintain the corporate structure.<sup>83</sup> For some native title holders, the burden of establishing and maintaining a statutory corporation seems disproportionate to the benefits they gain through the corporation. The PBC structure involves a number of complex legal relationships. There is a statutory trust or agency relationship between holders of native title and the PBC governed by the *NTA*. There is a corporate relationship which creates a raft of obligations on the PBC to the Registrar of Aboriginal Corporations under the *ACA Act*. This is added to any pre-existing relationships native title holders have with each other, and with others, within the native title area.<sup>84</sup>

Mantziaris and Martin point to a variety of contradictions in rights and obligations under these different relationships; including, ‘non-congruence of group and corporate membership, the cultural specificity of the corporate governance model (in particular, the structure of the general meeting, and the operation of the fiduciary principle), and the possibility that the fulfilment of the corporation’s obligations under the statutory trust or agency relationship may be disturbed by an indigenous ‘politics of representation’ played out through the governance structure of the corporation.’<sup>85</sup> These problems specific to PBCs in the native title context compound the problems of cultural inappropriateness inherent in corporate governance models such as the *ACA Act 1976* (Cth), which is discussed below.<sup>86</sup>

The very different membership and structure of NTRBs and PBCs provides two very different perspectives of potential regional governance models. For the purpose of native title, the disjuncture between them seems unnecessarily strict, particularly in the post-claim context in which they are both focussed on the maintenance of native title rights. The disjuncture occurs in the first place because of the restricted membership of PBCs. Although the restricted membership of PBCs reinforces the basis of community membership in native title rights, it does so at the expense of flexibility that is necessary in sustainable community arrangements. The lack of flexibility is exacerbated by the requirements of incorporation under the *ACA Act*, such as appropriate record keeping, and reporting functions.

If native title is to be used as the platform for regional governance, NTRBs would seem to have the greater potential as the representative regional body. In comparison to PBCs, NTRBs are more flexible in their membership, which is particularly important if their role is to be regional in nature and not simply related to native title issues. They also have the broader experience and expertise required to manage native title needs within the broader framework of regional governance.

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<sup>83</sup> Fingleton Review 1996. commissioned by ATSIC and the Minister for Aboriginal Affairs, and conducted through the Australian Institute of Aboriginal and Torres Strait Islander Studies.

<sup>84</sup> See generally, Christos Mantziaris and David Martin, *Native Title Corporations* (2000).

<sup>85</sup> Mantziaris and Martin, above n 89, 182.

<sup>86</sup> See Analysis of *ACA Act*.

## I. E. *Aboriginal Councils and Associations Act 1976 (Cth)*

*The Aboriginal Councils and Association Act 1976 (Cth)* (*ACA Act*) is to be repealed by Act No 125 of 2006 on 1 July 2007. The repeal follows acceptance of recommendations in a government commissioned review of the Act conducted by the law firm Corrs, Chambers, Westgarth in 2002. In the following section we outline the history of the Act, including three revisions of the Act since its introduction in 1976. This history reveals that the original purposes of the Act were not realised, and that this has led to its ultimate demise. It is worthwhile setting out the history of the Act as we believe the Act, and particularly Chapter III of the Act dealing with Aboriginal Councils, had considerable potential as a legislative vehicle for regional governance.

The *ACA Act* provides a mechanism for the creation of Aboriginal corporations under the supervision of the Registrar of Aboriginal Corporations. The key benefit of incorporation is that it creates a legal personality for a community through which it can enter legal arrangements with others. The corporate structure thus created takes on the benefits and liabilities of any legal agreements of the community and can survive the life time of individuals in the community. The corporate structure also protects individuals in the community from personal liability.<sup>87</sup> The downside of the corporate structure is that it is administratively complex, and takes a particular, culturally specific form. Indigenous groups form corporations for a variety of reasons, including the establishment of land councils, business entities and service provision organisations. Often incorporation is a requirement to gain the benefits of other government schemes such as under the *Native Title Act 1993 (Cth)*.<sup>88</sup>

The *ACA Act* has its origins in three reports in the 1970s<sup>89</sup> which recognised that there were circumstances in which Aboriginal communities needed corporate structures to organise their affairs, and that existing State and Territory legislation were inadequate for this purpose. The *ACA Act* was designed to create a simpler and more flexible process for the incorporation of Aboriginal corporations than existed under existing State based corporations law and to provide corporate structures that were more suited to the needs of Aboriginal communities.<sup>90</sup> The Second Reading speech of the Minister for Aboriginal Affairs, Ian Viner, also reflected a commitment to Aboriginal self-determination: “The Bill is a tangible indication of this Government’s commitment to the principle that Aboriginals and

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<sup>87</sup> See generally, Matziaris and Martin, above n 89.

<sup>88</sup> Reference to *NTA*.

<sup>89</sup> Report of the Committee of Review into the situation of Aboriginal people living on pastoral properties in the Northern Territory (the Gibb Committee report 1971); the first and second reports of the Aboriginal Land Rights Commission (Woodward reports 1973 and 1974).

<sup>90</sup> See Honourable Iain Viner, Minister for Aboriginal Affairs, Hansard, House of Representatives, 3 June 1976, 2946; David Dalrymple, ‘The Forgotten Option – Part III of the Aboriginal Councils and Associations Act 1976 (1988) 2(32) *Aboriginal Law Bulletin* 11-13.

