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## ‘TAXPAYERS’ MONEY’? ATSIC AND THE INDIGENOUS SECTOR

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### Introduction

Funding organisations controlled by Indigenous Australians and dedicated to serving them, in the name of ‘self-determination’, has created risks both for governments (who must satisfy the public that ‘taxpayers’ money’ is being well spent) and Indigenous leaders (who must not only meet service expectations of Indigenous Australians but also acquit funding according to government criteria). This chapter compares two experiments in governance: the Indigenous sector (thousands of Aboriginal and Torres Strait Islander corporations) and the Aboriginal and Torres Strait Islander Commission (ATSIC).

Australian governments have encouraged Indigenous Australians to form corporations in order to hold title to Indigenous property, advocate, deliver services and manage employment programs. The federal (conservative, led by Malcolm Fraser) government passed the *Aboriginal Councils and Associations Act 1976* (henceforth ACA Act) in 1976. The Howard (conservative) Government replaced the ACA Act in 2007 with the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (henceforth CATSI Act). Both Acts authorised the Registrar of Aboriginal/Indigenous Corporations to report publicly on Indigenous corporations’ financial accountability and organisational integrity. At the same time, Australian governments created national, elected Indigenous representative

organisations: the National Aboriginal Consultative Committee (NACC, 1973–76), the National Aboriginal Conference (NAC, 1977–85) and the Aboriginal and Torres Strait Islander Commission (ATSIC, 1989–2005).

ATSIC, unlike its predecessors, administered programs – mostly infrastructure, housing and employment, but not health, education and security programs. Under the Howard Government (1996–2007), the increasing political embarrassment of ATSIC led to a 2002–03 review and then ATSIC’s abolition in 2004–05. Critical attention to the Indigenous sector took the form of amendments of the ACA Act in 1992, reviews of the Act in 1996–97 and 2001–04 and new legislation (the CATSI Act) in 2005–06. Why was one experiment in the delegation of public expenditure to Indigenous Australians (ATSIC) terminated while the funding of Indigenous organisations has continued as a permanent adaptation of Australian government to Indigenous political mobilisation?

## Expectations of the ACA Act

Although some Aboriginal and Torres Strait Islander people had formalised their collective action before the 1960s (sometimes in the context of long-lasting missions), we begin our story in 1970 with Charles Rowley’s suggestion that the Aboriginal ‘group’ would no longer be treated by governments as a ‘disappearing liability’ (as assimilation policy tended to assume), but as ‘an asset, to be endowed, by its own efforts, with enduring legal personality’.

The ‘fringe group’ was ‘the raw material for a corporation in perpetuity’.<sup>1</sup> When Prime Minister McMahon spoke on Aboriginal policy in January 1972, he promised to investigate ‘a simple flexible form of incorporation for Aboriginal communities’.<sup>2</sup> Justice Woodward’s advice to the Whitlam Government on land rights in 1973 included recommending that an incorporation statute be easy to understand, flexible enough to meet the needs of a variety of situations in which Aboriginal people would find themselves, not liable for taxation of its income, open to Aboriginal customs of decision-making and open to government intervention ‘if things go wrong ... through corruption, inefficiency, outside influences or for other reasons’.<sup>3</sup>

1 Rowley, ‘Outcasts’, 425.

2 McMahon, *Australian*, 12.

3 Woodward, *Aboriginal*, para. 332, p. 65.

Barrie Dexter, Secretary of the Department of Aboriginal Affairs from 1973, recalled in 2015 that Aboriginal-controlled incorporated bodies were 'crucial to so much we were trying to do'.<sup>4</sup> However, as they came under scrutiny, 'Parliament and the community at large seemed to have become more interested in correct, detailed accounting than in the outcome of programs', making the Department of Aboriginal Affairs 'more reluctant to fund Aboriginal groups and let them learn by making mistakes, since we would certainly be further roasted by Parliament and our critics for any failures'.<sup>5</sup> An incorporation statute designed to empower Indigenous Australians would also have to be a means of accountability and tuition.

Introducing a Bill for Aboriginal Councils and Associations in September 1975, the minister for Aboriginal affairs (Lesley Johnson) linked it to land rights in the Northern Territory; the Act was to provide 'a method of incorporation that would safeguard Aboriginal tenure of land'. He went on to list ways that the Act would also enable collective action not related to land tenure: receiving grants, holding and disposing of real and personal property, contracting, operating enterprises, and 'generally to conduct their affairs in an orderly manner' so that Indigenous Australians could fulfil their 'obligation to acknowledge responsibility for the consequences of their actions'. The Act would be especially helpful to 'remote, tradition-oriented communities where the understanding of Western European legal concepts is very limited'; for such people, Johnson believed, the existing corporations laws were not helpful.<sup>6</sup> Speaking in support, Manfred Cross remarked that 'Aborigines do not have the sophistication and business experience to comply with many of the complex and technical requirements of State laws'.<sup>7</sup> In establishing the Registrar of Aboriginal Corporations, the government intended to 'advise and assist Aboriginal corporations and to supervise their activities in much the same way as a Registrar of Companies supervises the affairs of companies'.<sup>8</sup> Johnson's bill lapsed when parliament dissolved in November 1975, but the Fraser Government saw the ACA Act through the parliament in 1976.

