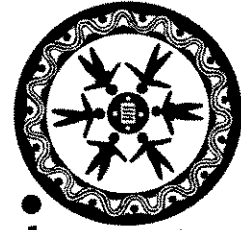




UNIVERSITY OF  
TECHNOLOGY SYDNEY



**jumbunna**  
Indigenous House of Learning

## **Submission for the Consultations for the proposed National Indigenous Representative Body**

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9 September 2008

To Whom It May Concern:

**Re: Consultations for the proposed National Indigenous Representative Body**

1. Thank you for the opportunity to provide this submission to the Consultations for the proposed National Indigenous Representative Body.
2. We would like to address the following issues:
  - a. The need for a national representative body;
  - b. The lessons learned from previous representative bodies;
  - c. The need for a regional level of representation;
  - d. The need to build on existing state and regional representative structures;
  - e. The need to adhere to the principles of democracy in relation to a national representative structure; and,
  - f. Options for resourcing a national representative structure.

**I. The Need for a National Representative Structure**

3. Aboriginal and Torres Strait Islander peoples need a national representative structure for many reasons including:

- On many issues – land, heritage protection, human rights protections, resource management – Indigenous peoples will have a policy perspective that is contrary to that of the Federal Government.
  - The Federal Government is responsible for the development of policy and programs for Indigenous peoples. Those policies and programs will work better with the input of Indigenous people, both to identify policy and funding priorities and to ensure Indigenous participation and ownership of those policies and programs.
  - A national body provides for a unified Indigenous voice across Australia. Although the priorities of Indigenous communities across Australia may vary, advocacy through a national body will be more effective than a number of competing regional voices.
  - A national body can lessen the tensions between different Aboriginal communities – such as the north/south divide – by seeking to negotiate a unified voice rather than exacerbate the “wedging” of one group against another.
4. Further, in order to improve the effectiveness and efficiency of service delivery into Aboriginal communities, there needs to be an investment in building the interface between Aboriginal communities and government. A national representative body can facilitate the interface between Aboriginal communities and governments that want to consult with them and include them in the development of policies, programs and service delivery.
5. Tim Goodwin makes the following observation about the implications of having no national representative body for Aboriginal and Torres Strait Islander peoples:

Since the abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC), there has been a significant and noticeable gap in broad national Indigenous policy advice and critique of government activity in Indigenous affairs. Rather, policy critique has been uncoordinated and disparate between various Indigenous organisations. This has weakened the position of Indigenous peoples in general, with various governments taking advantage of the situation by privileging particular individuals and organisations that support their measures while ignoring the bulk of people and groups that do not. This

situation also allows governments to mislead the public and misrepresent Indigenous affairs in such a way as to build strength of support for their initiatives.<sup>1</sup>

6. We would also note the Australian Labor Party's 2007 Platform and Constitution:

### **Aboriginal Peoples and Torres Strait Islanders**

#### **Basic Objectives**

44. Labor will review the current citizenship rights extended to youth, including suffrage, discrimination and representation in the policy making process and seek to extend these rights where they respond inadequately to young people's needs and legitimate aspirations.

- To promote the First Nations status of Indigenous Australians.
- To build national consensus around a long-term strategy to improve the social and economic well-being of Indigenous Australians.
- To enable the full exercise of Indigenous Australian's rights and responsibilities on both an individual and collective level.
- To advance reconciliation and social justice.

#### **Guiding Principles**

- Labor respects the right of Indigenous Australians to meaningful self determination arising from their First Nations status.
- ***A Labor Government will develop a strong political relationship with a new national representative body, and be accountable to it.***
- Labor will harness Indigenous decision-making power in relation to the formulation and delivery of policies and programs.

## **II. The Lessons Learned from Previous Representative Bodies**

7. We believe that consideration should be given to the strengths and weaknesses of previous national representative structures and that the lessons learned from those institutions can inform the design of a new national representative model.

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<sup>1</sup> Tim Goodwin "A New Partnership Based on Justice and Equity: A Legislative Structure for a National Indigenous Representative Body", in *Journal of Indigenous Policy Volume 10* forthcoming 2008

8. The Aboriginal and Torres Strait Islander Commission (ATSIC) was the most recent national representative body and it provides an informative case study about what considerations for the development of a new national representative body.
  