Torres Strait Islanders should be as free as other Australians to determine their own future and to take their rightful place as citizens in the Australian community.”<sup>91</sup>

The *ACA Act* has three substantive sections. Chapter II establishes the position of the Registrar of Aboriginal Corporations. The functions of the Registrar include, among other things, maintaining public registers of Aboriginal Councils and of Incorporated Aboriginal Associations; advising Indigenous communities on the procedures for the constitution of Councils and the incorporation of Associations under the *ACA Act*, and arbitrating disputes.<sup>92</sup> In relation to the constitution of rules of corporations under the *ACA Act* and the compliance of Councils and Associations with those rules, the Registrar has a high degree of involvement in the operation of these Indigenous bodies. Chapter III provides a framework for the creation of Aboriginal Councils, and Council areas. No Aboriginal Councils have been established under the *ACA Act*. Chapter IV provides a framework for the incorporation of Aboriginal incorporated associations. In January 2003, there were almost 3000 such associations incorporated under the *ACA Act*.<sup>93</sup> This represents about half of all Indigenous incorporated associations.<sup>94</sup> The other half was incorporated under State, Territory or Commonwealth corporations laws. For many Indigenous communities, incorporation under the *ACA Act* is a prerequisite to accessing various forms of government assistance.<sup>95</sup>

The Act has been reviewed three times since its inception. Two reviews were commissioned by the Registrar of Aboriginal Corporations (Neate Review 1989, and Corrs, Chambers, Westgarth Review 2002), and one was commissioned by the Minister and ATSIC (Fingleton Review 1996 conducted through the Australian Institute of Aboriginal and Torres Strait Islander Studies). The terms of reference of the Neate Review excluded Chapter III. The Corrs Review did not exclude Chapter III, but focused predominantly on Chapters II and IV. Both reviews focused on the effective operation of the technical aspects of the *ACA Act* including the degree of flexibility in the creation of the rules of incorporation, ways to improve compliance with the rules, and the role of the registrar in these processes. The Fingleton Review was the only one to provide a significant appraisal of Chapter III. In addition, it analysed the Act within the broader context of Indigenous governance.

As a result of the Corrs Review, the Federal government introduced a new Bill into Parliament to replace the *ACA Act*, the *Corporations (Aboriginal and Torres Strait Islander) Bill 2005*. The most significant change in the new

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<sup>91</sup> Honourable Iain Viner, Minister for Aboriginal Affairs, Hansard, House of Representatives, 3 June 1976, 2946.

<sup>92</sup> *ACA Act*, s5.

<sup>93</sup> Senator Amanda Vanstone, Minister for DIMIA, Media Release, 15 January 2003.

<sup>94</sup> Fingleton Review, above n 87, 12.

<sup>95</sup> Fingleton Review, above n 87.

legislation is the removal of Chapter III on Aboriginal Councils. In September and October 2005, the Senate Legal and Constitutional Committee conducted an inquiry into the new legislation. At the time of writing, it has not delivered a final report.

## 1. Chapter IV – Aboriginal Associations

Chapter IV contains detailed rules on the creation of Indigenous incorporated associations, the rights and duties of members and directors, and the powers and responsibilities of the Registrar in relation to Indigenous associations. The requirements for incorporation are modelled on mainstream models of incorporation.

The Neate Review 1989 made a series of recommendations for increasing the accountability of Indigenous Corporations. According to the Review, this could be achieved by tightening the rules of association and providing an even greater role for the Registrar in creating and ensuring compliance with the rules. The review led to a series of changes to the *ACA Act*.

The Fingleton Review was critical of the cultural appropriateness of the *ACA Act*. The review concluded that there was ‘practically no opportunity for groups to adopt rules on the matters of most significance to them’.<sup>96</sup> Fingleton held that many of the prescriptive requirements in the *ACA Act* were not culturally appropriate. For example, Fingleton was of the view that membership of the corporation should be a matter for communities and not the subject of rules of association.<sup>97</sup> Fingleton was also of the opinion that the rules for the holding of meetings, including general meetings, do not reflect the decision-making structures in communities;<sup>98</sup> and the extensive (and apparently growing) powers of the Registrar have worked against culturally appropriate incorporations because of the concern of the Registrar to ensure statutory compliance.<sup>99</sup> Fingleton concluded that incorporation has too often led to a loss of control over community affairs, ‘rather than the legal recognition of traditional authority structures which was promised’.<sup>100</sup>

Fingleton looked at the accountability of Indigenous corporations in relation to their outcomes, rather than their compliance with the rules of association. Accountability should be, according to the review, primarily to the community whom the association represented and to the wider community and not only to the Registrar of Aboriginal Corporations. The Review suggested paring back the *ACA Act*, so that it was much simpler law, as originally intended, and that the rules of incorporation be dependent more directly on the purpose for the

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<sup>96</sup> Fingleton Review, above n 87, 45.

<sup>97</sup> Fingleton Review, above n 87, 45-51.

<sup>98</sup> Fingleton Review, above n 87, 56.

<sup>99</sup> Fingleton Review, above n 87, 58-61.