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4 Dexter, *Pandora's Box*, 336.

5 Dexter, *Pandora's Box*, 336.

6 Johnson, *Commonwealth Parliamentary Debates*, House of Representatives (CPD HoR), 30 September 1975, 1410.

7 Cross, CPD HoR, 4 November 1975, 2762.

8 Johnson, CPD HoR, 30 September 1975, 1410–11.

We note several themes in the justification of the ACA Act: to acknowledge overlooked Indigenous political capacity by giving it a formal vehicle, to acknowledge cultural difference in Indigenous ways of associating, to bring order and transparency to group life, to make Aboriginal collective actions legally and fiscally accountable, and to spare Aboriginal people the burden of understanding complex legislation.

## An emerging sense of political risk

Incorporation was not only a means to Indigenous political development, it also became a resource for political elites (Indigenous and non-Indigenous) to manage a new political risk that arose partly from different views about what Australia owed Indigenous Australians. For some Aboriginal people in the 1970s, as Johanna Perheentupa has shown in her chapter, government grants were compensation for dispossession and ill-treatment, so that Aboriginal people were not accountable to anyone but themselves in their spending of such funds. This view persisted among many Aboriginal people. In 1981, the NAC – the Fraser Government’s representative, elected assembly – called for the compensatory payment of 5 per cent of Australia’s gross national product to Aboriginal people to meet Aboriginal needs.<sup>9</sup> Such claims were sympathetically acknowledged in 1991 in the *National Report* of the Royal Commission into Aboriginal Deaths in Custody:

What, to non-Aboriginal people, is a citizens’ right (which is subject to assessment, monitoring and may be taken away if the citizen fails to meet administrative and other criteria) should be available for them on a basis rather like that which might apply if compensation payments were made for past injustices. Given that sense of injustice, many Aboriginal people regard it as an added insult that payments made, either directly or through Aboriginal organizations, to meet basic needs should be subjected to the minute and suspicious scrutiny which accompanies such payments. At this level, Aboriginal people would see the whole process of delivery of such services as being one of further control of their lives and not one which offers autonomy.<sup>10</sup>

9 ‘Aborigines Want Land, Self-Rule’, *West Australian*, 23 September 1981.

10 Royal Commission into Aboriginal Deaths in Custody (RCIADIC), *National Report*, vol. 2, 525–26.

The national commissioner's impression was that Indigenous Australians 'have accepted the concept of representation through organisations', and he predicted that they would come to trust their organisations more, allowing their leaders more scope for decision-making.<sup>11</sup> For trust to develop, he advised, governments would have to moderate or cease their close inspection of organisations' use of public money.

By then, the minister for Aboriginal affairs had initiated discussion of the Act, circulating a review paper in February 1990.<sup>12</sup> There were 1,024 corporations registered under the ACA Act and supported by government grants. The registrar proposed amendments to the ACA, resulting in the Keating Government's *Aboriginal Councils and Associations Amendment Act 1992*. The changes were intended to strengthen the rights of ordinary members and to improve public accountability. Governing committees could no longer include bankrupts or certain categories of persons sentenced to imprisonment; members of governing committees would disclose financial interest in matters before the committee; the registrar would arbitrate internal disputes and enforce dissenting members' right to request that governing committees convene a special meeting; the registrar could now issue statutory notices, seek injunctions, appoint administrators and petition for a corporation's wind-up. In June 1993, the Keating Government tabled further amendments that would have increased state discipline.<sup>13</sup>

These changes addressed perceptions that Aboriginal corporations might use grants improperly if not more closely monitored. Adding to the perception that public money was at risk, there was now another layer of Indigenous control over money, as ATSIC assumed responsibility for programs that had been administered from 1973 to 1990 by the Department of Aboriginal Affairs (DAA). While ATSIC officials, like DAA officials, were Commonwealth public servants, ATSIC policies were set by elected Indigenous Australians. The Aboriginal and Torres Strait Islander electorate voted in regions (at first 60, but reduced to 36 in 1993) to select regional councillors, and regional councils formulated development plans. To select ATSIC's national leadership, regional councillors were grouped into 17 electoral zones, each zone electing one commissioner. The government appointed three commissioners

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11 RCIADIC, *National Report*, vol. 2, 525–26.

12 Office of the Registrar of Aboriginal Corporations (ORAC), *Annual Report 1989–90*.

13 Mantziaris, 'Beyond'.

(including the chair), to make a board of 20. Regional Councils had discretion over grants to Indigenous organisations delivering housing, infrastructure and employment, subject to policies set by the commissioners. ATSIC was thus a hybrid of two previously distinct kinds of agency: program delivery (formerly DAA's responsibility) and the work of political representation and policy advice previously carried out by the NAC and its predecessor the NACC.