9. To this end, the following strengths of ATSIC should be noted:
  - a. **ATSIC had a Broad Legislative Mandate:** The objects of the *ATSIC Act 1989 (Cth)* articulated a regime that gave a greater role for Aboriginal and Torres Strait Islander peoples to deal with the issues facing them through elected representation. The objects included:
    - 'Maximum participation';
    - 'The development of self sufficiency and self management';
    - 'Furtherance of the economic, social and cultural development'; and
    - 'Coordination in the formulation and implementation of policies ... without detracting from the responsibilities of ... governments'.
  
10. The functions given to ATSIC in the Act set out a range of legislative mandates to meet these objectives, namely to:
  - Formulate and implement programs;
  - Monitor the effectiveness of programs conducted by all bodies and agencies;
  - Develop policy proposals, to assist, advise and cooperate with all and sundry;
  - Advise the Minister on all matters;
  - Provide advice to the Minister when requested;
  - Protect cultural material and information; and
  - Collect and publish statistical material (if the Australian Bureau of Statistics approved).
  
11. The objects and function, when read together, established a framework of responsibilities that conferred to ATSIC the *primary role* of advising the Federal Government on any matters relating to Aboriginal and Torres Strait Islander peoples and for the oversight of all government effort in policy development and the provision of services to Aboriginal and Torres Strait Islander peoples. That is, ATSIC was tasked to:

- Maximise the participation of Aboriginal and Torres Strait Islander peoples in the formulation and implementation of programmes; and
- Provide an effective voice within the government.

12. The *ATSIC Act* articulated the functions of the Commission and the powers it had to implement them in clear and broad terms. The functions were relatively broad and the powers that the Commission had been given to achieve these functions should have been adequate enough to allow the Commission to effectively fulfil its mandate. That this did not occur raises the question as to why such a generous set of objectives and functions were not used more effectively.

**b. A National Representative Body that Reflects the Views of Indigenous Peoples**

13. ATSIC was able to develop policy on some key areas that reflected the position of Indigenous peoples. This was a strength in areas where it strongly advocated on issues often conflicting with the Government's position.

14. One such area was native title. ATSIC's strategies and policies on native title often conflicted with the federal government position and it funded Native Title Representative Bodies to litigate native title claims in matters where the Federal Government is a party. Another area of strength was ATSIC's ability to lobby in the international arena where it frequently advocated positions contrary to the Federal Government's.

15. ATSIC was also able to maintain a focus on the rights agenda in a period where the government of the day had a policy of "practical reconciliation." Although attempting to focus on socio-economic issues, the Howard Government's agenda ignored broader social, cultural and economic issues facing Indigenous communities. ATSIC's position was that the recognition and enjoyment of rights was required if any real, meaningful and

sustainable progress was to be attained. The "rights agenda" advocated by ATSIC was a position that directly opposed the Federal Governments, but ATSIC was able to continue to focus on structural, long-term rights issues. This broader and structural focus saw ATSIC take the lead on the national treaty debate as a way of maintaining a dialogue about rights protection.

### **c. An Interface with the Federal Bureaucracy**

16. ATSIC was the first national representative body whereby Indigenous peoples had a role in both an advisory and decision making capacity. The dual role provided ATSIC with a legitimate seat at the table, with leverage and with an actual role in determining the direction and priorities in respect of Commonwealth programs, albeit within fairly tight constraints in terms of actual dollars and programs. This very real power provided ATSIC with a capacity to negotiate on the playing field and, although not level, this was a far cry from the powerless positions experienced in negotiations by Indigenous representative bodies up until that time.
17. From this position, ATSIC was able to make positive contributions to a broad range of agendas and initiatives including the response to the Royal Commission into Aboriginal Deaths in Custody, the National Aboriginal Health Strategy additions and the response to the Bringing Them Home report.
18. ATSIC was also able to take a seat at the MCATSIA table and was influential within COAG (twice) putting forward the National Commitment to Improved Service Delivery to Aboriginal and Torres Strait Islander People. It also was actively involved with the COAG Reconciliation Agenda. These were positive initiatives emanating from COAG and had substantial merit.

19. These gains were hard fought and marked significant advances in attempting to reform the way government conducted business in the Indigenous portfolio. These points of interaction and influence must not be cast aside.