<sup>100</sup> Fingleton Review, above n 87, 62.

establishment of the corporation. For example, if a group was incorporating to form a PBC under the NTA, the rules should be informed directly by the regulations governing PBCs. Or if the association was to carry out a service agreement, this should dictate the formation of its rules. In other words, the *ACA Act* should only provide the most basic framework for incorporation. Beyond this, its form should be controlled by its purpose, and those directly involved in that purpose. This way the Registrar would have a vastly diminished role. None of the Fingleton recommendations have been implemented.

The Corrs Review of December 2002 focussed more narrowly on improving the technical requirements of incorporation, such as rules governing membership, duties of directors, reporting, amalgamation, general meetings, and the role of the Registrar. The review was conscious of issues of conflict between corporate and cultural needs within the structure of an Indigenous association.<sup>101</sup> To deal with these issues, the review recommended that Indigenous communities be provided with special regulatory assistance, dedicated education and training and more flexible means of implementing and enforcing the rules of incorporation. It is the high level of prescription in the rules that gives rise to the need for special assistance. The assistance is not based on the strength or particularity of Aboriginal culture, but on its frailty. There is, in fact, one mention of Aboriginal culture in Chapter IV; that is, that ‘The Rules of an association with respect to any matter may be based on Aboriginal custom.’<sup>102</sup> Many of the recommendations in the Corrs Review 2002 have been accepted by the Registrar of Aboriginal Corporations, and the new *Corporations (Aboriginal and Torres Strait Islander) Bill 2005* is a direct response to it.<sup>103</sup>

The Corrs review describes Chapter IV of the *ACA Act* to be a ‘special measure’ under the *Racial Discrimination Act 1975 (Cth)*. One of its focuses was on whether there still needed to be this special measure. The assumption seemed to be that the separate incorporation needs of Indigenous communities would eventually cease and Indigenous corporations would use mainstream incorporation laws. In the end, the Review concluded that this point had not yet been reached and that special measures were still required. Understood as a special measure, the *ACA Act* is a poor vehicle for a sustained Indigenous governance model. The Act is not a model for sustainable self-government, but a concession to Indigenous communities, which will become unnecessary over time. If the *ACA Act* is to have any lasting potential as a vehicle for self-governance, this understanding needs to be revisited.

Although the Corrs and Neate Reviews had a very different focus to the Fingleton Review, common to all the reviews is the difficulty of any corporations

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<sup>101</sup> Corrs Review, Review of the Aboriginal Councils and Association Act 1976, Executive Summary, 5, 7.

<sup>102</sup> S43(4).

<sup>103</sup> Registrar of Aboriginal Incorporations, Reform of the *ACA Act 1976* – Proposed new *Corporations (Aboriginal and Torres Strait Islander) Act*, as at 17 March 2005.

law to cater for the particular needs of Aboriginal communities, and the difficulty of remaining simple and flexible. However, where Corrs and Neate still believe there is a place for the *ACA Act*, Fingleton concluded that in its present form, Indigenous peoples are better off using mainstream State or Commonwealth statutes of incorporation.

## 2. Chapter III – Aboriginal Councils

Despite the findings of the Corr review of the *ACA Act*, and the omission of Aboriginal Councils from the Corporations Bill 2005, we discuss Chapter III the Aboriginal Councils section of the *ACA Act* in some detail because of its significance for Indigenous governance. Under the *ACA Act*, Aboriginal Councils have a potentially wide range of functions including, among others, the delivery of housing, health, education and training, communication, roads, and welfare services.<sup>104</sup> Councils also have the power to make by-laws,<sup>105</sup> and to impose minor penalties for their breach.<sup>106</sup> In his second reading speech introducing the legislation, the Minister described councils as ‘a community corporation based on a local Aboriginal social structure serving the special interests of that community’.<sup>107</sup>

In the original version of the *ACA Act*, Aboriginal Councils could be established by the Registrar in areas where government already existed under State law, and could be binding on all peoples, Aboriginal and non-Aboriginal, in that Council area. Thus, in its original form, the *ACA Act* could have been used to override State based local government arrangements within a newly created Aboriginal Council area. This may give rise to a difficult constitutional question outside of the Northern Territory of whether the Commonwealth has the power under s51(xxvi) to make laws binding on non-Aboriginal people as an incident of its power to make special laws deemed necessary for the people of any race, or does the application of the law to others mean it is no longer a ‘special law’?

The Queensland and Western Australian State governments under Premiers Jo Bjelke-Petersen and Charles Court, lobbied hard for amendments to the Act which removed this power in the Registrar. As a result, two key amendments were made to the *ACA Act*. Section 16(aa) restricted Aboriginal Councils to areas where there was no local government in existence and no plans to bring the area under the control of local government. Furthermore, under Section 17(4), the Minister could only direct the Registrar to constitute an area as an Aboriginal Council area after consultation with the States and Territories.

Upon receiving an application to establish an Aboriginal Council, the

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<sup>104</sup> S11.

<sup>105</sup> *ACA Act* s30.

<sup>106</sup> *ACA Act* s30(10).

<sup>107</sup> Honourable Iain Viner, Minister for Aboriginal Affairs, Hansard, House of Representatives, 3 June 1976, 2947.