Debating the *Aboriginal and Torres Strait Islander Commission Act 1989*, conservative members of parliament had doubted that an agency controlled by elected Indigenous Australians would handle public money responsibly. The shadow minister for Aboriginal affairs (Warwick Smith) criticised ATSIC as excessively centralised, adding:

This integration of representative and administrative functions [would leave the commissioners] torn between doing the best for their constituents and administering hundreds of millions of dollars for grants with bureaucratic impartiality. That is a fundamental conflict, a conflict in which lie the seeds of ATSIC's destruction.<sup>14</sup>

Conservative misgivings about ATSIC went even deeper than this. The very idea of a distinct Indigenous institution seemed wrong in principle to John Howard. On 11 April 1989, before the bill's 'first reading', he warned that:

If the Government wants to divide Australian against Australian, if it wants to create a black nation within the Australian nation, it should go ahead with its Aboriginal and Torres Strait Islander Commission (ATSIC) legislation and its treaty.<sup>15</sup>

The Hawke Government did not yield to Howard's point, but it did address the worry that elected persons might use public money to ingratiate Indigenous constituents. The Act prescribed an Office of Evaluation and Audit (OEA) within ATSIC. The intended functions of the OEA paralleled those of the Registrar of Aboriginal Corporations.

14 Smith, *CPD HoR*, 23 May 1989, 2714.

15 Howard, *CPD HoR*, 11 April 1989, 1328.

## The registrar becomes active

Though not obliged to issue annual reports, the Registrar of Aboriginal Corporations began to do so in 1989–90, ATSI's first financial year, listing corporations subject to the new regime of 'enforcement' enabled by the 1992 amendments to the ACA Act. Registrar Nourredine Bouhafs (appointed in January 1993, after two periods 'acting' in 1991 and 1992) justified his powers:

When the Act was originally drafted in the 1970s, the emphasis was on keeping the incorporation process simple, allowing for the flexible operation of Aboriginal Corporations and keeping the ongoing reporting requirements to a minimum. The Act was particularly oriented towards the needs of remote communities receiving one-off grants for special purposes. Legislators at the time could not have foreseen the size and range of funding now flowing to Aboriginal Corporations, the complex business activities in which many are now involved and the considerable assets accumulated by Corporations over the past 16 years.<sup>16</sup>

Bouhafs advised further amendments to the ACA Act, finding the Keating Government receptive. When ATSI was asked to comment in 1994, the commissioners persuaded the minister to defer amendments, pending a review of the ACA Act to be conducted by ATSI. The review (by Dr James Fingleton for the Australian Institute of Aboriginal and Torres Strait Islander Studies) recommended relaxation of restrictions on the design of Indigenous corporations, to align them better with Indigenous custom.<sup>17</sup> Fingleton's 1996 recommendations did not persuade the Howard Government to change the ACA Act.

While Fingleton was conducting his review, the election of the Howard Government in March 1996 brought to power members of parliament still sceptical about whether Indigenous people other than public servants should be spending public money. Publicised instances of dishonesty and/or incompetence illustrated for many Australians that public money allocated to elected Indigenous Australians could bankroll political patronage by an emerging Indigenous political class. Accordingly, there was an audience for Bouhafs's continuing reports. Enforcement statistics for July 1994 to June 2000 (the period in which Bouhafs was Registrar) are shown in Table 6.1:

<sup>16</sup> ORAC, *Annual Report 1993–94*, vii.

<sup>17</sup> See Rowse, 'Culturally' for a discussion of the Fingleton Report.

**Table 6.1: Acquittal lapses and corrective actions, ORAC, 1994–95 to 1999–2000.**

Year	1994–95	1995–96	1996–97	1997–98	1998–99	1999–2000
Administrators appointed	9	15	15	10	17	13
Not submitting financial statement	803	1,015	Not reported	700 ('for last three years')	'a high proportion'	388 ('for last three years')
Examinations completed	90	56	70	65	35	47
Issue of compliance notice	48	30	22	44	14	32
Subject to winding up	13	18	28	26	34	57
Total corporations registered	2,389	2,654	2,816	2,999	2,853	2,703

Source: ORAC, *Annual Reports 1994–95, 1995–96, 1996–97, 1997–98, 1998–99, 1999–2000*.

Examinations enabled the registrar to provide 'feedback', usually in the form of a letter detailing a list of required improvements. Corporations in serious trouble were sent a formal notice requiring them to 'show cause' why ORAC (Office of the Registrar of Aboriginal Corporations) should not appoint a 'special administrator' to take temporary control of the corporation. Administration did not usually include liquidating the corporation's assets, negotiating a plan to pay its debts and winding it up. More often, 'administration' sought to enable an Indigenous corporation to continue on a more sustainable financial footing, so that the surviving Indigenous corporation could be handed back to its directors.