#### **d. The Use of Regional Planning Processes**

20. There has been recognition of the importance of governance for Indigenous communities at the regional level to capture differences in policy and program needs across the country. Regionalisation recognises that a one-size-fits-all approach to Indigenous policy-making and program delivery is not as effective as an approach that distinguishes between the priorities of different Indigenous communities.
21. The ATSIC structure sought to give effect to this level of governance through the Regional Councils. Regional Councils were able to respond to the needs of local communities and they can achieve these outcomes through policy development and advocacy.
22. The Regional Councils were required to formulate a Regional Plan and then to assist, advise and co-operate in the implementation of that plan. Importantly, this process of implementation requires broad consultation and negotiation, not just with ATSIC, but also with various levels of government.
23. The ATSIC Regional Councils also had a legislative obligation to receive and to pass on to the Commission and the Torres Strait Regional Authority the views of their constituents about the activities of government bodies in their region and to represent and advocate on behalf of their constituents.
24. These powers and functions provided a governance structure at the regional level and served as an important source of advice on policy and priorities at the national level to assist with the allocation of resources and participation in decision-making processes.



### **e. An Appropriation: Financial Leverage**

25. The control of economic resources is the most significant factor in the capacity of any organisation to influence its environment. For too long Indigenous organisations have been subject to the benevolence of government and have had to negotiate without power or influence. Program resources provide that power and influence. For the organisation to be effective it must be at least retained if not expanded.
26. ATSIC's responsibility for policy and advocacy and its responsibility for program/service delivery was one that resulted in tensions between these two mandates. However, without the appropriations for its program responsibilities, ATSIC did not have had the capacity to negotiate with any power with other agencies and governments.
27. That is not to say that a national representative body has to deliver services directly; this function can and should be a strategic mix of direct and delegated service delivery processes and mechanisms aimed at maximising the effectiveness of delivering those services. That is, maximising access to services for Indigenous peoples and improving the outcomes for the ultimate beneficiaries.
28. The positive and meaningful involvement of Indigenous people in the development and delivery of programs to Indigenous peoples can only be a reality when, Indigenous peoples have explicit, effective and significant control over resources.
29. ATSIC also had the following weaknesses:

- **Competing Advice to Government**

30. ATSIC was established as an advisor to government. At the same time, the Office of Indigenous Affairs was also established as a source of alternative advice. This may have been an initiative to ensure that non-Indigenous interests that may have been affected as a

consequence of Indigenous initiatives were considered but it quickly became a source of friction between government and ATSIC.

31. This duality of advice was only one way in which government sought alternative advice to ATSIC. Each level of government and each agency with some responsibility for Indigenous matters had an advisory mechanism and these arrangements remained after the commencement of ATSIC. With these multitudes of forums and advice, unstructured and uncoordinated policy and program development resulted. Agencies and governments were entitled to seek additional and expert forum advice with respect to specific programs.
  
32. The health program is perhaps the best example of the friction created by the lack of strategic and lateral thought on the part of both government and ATSIC. Just prior to ATSIC being established, the NAIHO (National Aboriginal and Islander Health Organisation) had been instrumental in negotiating the National Aboriginal Health Strategy (NAHS), a significant and long overdue initiative to address the problems in health including environmental health. Some \$250M plus was provided and NAIHO was the primary advisor. With the advent of ATSIC, their role was usurped in respect of the bulk of the monies.
  
33. The Indigenous health lobby campaigned to have the responsibility for the health program transferred from ATSIC and into the Department of Health, effectively mainstreaming the health program. It should be noted that when the transfer was made, a significant increase in funding was also given to the Department of Health, providing it with resources that were not made available to ATSIC.
  
34. This example highlights a situation where each program specific area, be it a peak body or a community organisation, is focussed on the needs of their program or their community and see it as paramount. While this is an understandable position for a lobbying body to

take it is the task of the organisation overseeing the distribution of funding across the many competing program and policy areas to make an assessment and allocate resources according to that assessment.

- **Program Delivery Versus Policy Making**

35. ATSIC was an agency delivering programs – particularly the CDEP and CHIP programs – while at the same time being the primary national advocate for Aboriginal and Torres Strait Islander peoples. The competing aims of delivering programs and developing policy seemed to be a tension that saw program delivery become a focus at the expense of policy-making.

36. There are practical difficulties in trying to provide services and achieve policy outcomes at the same time. One takes priority over the other. Ultimately, ATSIC's preoccupation with the service delivery function was to the detriment of its policy development responsibilities. As a result it has become trapped in a constant funding cycle making ATSIC incapable of developing anything but program policy.

- **No Executive Power**

37. Under its enabling legislation, ATSIC was given the function to monitor the effectiveness of other agencies, to coordinate the development and implementation of policies and to formulate and implement program proposals. To fulfil this responsibility ATSIC required the active cooperation and involvement of Commonwealth agencies and State and Territory governments. This in turn required an interface backed by executive authority from the Department of Prime Minister and Cabinet.