Registrar has certain duties to explain and discuss the proposal. (ss12,13) If the Registrar is satisfied that a substantial majority of the adult Aboriginal residents are in favour of the Council, that it will be able to fulfil its proposed functions and that it will not overlap with an existing or proposed local government council area, then the Registrar may establish the areas as an Aboriginal Council area. (s16(1)). The registrar then conducts the election of the first councillors (s21), and convenes and presides over the first Council meeting (s22). The Council's Rules are determined at the first Council meeting. (s22(1)). These provisions parallel those for Aboriginal Associations. Section 23(3) states that any of the Rules may be based on Aboriginal custom. The law-making powers of the Council under s30 are circumscribed in a few key respects. They must be approved by the Minister (s30(4)) and they do not apply to non-Indigenous people (s30(9)). A similar limit to s30(9) exists on Aboriginal Council laws under the *Community Services (Torres Strait) Act 1984 (Qld)*. This has led to relatively complicated local government arrangements in the Torres Strait.<sup>108</sup>

Chapter III of the *ACA Act 1976* does not provide funding for Councils. Councils must rely on existing arrangements for funding of local government under Commonwealth and State legislation. A decision whether or not to incorporate a Council, might well depend on what funding arrangements can be negotiated with Federal and State governments, and what revenue raising capacity the Council has. The fact that Council by-laws do not bind non-Aboriginal people in a Council area might severely curtail any revenue raising capacity. There have been 11 applications for the establishment of Aboriginal Councils under the Act. The first was in 1978 (Maningrida, Northern Territory) and the last in 1995 (Aboriginal Embassy).<sup>109</sup> The applications were all abandoned, in most cases with the applicants forming Councils or other governing bodies under State and Territory legislation.

Given the hostility of State governments in the late 1970s to the establishment of Aboriginal Councils under Commonwealth legislation at the time, it is perhaps not surprising that few applications for establishing a Council were made, and no councils have ever been established. However, it may be that the present environment is more conducive to the establishment of Aboriginal Councils. Firstly, a gap in service provision to Indigenous communities has been created by the repeal of the ATSIC legislation and the consequent abolition of ATSIC Regional Councils. In 1996, the Fingleton Review recognised the potential of Aboriginal Councils should ATSIC Regional Councils be abolished. 'If [an] Aboriginal Council did genuinely represent the interests and wishes of all Indigenous people in its area, given its legal responsibilities and leaving land matters aside, and was responsible either for funding or delivering a wide range of services to these people, the ATSIC Regional Councils in some parts of Australia

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<sup>108</sup> See the section on the TRSA.

<sup>109</sup> See generally, Fingleton, 97 – 113.

would probably be superfluous.’<sup>110</sup>

Secondly, there is a much better recent record of cooperation between State and Commonwealth governments in relation to Indigenous Affairs. The COAG trials are evidence of this, as is the fact that a joint State and Commonwealth local government structure has been operating in the Torres Strait since 1994.<sup>111</sup>

Amendments required by the State government in 1978 which require negotiation between the Commonwealth minister and the States before empowering the Registrar to establish a Council under s17(4) are consistent with the philosophy of cooperative federalism, and agreement making which is being pursued in Indigenous policy initiatives in Australia at the present time. Perhaps ironically, the provision which has been the impediment to the establishment of Councils may now be a strength of the legislation. Before an Aboriginal Council was established, the Commonwealth and other government agencies must negotiate suitable service delivery and funding arrangements in the region. This is a sensible requirement and may avoid duplication of services and funding which has been a significant failure of Indigenous policy in Australia.

The Neate Review 1989 did not assess Chapter III. The Fingleton Review saw potential in Chapter III as a vehicle for Indigenous self-government. The Corrs Review recommended Chapter III be repealed as it had been ‘superseded by other developments’, though it does not adequately explain what those developments were.<sup>112</sup> We are inclined to agree with Fingleton that despite the lack of utilisation of the Councils provision of the *ACA Act*, in the current environment, with the abolition of ATSIC and the level of cooperation between State and Commonwealth governments, Chapter III of the Act may have considerable potential as a model of regional governance.

Although the *ACA Act* would seem to have potential as a framework of regional Aboriginal Governance, a few cautions about the limitations on the potential of Aboriginal Councils need to be stated. Firstly, the limitation on the application of by-laws to non-Aboriginal people under s30(9) seems to be highly restrictive on the power of the Councils to effectively govern within the Council region. Secondly, under the current legislation, the incorporation process, as for Chapter IV is highly prescriptive and places a great deal of power and discretion in the Registrar of Aboriginal Corporations.

It is necessary to assess the benefits of incorporation under the *ACA Act* against existing State and Territory structures for the creation of Aboriginal Councils to gauge the significance of Chapter III of the *ACA Act*. Part 5 of the *Local Government Act (NT)* which provides for ‘Community Government Councils’. These Councils can operate in areas where there is no local government yet in existence. The *Aboriginal Communities Act 1979 (WA)* empowers certain

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<sup>110</sup> Fingleton Review, above n 87, 120.

<sup>111</sup> TSRA and *Local Government Act (Qld)*

<sup>112</sup> Corrs Review, 243, and Appendix G.



communities to make by-laws on land which is declared to be community land under the Act. The by-laws are of limited scope, covering such things as maintenance of and access to the land. The *Community Services (Aborigines) Act 1984 (Qld)* and the *Community Services (Torres Strait) Act 1984 (Qld)*, and the *Local Government (Aboriginal Lands) Act 1978 (Qld)* have been used to create Aboriginal Councils on the mainland and in the Torres Strait.<sup>113</sup> However, SA, NSW and Victoria do not have legislation dealing with local or regional government throughout those States.<sup>114</sup> Overall, then, Chapter III of the ACA Act provides a framework for regional governance that is not available at all or to the same extent in the legislation of many States. Furthermore, a mechanism for the creation of Aboriginal Councils in Commonwealth legislation is likely to be of greater significance as a result of the abolition of ATSIC regional councils.