The registrar continued to press for reform, noting significant changes in the Act's environment in the 1990s: Australian lawmakers at the state and the national levels had been forced by a High Court ruling in 1990 to engage in a major reconstruction of corporate regulation, resulting in the *Corporations Act 2001*; and the implementation of the *Native Title Act 1993* was giving rise to many prescribed bodies corporate, as title-holding entities. In November 2000, the registrar commissioned a review of the ACA Act by a multidisciplinary team headed by Corrs Chambers Westgarth, Lawyers. The review's consultation paper asked whether a specific Indigenous incorporation statute was still necessary,

and (if so) whether it should be for all Indigenous corporations, regardless of size. Consultations found widespread support for such a statute with no restriction on the size of the organisations to which it would apply; as well, according to the registrar, supporters wanted the Act to be both 'more flexible' about the design of corporations and more consistent with the *Corporations Act*, while enabling the registrar's office to focus more on 'capacity building and assistance'.<sup>18</sup> The final report and recommendations of the Corrs review were released in December 2002. Before we describe the legislation that flowed from the report, it is necessary to note what was happening to ATSIC.

## ATSIC's demise, 2002–05

From the inception of ATSIC, its leaders had faced a problem of legitimacy in the eyes of Indigenous Australians, as the first appointed chair of ATSIC, Lowitja O'Donoghue, acknowledged in 1995:

Certain Indigenous organisations have also been critical of ATSIC's role and representativeness. They have challenged its decisions or sponsored challenges in public debate, in courts or tribunals or through the Ombudsman. To a great extent these challenges should not be regarded as surprising or necessarily reflecting on ATSIC's competence. It is only natural that other organisations may have agendas that differ from the Commission's. It should not be assumed that indigenous Australia will always speak with one voice. But ATSIC as the only national structure of indigenous representation will endure. Above all, ATSIC represents a challenge for Indigenous Australians, a challenge to get involved, to make processes work for them.<sup>19</sup>

On assuming office, the Howard Government modified but did not extinguish the Hawke government's and Keating government's defining Indigenous policies: ATSIC and native title. In April 1996, the Howard Government appointed a special auditor to ATSIC. Before grants or loans to organisations could be made, a clearance from the special auditor would be required. ATSIC disputed the legality of this innovation and the Federal Court ruled that the government was not empowered to direct the commission in this way. By the time this judgement was announced,

18 ORAC, *Annual Report 2001–02*, 3.

19 ATSIC, *Annual Report 1994–95*, 34.

the special auditor had already examined 1,122 organisations, clearing 95 per cent of them for further funding. ATSIC was pleased to report the opinion of the special auditor that many accountability problems related not to dishonesty but to the small size of the organisations and to their lack of training.<sup>20</sup> In its first budget (1996–97), the Howard Government reduced ATSIC's funding by 6 per cent.

Constrained by the new national ideology of 'reconciliation' (which Howard described as 'an unstoppable force'), the Howard Government seemed cautiously to explore what legacies of Labor to reject and what to 'live with', pragmatically.<sup>21</sup> Affording ATSIC greater autonomy, the government in 1999 allowed that the chair of ATSIC be elected by the Board of Commissioners. In December 1999, the board elected Geoff Clark, whose commitment to Indigenous rights made him one of many critics of the Howard Government's 1998 amendments to the *Native Title Act*. Howard and Clark were thus on opposite sides of a 1990s debate about whether recognising distinct Indigenous rights was essential for reconciliation.<sup>22</sup> While both agreed that 'reconciliation' included reducing Indigenous Australians' socio-economic 'disadvantage', ATSIC (and Clark) argued that the key to overcoming disadvantage was greater government recognition of Indigenous Australians as self-determining peoples within the Australian nation. The Howard Government dismissed distinct Indigenous rights as a distraction from the interests of Indigenous Australians: the 'practical reconciliation' that would result from government programs in housing, health, education, security services, employment and Indigenous enterprise formation.

Clark, like O'Donoghue, sensed that ATSIC was politically vulnerable. At ATSIC's policy conference in April 2002 he reminded his audience that, even though ATSIC spent less than half of the Commonwealth's Indigenous program budget, it was conspicuous (to the public) as the paramount Indigenous agency, and easily blamed for not achieving socio-economic equality ('practical reconciliation').<sup>23</sup> Exacerbating ATSIC's problem were the diminishing reputations of Clark and his Deputy Chair Ray Robinson. In July 2002, police in Victoria decided not to prosecute Clark for rape, after 12 months of investigating well-publicised

20 ATSIC, *Annual Report 1996–97*, 25.

21 Howard, *Howard*, 252.

22 For a content analysis of federal MPs' uses of the 'reconciliation' see Pratt, *Practising*.

23 'Systemic Ignorance over ATSIC Budget: Clark', *National Indigenous Times*, 22 May 2002, 9.

accusations. He was also being prosecuted for 'riotous behaviour' after a fight in a hotel. Some observers questioned the political judgement of ATSIC's Board of Commissioners for covering the costs of his defence by a top Melbourne QC. In Queensland, Ray Robinson began legal proceedings against the *Courier Mail* for alleging his improper financial dealing, while the Office of Evaluation and Audit investigated the claim.<sup>24</sup>

