Attention:
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SUBMISSION TO THE SENATE SELECT COMMITTEE ON THE ADMINISTRATION OF INDIGENOUS AFFAIRS

Members of the Committee,

Introduction

My name is Clemens Van der Weegen and I make this submission as a private citizen; however, with an intimate knowledge of the former Aboriginal and Torres Strait Islander Services. It is my contention that the proposed Bill before the Parliament is an expedient piece of legislation that has merely 'cut and pasted' the old legislation in a 'ham-fisted' attempt to bring about the end of the principle of self determination for Aboriginal people through the proposed abolition of ATSIC and the elected body representing Aboriginal and Torres Strait Islander people.

The Prime Minister is trying to push this legislation through without a mandate for doing so. One would have thought that such a fundamental shift in policy towards Indigenous Australians would have meant putting it to the people for their imprimatur. The contempt the Prime Minister has for the sensitivities of Indigenous people and the voting public is manifest in his 'executive decision' to mainstream ATSIC programs.

The unlawfulness of mainstreaming ATSIC programs

The preferred method of implementing the majority of these changes to Indigenous policy (the mainstreaming of ATSIC programmes to other agencies) through executive power before the appropriate legislation is passed is unconscionable to say the least. I would contend that the executive has no power to do so under the present *Aboriginal and Torres Strait Islander Act 1989* which is still (L.A.W.) law. Section 3 of the present Act states the object of the Act (interestingly, this section is to remain in the amended legislation; however, its importance is often overlooked at worst, and underrated at best by the government):

> The objects of this Act are, in recognition of the past dispossession and dispersal of the Aboriginal and Torres Strait Islander peoples and their present disadvantaged position in Australian society:
>
> > (a) to ensure maximum participation of Aboriginal persons and Torres Strait Islanders in the *formulation* and *implementation* of government policies that affect them;
> > (b) to promote the development of self-management and self-sufficiency among Aboriginal persons and Torres Strait Islanders;
> > (c) to further the economic, social and cultural development of Aboriginal persons and Torres Strait Islanders; and
> > (d) to ensure co-ordination in the formulation and implementation of policies affecting Aboriginal persons and Torres Strait Islanders by the Commonwealth, State, Territory and local governments, without detracting from the responsibilities of State, Territory and local governments to provide services to their Aboriginal and Torres Strait Islander residents.

The underlining and italics in the above section have been inserted by me to emphasise the spirit and intent of the legislation. In fairness, the recent COAG trails have finally brought about some meaning to sub paragraph (d) rather than the previous abrogation of responsibility by the various governments of the mainstream.

It follows from section 3 of the present unamended *ATSIC Act* that the primary, and, indeed, exclusive function of the Commission according to section 7 paragraph (1)(a) of the same Act is 'to formulate and implement programs for Aboriginal persons and Torres Strait Islanders'. Now, according to paragraph (1A) of the same section, the function referred to in paragraph (1)(a) that being programs formulated and implemented by the Commission can only be performed by the Commission itself unless the Commission authorises other persons under contracts or agreements entered into with the Commission under sub paragraph (a), or to whom the Commission has delegated the function under sub paragraph (b).

Therefore, the recent wholesale mainstreaming of ATSIC programs (except statute specific programs such as Indigenous Business Australia and the Housing Loan Scheme), notwithstanding that the majority of those programs were under the auspices of the Aboriginal and Torres Strait Islander Services (ATSIS) is, in my submission, unlawful. The present Commission DID NOT pursuant to the present Act which is still (L.A.W.) law authorise or delegate to any other government agency to perform its exclusive function outlined in section 7 paragraph (1)(a). The lawfulness or otherwise of the establishment of ATSIS is another issue which is subject to a present High Court challenge, and is not part of this submission. Nevertheless, it is still up to

the present Commission – NOT THE EXECUTIVE – to decide what, if any, of its programs are to be delegated out, and where and to whom they go to.

Self Determination

One of the stumbling blocks to the signing of the Draft International Declaration for the Rights of Indigenous People is Australia's intransigence in the United Nations. Indeed, Australia is the only country that is objecting to the principle of self determination for its own Indigenous people. This is a fundamental right that even its best friend The United States acknowledges for its own Indians. Never mind the Prime Minister saying that he is not going to apologise for past injustices when those injustices are still happening today.

The question of Indigenous sovereignty has been buried in the past. The much lauded *Mabo* decision did not go far enough. Indeed, if the High Court were to take the fiction of *Terra Nullius* to its logical conclusion, it would have declared itself – and the constitution of this country – *ultra vires*. Of course, it was never going to do that; thus it remains a political problem that still has to be dealt with. Political will failing, there is still scope for another *Mabo* type decision with the recent discovery of a hitherto unreported 1829 decision of the full bench of the New Wales Supreme Court in the matter of *R v Ballard*.

This case was recently reported by Professor Bill Kercher of Macquarie University in *The Kercher Reports*. This case is extraordinary in that the court recognises Aboriginal sovereignty when it came to offences occurring between themselves. The court held that British law has no jurisdiction over matters that occurred between themselves. Indeed, I have written a research paper on this very issue as part of my law degree at The Australian National University. I argue in the paper that *R v Ballard* is still good law as it has not been overturned by any subsequent decision, nor have the principles enunciated in the decision been expressly removed by any legislation.

An obvious question that most Australian Indigenous people ask is, if their Pacific cousins can have sovereignty of their islands, why can't they have sovereignty over their land? Well the obvious answer is money, size and numbers. Australia is too big

– rich in resources and a large economy, and Indigenous numbers are too small; whereas the pacific islands are too small with poor economies and limited resources and a majority Indigenous population. It is no secret that Australia would, like South Africa, eventually hand over power to its Indigenous population if it had a Majority Indigenous population. Aboriginal and Torres Strait Islander people are always going to have a limited capacity for voice in a Euro-dominated culture and country.

The 'minority problem' is why ATSIC or any other elected representative body for Indigenous people was so important. It gave them an important voice in the 'formulation and implementation of policies that affected them'. And that is what makes it so tragic that something that is so important to the exercise of that voice is being summarily taken away from them.

Conclusion

Reconciliation is about educating the white population in the rights of Indigenous people. Most of the wider white Australian community know nothing about the principle of self determination and what it means to Indigenous people. The recent Reconciliation Council was well meaning, but it was preaching to the converted. I had a friend on the Council, and most of the time she was visiting and talking to Aboriginal Communities. Its focus should have been with the wider white community.

I am white, but it wasn't until I worked as a police prosecutor (not my present occupation) on the Broken Hill Court Circuit in the early 90s of which the predominately Aboriginal community of Wilcannia was a part, that I began to appreciate the position of Indigenous Australians.

Since those times I have formed many lasting friendships with Indigenous Australians. They are an amazing group of people. They are, unlike a lot of white Australians, very much community and family oriented. Most don't think twice when it comes to giving and sharing what they have as they do not have the same concept of private property as we white people do.

My wish is that the wider white people come to know them as I have. To get over the fear and realise that once you open up to them you come to understand them. I will be happy to elaborate on anything further if the Committee wishes. I am also prepared to appear to give an oral submission and subject myself for questioning if appropriate. I can be contacted at the above address and phone number or this email address.

Thank you for your consideration.

C. J. van der Weegen BA (Hons) ANU
28 July, 2004