## **F. Indigenous Governance In The Northern Territory**

The framework of local government in the Northern Territory has been contentious ever since Aboriginal communities gained rights under the *Aboriginal Land Rights Act 1976 (Cth) (ALRA)*. Under the *ALRA*, over 42 percent of land in the territory is held by Aboriginal traditional owners under inalienable freehold title. Four Land Councils (Central, Northern, Tiwi and Anindilyakwa) hold the land on trust for traditional owners. A perennial question under the *ALRA* is whether the land council structure provides traditional owners with sufficient control over decisions on their land, and whether it provides an adequate structure for the self-government of communities.

Several local government frameworks co-exist with the *ALRA*. In some areas, communities have incorporated under the ACA Act or under the *Associations Incorporation Act 1990 (NT)*, or they have formed community government councils under the *Local Government Act 1978 (NT) (LGA)* to govern their communities.<sup>115</sup> In 2004, there were 36 municipal and community councils under the LGA. Seventy-eight percent of the territory population resides in 6 municipal council areas (Darwin, Alice Springs, Palmerston, Litchfield, Katherine, Tennant Creek). The rest is divided among 30 community councils and 29 local

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<sup>113</sup> For a review and critique of this legislation, see Sean Brennan, 'Queensland Models of Self-Governance' Submission to Review on the Aboriginal Councils and Association Act 1996, Volume 2, Supporting Material.

<sup>114</sup> There are some area specific arrangements. For example, in SA, Anangu Pitjantjatjara, which was established under the *Pitjantjatjara Land Rights Act 1981 (SA)* is recognised as a local governing body and receives local government financial assistance.

<sup>115</sup> *Local Government Act 1978 (NT)*, Pt 5. See generally, Frith Way and Simeon Beckett, 'Land Holding and Governance Structures under Australian Land Rights Legislation', Discussion Paper 4 in Garth Nettheim, Gary Meyers and Donna Craig, ARC Collaborative Research Project, UNSW and Murdoch University, *Governance Structures for Indigenous Australians on and Off Native Title Lands*, 1999.

governing bodies established under other legislation, including the *ACA Act*.<sup>116</sup> Under the *LGA*, community councils have the same functions and powers as municipal councils.<sup>117</sup> In addition, community councils can apply to the Minister to enter ‘community governance schemes’ which might provide for alternative powers, functions and electoral processes.<sup>118</sup> In this way, the rights of traditional owners can be recognised in the constitution of councils.<sup>119</sup>

The municipal and community council areas account for only 1% of the land mass of the territory. This reflects one of the limitations of the local government framework – the jurisdiction of local government is legislatively confined to discrete areas where there are concentrations of the local population. It is not co-extensive, for example, with the extent of community control of land in a particular area that is within the control of land councils on trust for traditional owners. Aboriginal associations are not so constrained to particular areas, which is one reason that they have been used as the vehicle for the management of rights to land under the native title regime.

Councils under the *LGA* are reliant on Northern Territory and Commonwealth government funding. Municipal councils raise significant revenue through the imposition of rates on housing, and various other types of charge. The smaller community councils are less able to raise revenue in this way. Which makes them almost totally reliant on external sources of funding. They also suffer from a lack of infrastructure, and lack of education of local members, which makes them even more beholden to NT and Commonwealth governments.

According to Martin Mowbray, under amendments to the *LGA* in 1993, communities were offered financial incentives to use the *LGA* framework for local government in preference to others, whether or not this was the framework best suited to their needs.<sup>120</sup> Mowbray identified a number of problems with the use of community councils as the vehicle to protecting rights under the *ALRA*. Most importantly, community councils were not required to consult with traditional owners in relation to the use or regulation of land, as is required under the *ALRA*. Furthermore, the constituency of a community council may not be representative of the group which has rights under the *ALRA*, as electors are not limited by cultural affiliation, background or traditional connection to the land.<sup>121</sup>

In 1997, the Reeves Review of the *ALRA*, *Building on Land Rights for the*

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<sup>116</sup> Local Government Association of the Northern Territory, Submission to the House of Representatives Standing Committee on Economics, Finance and Public Administration, *Inquiry into Cost Shifting onto Local Government and the Financial Position of Local Government in Australia*, July 2002.

<sup>117</sup> *Local Government Act 1993* (NT) Pt 6.

<sup>118</sup> *Local Government Act 1993* (NT), Pt 5, Div 2.

<sup>119</sup> David Coles, ‘The Marriage of Traditional and Western Structures in Local Government in the Northern Territory’, IPAA Conference, Darwin, 8-10 September 1999.

<sup>120</sup> Martin Mowbray, ‘Subverting the Aboriginal Land Rights (NT) Act 1976: The NT Local Government Act 1993’, *Indigenous Law Bulletin*, 1998 4 (10).

<sup>121</sup> Mowbray, above n 124.