Without referring to these problems of individual standing, in June 2002 the minister (Philip Ruddock) announced a review of ATSIC. He justified the inquiry as a response to Indigenous disquiet, quoting Marandoo Yanner describing ATSIC as a 'hopeless, powerless, useless organisation'. While that was harsh, the minister commented, it 'speaks of the sort of frustrations that are there'.<sup>25</sup> Two weeks later, the *National Indigenous Times* reported a young Aboriginal man, Joe Hedger, saying that ATSIC was in the newspapers 'for the wrong reasons' and that young people such as himself were not attracted to it for a political career.<sup>26</sup> In July 2002, Clark acknowledged that some Indigenous Australians were so alienated from ATSIC that they might not participate in its fourth election (scheduled to be held on 19 October 2002). Voter registration, he acknowledged, was a test of ATSIC's significance to Indigenous Australians.<sup>27</sup> Clark and John Ah Kit (an Indigenous member of the Northern Territory Legislative Assembly) were quoted as saying that, while they respected the choice not to vote, Indigenous Australians should vote.<sup>28</sup> The October election produced a new board and, in December, Clark and Robinson persuaded commissioners that they should continue as chair and deputy chair.

Criticism of ATSIC came from Indigenous people whom the minister could not ignore. At the time of the election, Patrick Dodson (former chair of the Council for Aboriginal Reconciliation) was reported as calling for ATSIC to be phased out; ATSIC was tarnished, he reportedly said, by

24 Chris Graham, 'ATSIC Launches Inquiry; Robinson Claims Innocence', *National Indigenous Times*, 31 July 2002, 1, 4.

25 Chris Graham, 'Ruddock Calls for Debate on ATSIC's Future', *National Indigenous Times*, 5 June 2002, 1, 4.

26 Chris Graham, 'A Fiery Political Welcome for Young "Warrior"', *National Indigenous Times*, 19 June 2002, 1, 9.

27 Chris Graham, 'ATSIC Enters Election Mode', *National Indigenous Times*, 31 July 2002, 1, 17.

28 Chris Graham, 'To Vote or Not to Vote? That Was the Question', *National Indigenous Times*, 9 October 2002, 1, 4. Table 8 in Sanders, Taylor and Ross, 'Participation', 508 shows that voter turnout, as a proportion of voting age Indigenous population, was 23.7 per cent in 1993, 24.1 per cent in 1996 and 22.9 per cent in 1999.

the actions of its leaders.<sup>29</sup> At the same time, newspapers reported a court case in which Clark's predecessor as chair, Gatjil Djerrkura, was accused of sexual harassment. Commissioner Jenny Pryor was quoted as saying that a woman should lead ATSIC, given the behaviour of its male leaders.<sup>30</sup> In November 2002, Minister Ruddock announced rules that would allow him to remove a commissioner 'for a variety of behavioural offences, including causing public embarrassment to an Aboriginal organisation, seriously disrupting meetings and sexual harassment in or out of the workplace'.<sup>31</sup> In December the new CEO of ATSIC, Wayne Gibbons, was quoted as saying that:

A lot of what you hear about ATSIC is not too favourable. There's a perception of poor administration and of waste. That's got to be dealt with or ATSIC does not have a future.<sup>32</sup>

Lowitja O'Donoghue wrote to Ruddock asking him to state his reasons for not sacking Clark.<sup>33</sup>

Meanwhile, on 12 November 2002, the minister had announced the ATSIC inquiry's terms of reference and the panel that would conduct the review: Bob Collins, John Hannaford and Jackie Huggins. Within weeks, he had pre-empted their recommendations in one respect. In order to deal with perceptions of conflict of interest, he announced on Christmas Eve 2002 that ATSIC could no longer fund organisations of which ATSIC full-time officeholders were directors or in which they had a controlling interest.<sup>34</sup> The review recommendations were further pre-empted, in April–June 2003, by a ministerial command that radically redesigned ATSIC: removing nearly all staff and almost the entire budget from the control of the Board of Commissioners and handing them over to a new body, the Aboriginal and Torres Strait Islander Services (ATSIS). ATSIS was to be made up of former ATSIC public servants, answerable to the minister and making all decisions about individual grants (within policy guidelines formulated by ATSIC's Board of Commissioners). Debating this change in April 2003, Ruddock and Clark had been unable

29 Chris Graham and AAP, 'Dodson Comments Sour Grapes: Sugar', *National Indigenous Times*, 23 October 2002, 1.

30 'Pryor Says ATSIC Needs a Woman at the Helm', *National Indigenous Times*, 23 October 2002, 10.

31 Chris Graham, 'Tough New Rules for ATSIC Board', *National Indigenous Times*, 20 November 2002, 1, 11.

32 Chris Graham, 'ATSIC Needs an Overhaul: CEO', *National Indigenous Times*, 18 December 2002.

33 'ATSIC under Fire', *National Indigenous Times*, 30 April 2003, 4.

34 ATSIC, *Annual Report 2002–03*.

to agree on a model that would deal – to the government's satisfaction – with perceptions that persons elected to ATISIC had a conflict of interest if they participated in grant decisions.<sup>35</sup> In the formation of ATISIS, the minister had asserted his authority – 'a gun pointed at our head', as Clark later described it.<sup>36</sup> ATISIS commenced on 1 July 2003.