38. This executive authority was never given to ATSIC and the activities of Prime Minister and Cabinet were often to the contrary to ATSIC's stated policies and intentions.

- **Lack of a State, Territory and Local Government Interface**

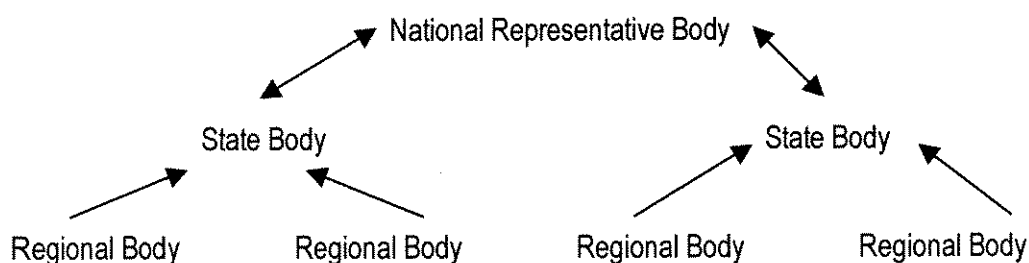
39. The ability of ATSIC to effectively fulfil its mandate was severely impeded by its inability to impact on State/Territory governments and to more effectively monitor how they spent money on key areas of Indigenous socio-economic disparity, namely, health and education.

40. Although there was an attempt to remedy this through the establishment of State Advisory Councils, these bodies were not legislated by the *ATSIC Act* and did not formally form part of ATSIC's legislative structure. State Advisory Council's existed as part of a 'convention' or policy rather than having the recognised force of legislation.

41. Therefore, individual State and Territory Governments didn't treat State Advisory Committees as having legitimacy and authority.

42. The failure to impose a structure that could act as the state representative voice of Aboriginal and Torres Strait Islander peoples created a vacuum in ATSIC's advocacy role.

43. The reports of the Commonwealth Grants Commission and the Productivity Commission attest to the parlous state of coordination and cooperation at the Commonwealth, State and Territory levels. ATSIC had been condemned for being unable to achieve an aspiration which to date eludes all levels of government, especially within Indigenous portfolios.



- **III defined Relationships Between the ATSIC Board, CEO, Minister and Regional Councils**

44. Another shortcoming of the *ATSIC Act 1989*, was its failure to define key relationships. These include the relationship between the Board and the CEO and the relationship between the Board and the Minister.

45. Before the split in the agency resulting in the creation of ATSIS and the appointment of a separate CEO, the CEO of ATSIC was answerable to and directed by the Board of Commissioners. However, the CEO of ATSIC is also responsible to the then Minister for Immigration, Multiculturalism and Aboriginal and Torres Strait Islander Affairs. The agenda of Board and the Minister could be very different creating difficulties in governance.

46. The legislation was also silent about the relationship between the Regional Councils and the ATSIC Board.

- **Public Perceptions**

47. ATSIC has too often been portrayed as being responsible for every Indigenous issue. It is not widely appreciated that it did not have fiscal responsibility for the areas of health and education and was only a supplementary funding provider on issues such as domestic violence, languages, heritage protection and housing.

48. In addition to this, there has also been a failure to appreciate that a large percentage (almost 80%) of the ATSIC budget was quarantined for programs such as CDEP and CHIP. These misconceptions directed attention away from government departments (federal and state and territory) with responsibility for Indigenous policy and service delivery.

49. The ability to treat ATSIC as the source of inadequate policy and ineffective service delivery stemmed from the media coverage of allegations against senior ATSIC board members. There is no doubt that the continued presence of Board members who were subject to continuing allegations and questioning undermined the credibility of the institution.
50. This was exacerbated by the misinformation about ATSIC and its responsibilities that were prevalent in comments within the media and by politicians. These attacks not only accused ATSIC of ineptitude in relation to policy-making and program delivery, but also criticised its governance processes.
51. Not only was this misinformation unfair to ATSIC, who is not in some cases responsible for the policy areas it was accused of failing in, it deflected criticism from the governments and agencies that were responsible for those shortcomings.