*Next Generation* recommended an alternative arrangement for managing rights under the ALRA to bring land management issues under regional control by abolishing the Central and Northern land councils, and replacing them with 16 'Regional Land Councils'. It recommended that the Regional Land Councils be under the supervision of a peak body which would also perform the role of the Native Title Representative Body for the Northern Territory, and would run all economic and social advancement programs for Aboriginal people in the Territory. The Standing Committee on Aboriginal and Torres Strait Islander Affairs conducted an inquiry into the Recommendations of the Reeves Report.<sup>122</sup> On the basis of the submissions it received, it rejected the recommendations. Although the principle of increased regional control under a peak body was accepted in principle, it was recognised that the process of creating it needed to be controlled by Aboriginal people and their communities. Aboriginal submissions to the Parliamentary Inquiry expressed the concern that the new regional councils would not necessarily represent the needs of traditional owners any better.

The structure of land rights and control of economic resources under the ALRA remains central to Indigenous governance in the Northern Territory. At the same time, local government has an important and growing role. Under the first Labor government in the Territory elected in 2001, the LGA has been promoted as a positive model for governing Indigenous communities, in particular by the Minister for Local Government, John Ah Kit.<sup>123</sup> The basis of these two models of governance are distinct. Whereas the ALRA promotes the rights of traditional owners, and entrusts the protection of their rights to land councils, the *Local Government Act 1978* is concerned with the provision of services on a regional basis. In relation to the ALRA, it is clear who should be the beneficiaries of land council decisions, and the challenge is to ensure that those beneficiaries have an adequate voice in decision making processes. In relation to local government under the LGA, the difficulty is in identifying the relevant communities. If this is done regionally, there is a difficult question of how to represent the particular rights and cultural requirements of Indigenous communities. One option explored by David Coles is to establish councils with many levels of representation.<sup>124</sup> Finally, even if satisfactory representative structures are established within each legislative scheme, there is the difficult question of how to balance the powers and responsibilities of representative Indigenous bodies between them.

## **G. Governance In External Territories**

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<sup>122</sup> 'Unlocking the Future': The Report of the Inquiry into the Reeves Review of the *Aboriginal Land Rights (Northern Territory) Act 1976*, 1999.

<sup>123</sup> See, eg, John Ah Kit, 'Local Government in the Territory – doing it better for our constituents' Local Government Association of the Northern Territory, AGM, Darwin, 16 October 2003.

<sup>124</sup> David Coles, 'The Marriage of Traditional and Western Structures in Local Government in the Northern Territory', IPAA Conference, Darwin, 8-10 September 1999, 12 – 15.

Australia's external territories have varying degrees of self-government. The *Norfolk Island Act 1979 (Cth)* (NIA) establishes a Legislative Assembly and a Supreme Court for the Island. The *Lord Howe Island Act 1953 (NSW)* establishes a Lord Howe Island Board to administer the affairs of the Island. The *Christmas Island Act 1958 (Cth)* and the *Cocos (Keeling) Islands Act 1955 (Cth)* establish Western Australian law as the law for the islands, with provision for particular Commonwealth legislation, and extend the jurisdiction of Western Australian courts to cover legal disputes that arise on Islands. In addition, one former territory, Papua, made the transition from self-government to independence.<sup>125</sup>

With the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *A Report on Greater Autonomy for Torres Strait Islanders: A New Deal* (1997) recommending that the Torres Strait become a self-governing territory, the arrangement of government in the external territories is particularly instructive for Indigenous governance in the Torres Strait. Norfolk Island has by far the most autonomous government of the existing external territories. So we focus in this section on the experience of self-government under the *Norfolk Island Act 1979 (Cth)*.

### **1. Norfolk Island Act 1979 (Cth)**

Norfolk Island is part of the Commonwealth of Australia.<sup>126</sup> It became a territory under the authority of the Commonwealth in 1913, and there have been various legislative arrangements for its administration since that time.<sup>127</sup> In 1976 there was a Royal Commission into 'matters relating to Norfolk Island' and Commission examined the future status of Norfolk Island.<sup>128</sup> At that time, all options seemed to be on the table from excising the Island from the Commonwealth altogether, to bringing the Island under Commonwealth control. However, the Commissioner recommended that the Island be maintained as an External Territory, and the Fraser Government subsequently committed itself to a form of self government for the Island in the *Norfolk Island Act 1979 (NIA)*.

Under the *NIA*, the Territory is administered by an Administrator, appointed by the Commonwealth Government. In forming certain opinions required under the *NIA*, the Administrator must rely on his or her own judgment. In all other respects, the Administrator acts on advice. That advice comes from a variety of sources depending on the category of matter involved. In some instances, the Administrator is the senior representative of the Commonwealth on

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<sup>125</sup> *Papua New Guinea Independence Act 1975 (Cth)*.

<sup>126</sup> *Berwick v Gray* (1976) 133 CLR 603, per Mason J at [9]. See also Eggleston J in *Newbery v The Queen* (1965) 7 FLR 34.

<sup>127</sup> *Norfolk Island Act 1913; Norfolk Island Act 1935; Norfolk Island Act 1957; Norfolk Island Council Ordinance 1960; Norfolk Island Act 1963*. See generally, Report of the Royal Commission, 48-51.