The Howard Government received the report of the ATISIC review in November 2003. Explaining Indigenous Australians' estrangement as an effect of ATISIC's concentration of power at the national level, the panel sought more power for elected regional councils. At the national level, the Board of Commissioners should be split into a deliberative, policymaking body of 38 that would delegate day-to-day leadership to a 'national executive' of up to 10 members, serviced by policy committees. Seeking to reduce expectations of ATISIC, the review pointed to the small role assigned to ATISIC in relieving Indigenous Australians' immense problems. Finally, the panel suggested that the elected and administrative arms (ATISIC and ATISIS) be reintegrated, but with a clearer delineation of their roles.<sup>37</sup>

The federal Opposition (the Australian Labor Party) contributed to the debate about these reforms by announcing on 30 March 2004 that it would abolish ATISIC if it won the 2004 election and replace it with a directly elected national Indigenous body. This emboldened the government to announce (on 15 April 2004) that it would abolish ATISIC, appoint a National Indigenous Council (NIC), devolve Indigenous-specific programs to mainstream departments, establish forums (Ministerial Taskforce, Secretaries Group, Indigenous Coordinating Centres) for intergovernmental and cross-agency cooperation, and negotiate agreements on service delivery with communities. Invoking their right to self-determination, around 200 Indigenous leaders gathered in Adelaide from 11 to 14 June to call for a new national Indigenous representative body, though they did not specify how representatives should be chosen. The Howard Government's response in November 2004 was to appoint a small, advisory NIC. Chaired by Aboriginal magistrate Sue Gordon, the NIC was not a representative but an 'expert' body, advising the Ministerial Taskforce on Indigenous affairs.

35 Chris Graham, 'A Painful Separation for ATISIC', *National Indigenous Times*, 16 April 2003, 6.

36 Brian Johnstone interview with Geoff Clark, 'An Assault on Me Is an Assault on Us All: Clark', *National Indigenous Times*, 23 July 2003, 7.

37 Review of the Aboriginal and Torres Strait Islander Commission, *Report*.

What caused ATSIC's downfall? Perhaps ATSIC demonstrated the limits of Australian governments' commitment to self-determination. Australian governments could have funded ATSIC more generously, broadened its program responsibilities and secured its seat in the higher forums of federated government so that it could call other federal and state/territory agencies to account. Against that view, we note that it was in response to Indigenous criticism (by Aboriginal community-controlled health services) that the Keating Government had removed health program funding from ATSIC (in which regional councils had much say about money for health programs) to the Commonwealth Department of Human Services and Health in July 1995. Another explanation of ATSIC's demise was that its inception was 'a classic pre-emption of Aboriginal choice' – that is, a national institution imposed on a political culture in which affiliations are local and in which mobilisation is necessarily episodic.<sup>38</sup> Yet another explanation is to point to cynicism (the venality and naivety of certain individuals who had been empowered by national structures) and naivety (unrealistic expectations by Indigenous voters about what ATSIC's programs could achieve and how quickly). A fourth explanation points to genuine philosophical differences about what it means to represent and serve 'your mob', with resulting unclarity of norms about ethical dealing ('conflicts of interest'). Here we note the novelty – within Australia's settler colonial political culture – of the very idea of Indigenous rights in governance. Whereas Indigenous property rights have been relatively easy to encode in legislation (though never without controversy), it has not been so clear how 'Indigenous rights' in governance should be operationalised. As well, the norms relevant to government funding (compensation or 'taxpayers' money?') have been contested. The dispute about what counted as a 'conflict of interest' in ATSIC's processes had little to do with the criminality (real or alleged) of this or that individual and more to do with unresolved issues of jurisdiction and political culture.

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38 Wooten, 'Self-determination', 17–18.

## The CATSI Act<sup>39</sup>

According to the 2002 Corrs review, the rationale for an Indigenous-specific incorporation statute was that most Indigenous corporations had social rather than commercial objectives. The review sought to recognise greater diversity among those social purposes, acknowledging the possibility of different constitutions and reporting requirements, and it recommended that the registrar have discretion to modify the latter.<sup>40</sup> Meanwhile, the responsibilities of directors and officers could more closely align with the *Corporations Act 2001*. The Howard Government's legislation largely followed these recommendations, and members of parliament from Labor and the Coalition had few differences to debate. Some Opposition speakers recalled that the Fingleton review had criticised the ACA Act for being too prescriptive of the internal structure of registered corporations. While they welcomed the new legislation's expanded options, they called for vigilance, so that actual Indigenous control did not slip away: improved corporate practices, they warned, should not be effected by 'experts' supplanting Indigenous people. Another reservation expressed by Labor speakers was that the registrar should be obliged to obtain a court order before ordering appointment of an administrator.