- **Failure to Build Governance Capacity**

52. The ATSIC Board was, on the whole, comprised of men and women who were extremely committed to and passionate about the people they represented and the issues they were engaged in.
53. However, the inability of the ATSIC Board to build an appropriate level of governance capacity despite the attempts of administrative staff, must be acknowledged. To some extent this was understandable given the lack of trust between the Board and the administration and this is a factor inherent in any interface between government and the community.
54. The Board was comprised of members with diverse priorities, opinions, perceptions and views. The needs and demands they represented were high and the resources to meet

them relatively low. In that environment every decision of the Board involving resource allocation was contentious and conflict was to be expected.

55. In such circumstances good governance is essential to ensuring that the decision-making, activities and the performance of the board is beyond reproach. The lack of unity, transparency and the behaviour of certain members of the Board tarnished ATSIK's reputation.
56. It should be noted, however, that the problems of the Board did not inhibit the effective delivery of the programs, nor did Indigenous peoples miss out. In spite of the machinations of some members of the Board it continued to deliver on program issues.
57. A greater focus on the importance and primacy of good governance is an issue to be addressed in building a new national representative structure.
58. To summarise, when looking at the key strengths and weaknesses of the ATSIK structure, the following observations can be made:
  - A national representative structure should have a broad, clear mandate and functions that are adequate enough to support it to meet its mandate;
  - It should have, as its primary focus, advocacy and monitoring but not be engaged in the delivery of services;
  - It should have a regional representative structure that is concerned with regional planning processes;
  - It should be given leverage through mechanisms such as appropriations, executive power and a seat at the COAG table.
  - It should build on existing representative structures at the state level, especially elected representative bodies;
  - It should also have a state interface;

- The relationships between the different levels of the structure and the representative body, the executive and the Minister.
- The representative body should be guided by good governance principles and capacity building in governance should be undertaken as part of the training for all elected representatives.

### **III. The Need for a Regional Level of Representation**

59. Regional representation allows for the specific the needs of the Indigenous communities within that area to be identified. It also allows the leadership within that region to be engaged with government in an effective way.
60. Regional structures offer a manageable model in relation to effective delivery of services at a local level. This is contingent on proper regional planning processes that engage with local communities. Regional governance allows for a more immediate response to local issues than does a national only approach.

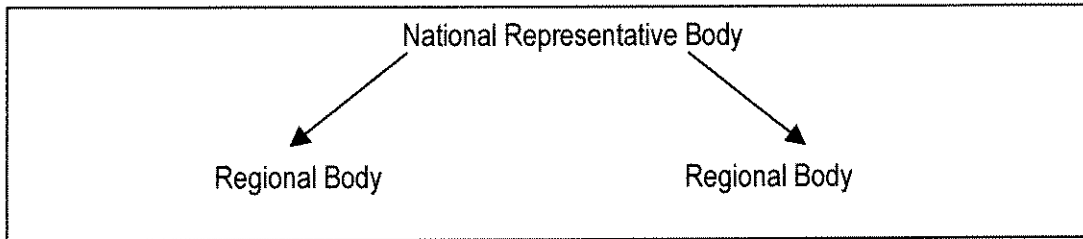
### **IV. The Need to build on Existing State and Regional Representative Structures**

61. A new national body must build on existing state and regional structures. Placing a new structure over the top of an existing structure without reference to the existing structure leads to the diminution of both structures with respect to legitimacy and acceptance.
62. Such antagonism towards to existing structures allowed for the representation and advocacy function within the existing structure to be undermined.
63. The opportunity to build on the existing elected representative structures such as the elected representative body in the Australian Capital Territory and other states and territories must be seen as a central obligation on any new national body design.

