

2 | significant issues

1 Recent Legislative History

The Legislative Review Committee was set up in August 1990 to review the *Community Services Acts 1984 - 1986* and the *Local Government (Aboriginal Lands) Act 1978 - 1981* and to recommend a new legislative framework. The Aboriginal and Torres Strait Islander Committee developed self-government options for Aboriginal and Torres Strait Islander people regardless of land tenure, location, population, cohesiveness or resources. The government responded to these recommendations with the Alternative Governing Structures Program.

The Parliamentary Committee of Public Accounts (PCPA) began an inquiry in 1990 into the financial administration of Aboriginal and Torres Strait Islander Councils because of poor audits. The PCPA recommended more autonomy for councils, better procedures and more training and support for councils.

The Electoral and Administrative Review Commission's Local Authority Electoral Review which commenced in 1990 was asked by Aboriginal people to consider whether Aboriginal councils were local authorities, and what their relationship was to mainstream local authorities. Some of this discussion informed the *Local Government Act 1993* which allows for joint local government and joint action by local governments.

The Queensland Government granted a greater measure of land rights with the *Aboriginal Land Act 1991* and *Torres Strait Islander Land Act 1991*. The DOGIT communities are still working under the DOGIT legislation while claims to the Land Tribunal are being heard. It is now possible to claim land on areas outside DOGIT including national parks.

In *Mabo v State of Queensland (No. 2)*, delivered on 3 June 1992, the majority decision was that the Meriam people were entitled as against the whole world to the possession, occupation, use and enjoyment of the land of the Murray Islands in the Torres Strait. The majority of the High Court held that the common law of Australia recognises native title, and that this was applicable to mainland Australia as well as Murray Island. The Commonwealth Government then passed the *Native Title Act 1993* and the Queensland Government passed complementary legislation, the *Native Title (Queensland) Act 1993*, prior to the Commonwealth legislation.

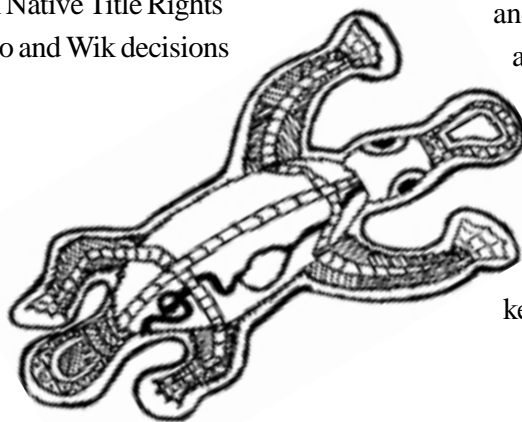
In the *Wik Peoples vs State of Queensland*, delivered on 23rd December 1996, the High Court of Australia held by a 4:3 majority that the grant of a pastoral lease did not necessarily extinguish native title. It was held that native title rights and interests may co-exist with the interests of a pastoral lessee, but in the event of a conflict, the pastoral lessee's rights would prevail.

The implications of this decision are far reaching for both State and Federal Governments. After the *Mabo (No. 2)* decision it was thought that native title might continue to

exist in only 15% of land in Queensland, as it was assumed by all Governments that native title was extinguished by the grant of a pastoral lease. For this reason the *Commonwealth Native Title Act 1993* provided important and substantial legal and procedural rights to native title holders. Since the Wik decision it is clear that native title may exist on a larger proportion of the State, and that the thousands of dealings in land before that decision, made on the assumption that native title was extinguished, may be invalid.

The Federal Government's response to the Wik decision, the 10 point plan, seeks to resolve the uncertainty created by that decision and provide clear guidance as to the current state of native title law in Australia. The *Native Title Amendment Bill of 1997* was heavily amended in the Senate. The House of Representatives rejected the Bill in that form and debate is soon expected to resume in the Senate.

Many Aboriginal community representatives have expressed concern that the Bill would effectively extinguish Native Title Rights conferred by the Mabo and Wik decisions of the High Court.



2.2 Royal Commission into Aboriginal Deaths in Custody

The Royal Commission into Aboriginal Deaths in Custody was established in 1989 following public concern over the deaths of 99 Aboriginal people in police custody and prisons between 1 January 1980 and 31 May 1989. Twenty-seven of these deaths occurred in Queensland.

The Commission looked at the circumstances of each death and the experience of Aboriginal people through 200 years of contact with non-Aboriginal society. This included close examination of the social and historical factors of colonisation and its range of impacts on the lives of Aboriginal people.

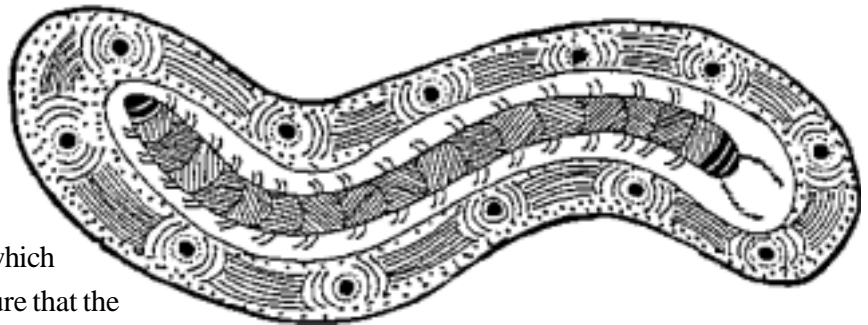
The Final Report of 1991 had many recommendations that refer broadly or specifically to how each government department or agency should consult or negotiate with Aboriginal people and communities and to the need to be aware of, and to apply, the relevant protocols when doing so.