<sup>128</sup> Report of the Royal Commission into matters relating to Norfolk Island, October 1976.

the Island, acting on the advice of the Minister for Territories. In other situations, the Administrator fills a role akin to the vice-regal function of a State Governor, acting on the advice of the Norfolk Island Executive Council or Legislative Assembly. In still other situations the Administrator refers matters to the Governor-General, who in turn acts on the advice of the Commonwealth Government.

Part III of the *NIA* establishes an Executive Council to advise the Administrator on ‘all matters relating to the Government of the Territory’.<sup>129</sup> Part V establishes a Legislative Assembly which has plenary power to make laws for the Island. The Assembly has 9 members chosen from the Island voting as a single electorate. People are eligible to vote if they have been resident on the Island for 5 years. Part VII of the *NIA* establishes a Supreme Court and leaves the jurisdiction of the Court to be determined by enactment of the Legislative Assembly. In 2004, the *Norfolk Island Amendment Act* added Australian citizenship as a requirement for future enrolment on the electoral role and as a requirement for standing for election for the Norfolk Island Legislative Assembly. These requirements were controversial among the Island population.<sup>130</sup>

In 2003, the Joint Committee on National Capital and External Territories undertook a major review of governance on Norfolk Island. A first report into Governance on Norfolk Island was completed in December 2003. A second inquiry is currently being conducted into the financial viability of governance structures on the Island. The first report was highly critical of aspects of self-government, and considered abolishing self-government on the Island altogether as a result of perceived inadequacies in the model of government, including widespread corruption. In the end, the Committee recommended retaining self-government, but on the condition that there be substantial reform under the supervision of the Commonwealth.

One issue of governance on the Island of particular relevance to our inquiry is whether persons of Pitcairn descent should have any special representation. In 1856, people of Pitcairn descent were transferred to Norfolk Island. The original intention was that the Island be reserved as a home for this population.<sup>131</sup> Pitcairn descendants were the sole occupants of the Island at the time, under the administrative control of the colony of NSW. Each family was provided with 50 acres of land upon which to subsist. All but one 50 acre allotment had been sold off by 1976. Pitcairn descendants on the Island claim particular rights as part of their customary practice, including communal grave digging and free burials; access to land for basic necessities; availability of grazing on commons land; maintenance of the Pitcairn dialect; and non-interference with life style involving such things as self-help, family picnics, special festive days and observance of the

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<sup>129</sup> Section 11.

<sup>130</sup> See Bills Digest No. 11 1999-2000, *Norfolk Island Amendment Bill 1999*.

<sup>131</sup> Royal Commission 1976, 37.

Christian religion.

In 1976, descendants of the Pitcairns made up about half the population.<sup>132</sup> The Royal Commission was of the opinion that there should be no special government rights for Pitcairn descendants. It recommended that:

...while the Pitcairn heritage should remain a clear feature of Norfolk's history and way of life, the Island should consciously strive towards a Norfolk Island identity and image in the future. ... Seldom does one sector in any society possess all the talents .... [N]ew blood should have its opportunity to play a role in government and it will be to the community's advantage for this to be encouraged.<sup>133</sup>

The Commission recommended that eligibility to stand as a candidate for local government should be a certain minimum length of stay on the Island. It took strength in this conclusion from the recently passed *Racial Discrimination Act 1975 (Cth)*.

The issue of governance on Norfolk Island has two distinct lessons as a governance model. Firstly, it offers a reasonably successful example of self-government in an external territory based on an economic base reliant mainly on tourism. However, it also demonstrates the potential for corruption within a self-government model due to the vested interests of representatives. This potential exists even when the self-government model is contained in a comprehensive code such as the *NIA*. Secondly, the attitude of the Royal Commission in 1976 and of the Joint Parliamentary Committee Inquiry into Governance on Norfolk Island of 2003 is that the Pitcairn descendants on the Island should have no self government rights that reflect their particular needs and interests. That is, the degree of autonomy of the Island as a whole may come at the expense of any distinction between the self-government rights of different groups on the Island. There may be a warning for Torres Strait Islanders and others Indigenous communities here, that is, that the protection of regional autonomy may come at the expense of the identification of the protection of particular groups within the region. If for example the Torres Strait were to become a self-governing territory, Torres Strait Islanders might not be able to adequately replicate the Indigenous specific protections they are currently afforded under Commonwealth legislation.

### **III. LESSONS FROM THE LEGISLATIVE FRAMEWORKS FOR FUTURE DIRECTIONS IN REGIONAL GOVERNANCE**

It is clear from the survey above that there is a large distance between the expectations and the capacity to provide some framework for the development of regional governance structures. However, there are aspects of these existing legislative frameworks that provide some insights into the possibilities for an

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<sup>132</sup> Royal Commission, p63.

<sup>133</sup> Royal Commission, 89.

effective regional governance structure.

The *Aboriginal and Torres Strait Islander Commission Act* provided for a regional and national representative structure. ATSIC has been the only Indigenous governance structure that operated with a direct relationship to government through its policy formulation, program responsibility and its monitoring and evaluation role. It was able to engage in those activities itself and its legislative functions and powers. This gave it leverage and a greater potential to influence policymaking and program delivery development in a meaningful way, much more so than previous and subsequent national Indigenous bodies that had an advisory only capacity. It would be an important aspect of any regional governance model that it be given the capacity to influence policy making and program delivery by providing powers and funding to ensure leverage and influence.