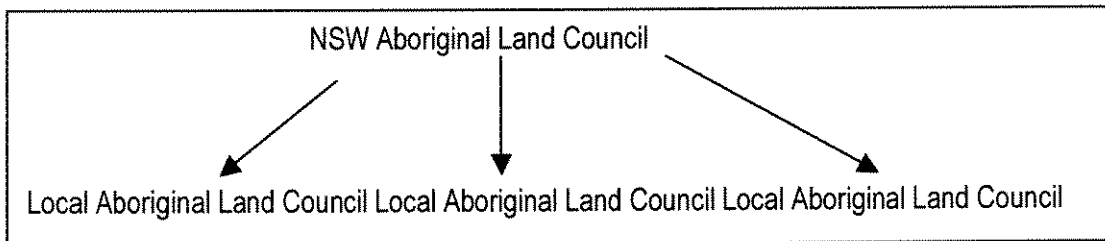


64. This accommodation might mean some adjustment to those existing structures. For example:

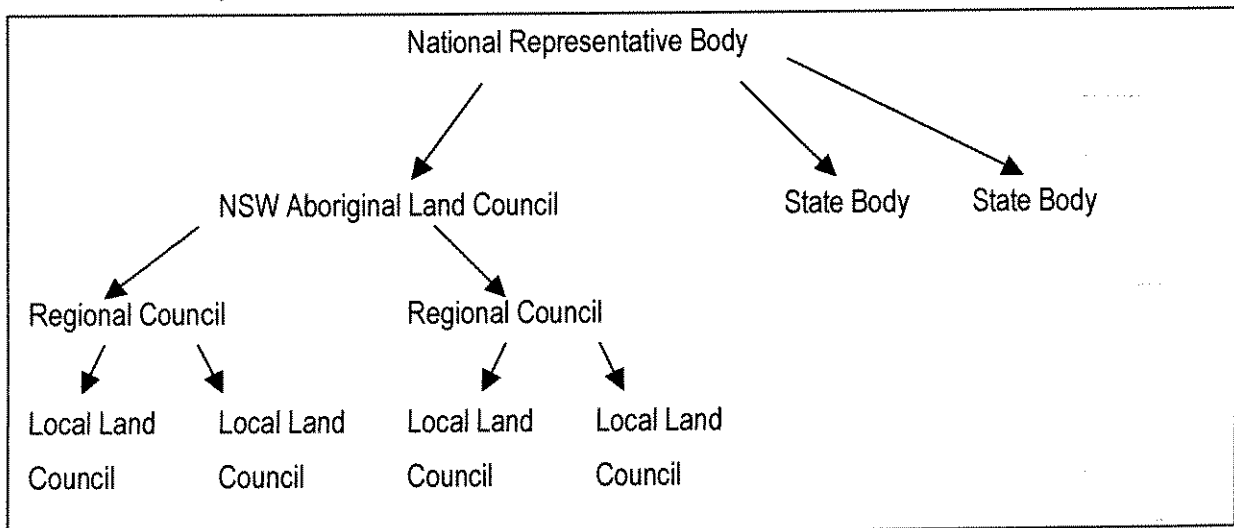
A national representative structure might have a national and a regional level.



The New South Wales Aboriginal Land Council is an existing elected representative body with a state and local level of representation.



Incorporating a body like the NSW Aboriginal Land Council into a national representative structure would require the building of a regional representative structure into the land council system.



## **V. The Need to adhere to the principles of democracy in relation to a national representative structure**

65. We strongly believe that a national representative body must embrace the principles of participatory democracy.
66. Aboriginal and Torres Strait Islander people are entitled to choose their representatives, to be involved in the process of choosing who is going to represent their interests.
67. Those elected representatives are accountable to the Aboriginal and Torres Strait Islander community, ensuring that they make themselves aware of the views of the people that they are representing.
68. The appointment of individuals to bodies such as the recent National Indigenous Council undermines the representative role of the body. Individuals who have been appointed by government have no duty to represent and have diminished legitimacy with those they are representing. They are appointed as individuals and act in that capacity and are not accountable to the community whose interests their decisions will affect.
69. The process of appointment excludes Indigenous people from input into membership of the body. This means that there will be no sense of ownership of the body from the Aboriginal community. It will also mean that those who are appointed are likely to be people whose politics and views coincides with those of the federal government.

## **VI. Options for resourcing a national representative structure**

70. The swift abolition of ATSIC was a reminder of the tenuous nature of a representative body that is created with the benevolence of government.

71. The NSW Aboriginal Land Council provides an example of a model by which a representative model can be given the capacity to be self-sustaining and viable. It has a large capital fund and land assets that covers its costs of administration and also allows it to engage in other commercial and benevolent activities.

## **VII. Recommendations**

72. We would like to make the following recommendations:

1. That the Rudd government continue to consult with Aboriginal and Torres Strait Islander people to develop a national representative structure.
2. That a national representative structure include the following features:
  - i. a broad, clear mandate and functions that are adequate enough to support it to meet that mandate;
  - ii. a primary focus on advocacy and monitoring but not the delivery of services;
  - iii. leverage through mechanisms such as appropriations, executive power and a seat at the COAG table;
  - iv. an interface with state/territory governments;
  - v. a regional representative structure;
  - vi. build on and work with existing state and regional elected representative structures;

- vii. adopt the principles of democracy by being an elected body;
- viii. have an independent source of sustainable funding.



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