All these references are too numerous to list. It is useful, however, to review the following key references:

- To ensure meaningful consultation is established and maintained, consistent with the Royal Commissioner’s recommendations, for each relevant Department or agency and at the “whole of Government” level.⁷
- To monitor the implementation of regional consultation and co-ordination arrangements ensuring that representatives of Aboriginal and Torres Strait Islander communities are able to meet regularly with regional executives of relevant Departments.⁸
- Recommendation 188 - that governments negotiate with appropriate Aboriginal and Torres Strait Islander organisations and communities to determine guidelines as to the procedures and processes which should be followed to ensure that the self-determination principle is applied in the design and implementation of any policy or program or the substantial modification of any policy or program which will particularly affect Aboriginal or Torres Strait Islander people.⁹

- Regional consultations take place in relation to funding priorities and the active participation of Aboriginal and Torres Strait Islander communities is sought in these processes. Where a service is funded, there is heavy emphasis on local design and development activities in relation to the new service.¹⁰

Also the *Legislative Standards Act (1992) Queensland* contains fundamental legislative principles requiring consultation with Aboriginal and Torres Strait Islander people on legislation that affects them.



⁷ Australian Government (1991), *Royal Commission into Aboriginal Deaths in Custody* (Final Report), (p. 2 Vol 3), AGPS, Canberra.

⁸ *ibid.*, (p. 3 Vol 3)

⁹ *ibid.*, (p. 199 Vol 3)

¹⁰ *ibid.*, (p. 202 Vol 3)

2.3 Bringing Them Home - The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families

The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families was established by the Federal Attorney General in 1995. It was conducted by the Human Rights and Equal Opportunity Commission (HREOC). The Inquiry submitted its report to the Federal Attorney General in April 1997.

Briefly, the Inquiry and each State Commissioner had a mandate to validate the stories of generations of Aboriginal and Torres Strait Islander people who, until the Inquiry, had carried the burden of having become separated from their families. Virtually every Aboriginal and Torres Strait Islander family was affected either directly or indirectly.

There are fifty-four (54) core recommendations with forty-nine (49) sub recommendations. Of this total, twenty-nine (29) core and sub recommendations relate directly to consultation or negotiation strategies. They are too numerous to list and all are important. Some of the major consultation and negotiation strategies are as follows:

“That all Australian parliaments...state and territory police...churches and other non-government agencies...acknowledge the responsibility of their predecessors for the laws,

policies and practices of forcible removals...and having played a prominent role in the implementation and administration of the above and...negotiate with the Aboriginal and Torres Strait Islander Commission a form of words for official apologies with wide and culturally appropriate publicity.”

“That the Aboriginal and Torres Strait Islander Commission, in consultation with the Council for Aboriginal Reconciliation, arrange for a national Sorry Day to be celebrated each year to commemorate the history of forcible removals and its effects.”

“That churches and other non-government welfare agencies that provide counselling and support services to those affected by forcible removal review those services, in consultation with Aboriginal and Torres Strait Islander communities and organisations, to ensure they are culturally appropriate.”¹¹

The other areas of consultation and negotiation considered in the Inquiry Report relate to: Compensation/Reparation; Minimum Access Standards to Aboriginal and Torres Strait Islander Family Information Services and Records; Indigenous Repositories; Research Programs; Health Professional Training; Access to Private Collections; a National Framework of Self-Determination; National Standards of Legislation for Aboriginal and Torres Strait Islander Children; and National

¹¹ Human Rights and Equal Opportunity Commission, *Bringing Them Home - The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, AGPS, Canberra 1997 (pp 36;44).

Standards for Aboriginal and Torres Strait Islander Children under State, Territory or Shared Jurisdiction.

The Queensland Government has acknowledged the significance of this report. On 3 June 1997, the Parliament of Queensland on behalf of the people of Queensland, expressed its sincere regret for the personal hurt suffered by those Aboriginal and Torres Strait Islander people who in the past were unjustifiably removed from their families.

It is important now that these past practices have been revealed to all Australians, and indeed, the world, for a genuine journey of reconciliation and healing to become the future focus and direction of all the nation.

2.4 Department of Aboriginal and Torres Strait Islander Policy and Development

The Department of Aboriginal and Torres Strait Islander Policy and Development (DATSIPD) is developing a lead agency role in providing a whole-of-government response to Aboriginal and Torres Strait Islander issues.

Queensland has a significant proportion of the population of Australia's Aboriginal and Torres Strait Islander peoples.

The Department recognises this and the inequitable relationship between Aboriginal people and the wider community which manifests itself in poor health, high unemployment, low educational achievement, low income, high imprisonment rates, family instability and overcrowded housing.

“Effective consultation, negotiation and collaborative action between Government and Aboriginal and Torres Strait Islander peoples could, in the future, focus on the following:

- Strengthening and rebuilding Aboriginal and Torres Strait Islander cultures (healing);
- Providing the means towards self-sufficiency;
- Building a new relationship (reconciliation); and
- Promoting self - determination and self - management.”¹²

The core to effective and successful consultation and negotiation could be summed up in the Department of Aboriginal and Torres Strait Islander Policy and Development's philosophy of:

**RESPECT CULTURES;
RECOGNISE TRADITIONS;
RECONCILE PAST AND PRESENT.**

¹² Office of Aboriginal and Torres Strait Islander Affairs, Department of Family and Community Services, *Negotiating Change* (Unpublished Working Paper), Brisbane, 1995