The *Corporations (Aboriginal and Torres Strait Islander) Act 2006* is a special measure for the advancement and protection of Aboriginal peoples and Torres Strait Islanders under Paragraph 4 of Article 1 of the Convention for the Elimination of Racial Discrimination and the *Racial Discrimination Act 1975*. The Act sets out rules about membership, elected office-holding, meeting procedures and record-keeping; it specifies corporate obligations about the timing and content of reports to the Office of the Registrar of Indigenous Corporations (ORIC); it defines ORIC's powers of enforcement and specifies offences; it demarcates the jurisdiction of courts as allies of the registrar in enforcement, enabling ORIC to prosecute. Thus empowered, ORIC has provided formal training in corporate governance to members and directors of Indigenous corporations and information and advice to members who have grievances about their corporation. In 2017–18 ORIC completed examinations of 53 corporations (out of

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39 In October 2006 parliament considered a package of bills: the Corporations Amendment (Aboriginal and Torres Strait Islander Corporations) Bill 2006; the Corporations (Aboriginal and Torres Strait Islander) Consequential, Transitional and Other Measures Bill 2006, the transitional bill; and the Corporations (Aboriginal and Torres Strait Islander) Bill 2005, the amendment bill.

40 Corrs Chambers Westgarth et al., *Modern Statute*.

3,046 registered corporations at 30 June 2018). On 5 July 2017 the Australian Government announced additional funding of \$4 million over four years for ORIC (roughly a 12 per cent increase in ORIC's budget, each year) for additional training, examinations and investigations.

The CATSI Act focuses on organisational soundness and financial transparency, but Indigenous organisations are also subject to *program accountability* to the government departments that fund them. Departments influenced by new public management have moved away from funding not-for-profits through block grants, instead contracting with not-for-profits for the delivery of services in accordance with precise program expectations. Many Indigenous corporations rely on income from programs administered by more than one department, making reporting complex and demanding advanced English literacy. Curchin's interviews with corporations elicited concern about the time diverted from service delivery to reporting. In 2010, the Commonwealth Ombudsman Allan Asher warned that 'promising Indigenous programs in rural and remote communities risk failure due to complex and onerous government reporting requirements'.<sup>41</sup>

The abolition of ATSIC also created problems insofar as mainstream departments that took over ATSIC's programs were reluctant to continue funding small highly localised Indigenous organisations. They encouraged the formation of larger regional Indigenous organisations or made contracts for the delivery of Indigenous services with non-Indigenous organisations including international non-government organisations. In 2012, ORIC reported that the 'move towards mainstreaming and regionalisation of service delivery for remote communities and away from funding for community organisations is affecting the solvency and long-term viability of many community-based Aboriginal and Torres Strait Islander organisations'.<sup>42</sup> ORIC was called on to assist in the restructuring and winding up of many organisations that had lost their most important funding stream.<sup>43</sup> At times, government departments were clawing back control of assets that had originally been funded by government programs, assets that Indigenous people see as belonging to the Indigenous community.

41 Commonwealth Ombudsman, 'Red Tape Causes Indigenous Programs to Fail', Media Release, 10 December 2010, [www.ombudsman.gov.au/media-releases/media-release-documents/commonwealth-ombudsman/2010/146](http://www.ombudsman.gov.au/media-releases/media-release-documents/commonwealth-ombudsman/2010/146).

42 ORIC, *Yearbook 2011–12*, 6.

43 ORIC, *Yearbook 2011–12*, 6.

## Conclusion

Indigenous organisations have been crucial to 'self-determination', and ATSIC and the Indigenous sector (made up of thousands of Indigenous corporations) have been experiments in governments' funding of Indigenous Australians to administer services to other Indigenous Australians. Within 15 years (1990–2005), ATSIC acquired and lost political support for reasons both structural and contingent. If the Indigenous sector has proved comparatively robust, it is not only because the benefits of local service organisations have been more obvious to Indigenous Australians than the benefits of national representative institutions, but also because the Australian state has been tutelary and disciplinary, providing a statutory environment that facilitated the Indigenous sector in three ways: enabling the exit of organisations that fell into disuse or into irreparable dysfunction, encouraging the formation of new organisations (including many formed as prescribed bodies corporate pursuant to the *Native Title Act*), and submitting organisations to oversight and training in what Australian governments and many Indigenous Australians considered good governance. The ACA and CATSI Acts both enabled and constrained the autonomy of Indigenous collectives. While the regulatory regime that has evolved since 1976 still sees persisting Indigenous communality in a positive light, it demands good governance.<sup>44</sup> Much of the CATSI Act mirrors the *Corporations Act 2001*, so that directors of Indigenous corporations must meet expectations derived from Western corporation law.

Among Indigenous leaders who see a governance gap that must be closed by encouraging Indigenous Australians to run corporations in better ways, we find Mick Dodson. In 2003, he and Diane Smith evoked an ethical culture that would result in profitable Indigenous enterprises

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<sup>44</sup> The embrace by some Indigenous public figures of the concept of good governance followed recognition by international financial institutions in the 1990s that good governance promotes economic growth and hence that international development assistance should be made conditional on good governance. 'What is Good Governance?' United Nations Economic and Social Commission for Asia and the Pacific, 10 July 2009, [www.unescap.org/resources/what-good-governance](http://www.unescap.org/resources/what-good-governance); 'The IMF's Approach to Promoting Good Governance and Combating Corruption – A Guide: Why Does the IMF Care So Much about Good Governance?', International Monetary Fund, last updated 20 June 2005, [www.imf.org/external/np/gov/guide/eng/index.htm#care](http://www.imf.org/external/np/gov/guide/eng/index.htm#care); World Bank, *Governance and the Law*, World Development Report 2017 (Washington, DC: World Bank, 2017), [www.worldbank.org/en/publication/wdr2017](http://www.worldbank.org/en/publication/wdr2017).