Another strength within the ATSIC system that can inform future models is its connection between regional and national governance. In theory, this meant that regional concerns, issues and priorities could be drawn out and taken up at the national level, but also there was, at that national level, the ability to consolidate a wide range of views from across Australia into a co-ordinated, and therefore more powerful, single advocacy position.

One of ATSIC's key weaknesses was its lack of a state/territory interface with government at that key level. With so many Indigenous issues being shared by state and federal governments – health, education, housing – and with some being the primary responsibility of states – law and order – the failure to have a tier of representation at this level as part of the structure weakened ATSIC's ability to influence government. Any future model should look at integrating regional governance into state and federal tiers of representation.

Another primary weakness in the ATSIC regime was the large gap between what its responsibilities actually were and what peoples' expectations were of what it could deliver. This showed the need for such bodies to be clearer with their constituencies about what their functions and powers are, and what they are and aren't able to provide. It also requires that other stakeholders, particularly government, are clear about where such a body's responsibility ends and government responsibility starts.

The *Aboriginal Land Rights Act (NSW)* also provides important lessons for representative structures. Just as the ATSIC model showed the importance of the link between national and regional structures, the land council system in New South Wales highlights the important link that needs to be made between regional and local representation. Its structure also reiterates the need for a tier of representation at the state or territory level. The other aspect of the NSW land council system that can inform models of regional governance is the important level of autonomy that can be gained for institutions that have an independent funding base and the capacity to accumulate capital. This allows for the funding of initiatives and priorities that government is unwilling or unable to support and

provides additional leverage in the development of policy and delivery of programs.

One of the key weaknesses that can occur in a governance structure, evident in the *Aboriginal Land Rights Act (NSW)*, is that the attempts to regulate the financial and governance arrangements – which go beyond what is expected of non-Aboriginal entities – has meant that the legislation deliberately tries to limit the benefits that can be given to members of the land councils. This seriously impedes the capacity of the land councils to assist Aboriginal communities to achieve improved socio-economic outcomes.

Much like ATSIC, the experience under the native title regime has been one that has seen a large gap between the expectations of Aboriginal people as to what the legislation can achieve and what that legislative framework can deliver in practice. Aboriginal communities pursuing native title interests often express an aspiration for self-governance as one of the desired outcomes of the process. However, even giving them generous interpretation, the representative bodies that the native title regime establishes – Native Title Representative Bodies and Prescribed Body Corporates – have neither the powers nor the capacity to deliver self-government to Aboriginal people in the manner that they would desire.

However, there have been some benefits to self-governance aspirations that have flowed from the native title regime that are worth noting. In particular, organising a loose collective into a structure can articulate and regenerate a shared collective identity and therefore help to define and represent a particular Aboriginal group or nation. It can become a type of nation-building process for Aboriginal people who are then able, through their representative structure to more effectively advocate on their issues, interests and priorities.

While this nation-building has been a positive side effect of the native title process, the inability of native title organisations, particularly Prescribed Body Corporates, to deliver regional governance highlights how legislation generally does not consider this to be any part of their purpose. Such bodies are designed to manage the assets and interest of Aboriginal people and have been designed within a system that has had, at its heart, the primary goal of providing certainty for non-Aboriginal purposes.

Similarly, the corporate structure provided within the *Aboriginal Councils and Associations Act* seeks to establish organisations that are able to manage Aboriginal assets and programs. They are established to fit Aboriginal people into a non-Aboriginal bureaucracy and governance practice and so offer very little scope for the exploration of self-governance, except as an unintended by-product.

By comparison, the Torres Strait Regional Authority can attribute some of its success to the way that its structure is built upon existing community council structures. This has given the TSRA legitimacy amongst its constituency because it is closely aligned and accommodates cultural governance structures. This has meant that it is more effective and sustainable. Basing regional, but particularly local, levels of representation on existing cultural models of governance should be



taken into account in the design of models for regional self-governance. There is a limitation to the extent that the TSRA can provide a model for regional self-governance and that its elected representatives have an advisory capacity only; they do not have direct control of the distribution of resources. That ultimate power rests with Commonwealth administrators.

The existence of forms of self-governance within the external territories of Australia, such as Norfolk Island provides evidence that it is possible to have systems of self-governance and heightened autonomy within the Australian state. It is just that, to date, such autonomy has been an experiment within non-Indigenous populations rather than Indigenous ones.

## **CONCLUSION**

This analysis of existing legislative structures that could enable some form of regional governance for Indigenous communities highlights the importance of the political, social and cultural context in which such legislation operates. Broader political will underpinning such legislative structures is key to their effective utilisation and sustainability. Reflecting on which legislation has been considered most 'successful' by Indigenous communities, it is those structures which are clearly defined and limited in scope and mandate that fall into this category, primarily because community expectations of their power and functions has been met. The importance of analysing the value of legislation beyond specific outcomes remains an outstanding area, such as considering the significance of valuing ATSIIC as an Indigenous governance structure in itself. Finally, it is apparent that with any legislative structure, either that which enables some form of regional governance as part of other purposes or that which is designed specifically for such a purpose, the need to be able to appropriately reflect the diversity of Indigenous communities' experiences, priorities and aspirations is critical.