and ‘political and business stability’.<sup>45</sup> They proposed ‘a clear separation between the powers and responsibilities of leaders and boards, and the daily management of community businesses and services’.<sup>46</sup> They listed core ingredients and principles of good governance, including respect for the ‘rules of the game’, such as those found in publications of the Australian Stock Exchange; commitment to procedures of appeal and dispute resolution; and ability to explain financial management systems to governing boards.<sup>47</sup> They hoped that Indigenous organisations could grow in size without losing effectiveness – scaling up beyond the local.<sup>48</sup> Based on his empirical investigation of Aboriginal community councils, Limerick considered that the conventional Western-derived practices and principles of good governance ‘are not only relevant in the unique cultural context of Indigenous governance, but perhaps have even greater importance in this context’.<sup>49</sup> In his view, Indigenous governance must be especially robust to survive members’ and directors’ family-oriented cultural values.

The Australian regime enacts protectionist and assimilationist policy logics. Sanders has noted the return of ‘protection’ and ‘guardianship’ to Indigenous affairs in the Howard era.<sup>50</sup> Indeed, protectionist logic has been evident in the regulation of Indigenous corporations since the 1970s. Indigenous collectives have been viewed as especially vulnerable, requiring a conscientious guardian (the registrar) against threats internal and external. However, Indigenous Australians are not unique in their subjection to protective and civilising powers, as we can see in the similarities of ORIC’s functions with those of the Australian Securities and Investments Commission (ASIC). Both ORIC and ASIC protect corporations’ creditors by preventing corporations from trading while insolvent, and both have the power to investigate and prosecute directors and senior officers of corporations. ORIC is far more tutelary, setting limits to acceptable customary difference; it can supervise problematic organisations more closely than ASIC, in what Sullivan calls the larger

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45 Dodson and Smith, ‘Governance’, 15, 20.

46 Dodson and Smith, ‘Governance’, 15.

47 Dodson and Smith, ‘Governance’, 14–17.

48 Dodson and Smith, ‘Governance’, 19.

49 Limerick, ‘What Makes’, 424.

50 Sanders, ‘Ideology’.

'attempt to normalize Aboriginal people by concentrating on Aboriginal deficit'.<sup>51</sup> ASIC possesses no power equivalent to ORIC's authority to examine Indigenous corporations' books.

Do protection and assimilation, persistent in this regime, compromise self-determination? One of this chapter's authors has argued that:

Self-determination, no less than assimilation, implies Indigenous acculturation. Capacities are not culturally neutral. Self-determination affords new pressures and opportunities for Indigenous Australians to be more like non-Indigenous Australians, in many ways. This does not demand the surrender of Indigenous identity (quite the opposite), but it stimulates changes in Indigenous ways of reckoning their obligations to one another.<sup>52</sup>

But what if the 'Indigenous identity' of a corporation includes norms and practices that amount to a 'polity', a colonised 'jurisdiction' not yet extinguished and demanding recognition? Indigenous political theorists, encouraged by 'mounting evidence of Indigenous polities increasing their authority over their Country and citizens', implicitly challenge Rowse's view.<sup>53</sup> They argue that, since the 1970s, Indigenous polities have adopted incorporation as a legal device to deal with the settler colonial state and civil society, an 'accommodation to colonizer law' that 'can create confusion between the governance of Indigenous community organisations and the governance of Indigenous communities'. Indigenous collectives need 'to transition from "corporate governance" (management of community organisations) to "political governance" (governing of polities)' a shift that 'might also be described as a transition from self-management to self-determination'.<sup>54</sup> Indigenous commentary on the CATSI Act is, therefore, ambivalent. Speaking at a forum convened by ORIC, Harold Furber complained of 'the imposition of Western systems upon an existing governance process ... I think ORIC is attempting to do it, and doing it to a certain extent well, but in the end what it is talking about is Western systems of governance and in the end it's an imposition'.<sup>55</sup>

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51 Sullivan, 'Disenchantment', 354.

52 Rowse, *Indigenous*, 231.

53 Vivian et al., 'Indigenous', 220. For an older (1996) Indigenous critique see Widders, 'On the Dreaming'.

54 Vivian et al., 'Indigenous', 227.

55 Harold Furber speaking at an ORIC forum on Indigenous Corporate Governance in Alice Springs in 2010, Curchin field data.

The Indigenous sector has enacted Rowley's vision of (what Batty calls) 'linkages between the mechanisms of government and a collective Aboriginal subjectivity or agency' such that Aboriginal people would 'incorporate the administrative procedures of government into their own sense of communal personhood'.<sup>56</sup> Aboriginal 'communal personhood' has bent to fit the mechanisms of government, far more than the mechanisms of government have bent to fit with Aboriginal 'communal personhood'.

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<sup>56</sup> Batty, 'Private', 213.

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