

The Parliament of the Commonwealth of Australia

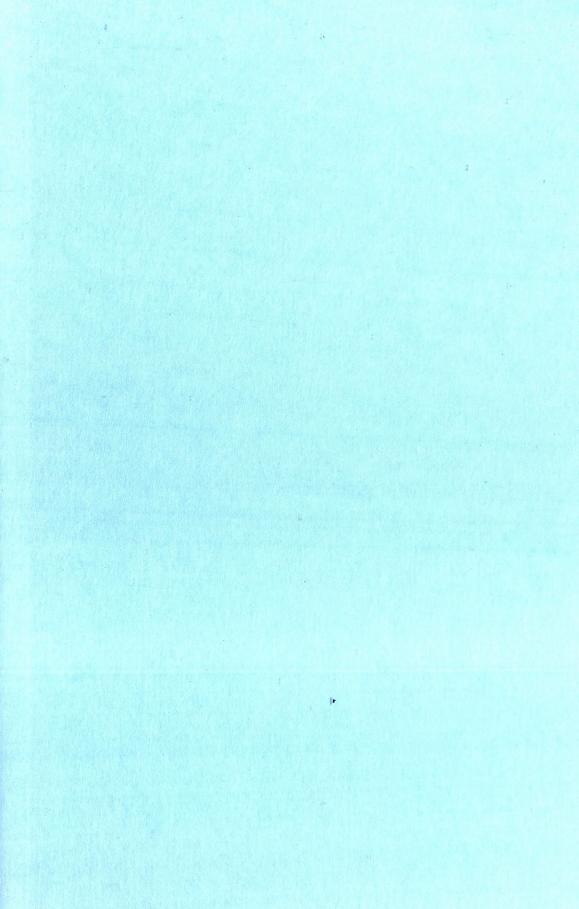
SENATE STANDING COMMITTEE ON CONSTITUTIONAL AND LEGAL AFFAIRS

Two Hundred Years Later . . .

Report on the feasibility of a compact, or 'Makarrata' between the Commonwealth and Aboriginal people

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Report by the Senate Standing Committee on Constitutional and Legal Affairs on the feasibility of a compact, or 'Makarrata', between the Commonwealth and Aboriginal people



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N.B. Any reference in this Report to Aboriginal people should, unless the context otherwise requires, be taken to include Torres Strait Islanders.

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#### RECOMMENDATIONS

- 1. The Government should, in consultation with the Aboriginal people, give consideration, as the preferred method of legal implementation of a compact, to the insertion within the Constitution of a provision along the lines of section 105A, which would confer a broad power on the Commonwealth to enter into a compact with representatives of the Aboriginal people. Such a provision would contain a non-exclusive list of those matters which would form an important part of the terms of the compact, expressing in broad language the types of subjects to be dealt with (para B.9, p. 115).
- 2. (a) The National Aboriginal Conference should take the opportunity offered it by the Government to seek re-establishment on an independent statutory basis and with an increase in membership, so as to allow for more effective representation of the Aboriginal people (para 8.37, p. 146).
- (b) The Government should ensure that the increased funding granted to the National Aboriginal Conference in the 1983-84 Budget is maintained so as to enable the National Aboriginal Conference to adequately fulfil its enhanced role as the representative and national voice of Aboriginal people (para 8.37, p. 147).
- (c) If the compact proposal is pursued, the National Aboriginal Conference should be considered as the most suitable organisation to co-ordinate Aboriginal opinion during the negotiation process and, once negotiations are completed, to conclude the compact on behalf of the Aboriginal people (para 8.37, p. 147).
- 3. In order to ensure that the negotiation process towards a compact is conducted on a basis of understanding and acceptance of the concept by all Aboriginal communities, the Commonwealth should ensure that the widest range of Aboriginal community leadership is involved in that preliminary task (para 9.9, p. 155).

# PART A

PRELIMINARY MATTERS

#### Chapter 1

#### INTRODUCTION

#### Terms of reference

1.1 On 24 September 1981 the Senate passed the following motion:

That the following matter be referred to the Standing Committee on Constitutional and Legal Affairs: An examination of the feasibility, whether by way of constitutional amendment or other legal means, of securing a compact or 'Makarrata' between the Commonwealth Government and Aboriginal Australians.1

## Conduct of inquiry

- 1.2 In early October 1981 the Committee lodged advertisements seeking submissions on the reference in newspapers and magazines throughout Australia. Letters were also sent to individuals and organisations, both Aboriginal and non-Aboriginal, seeking submissions. We received 35 submissions and these are listed in Appendix 1. During the course of the inquiry the Committee held 19 public hearings and many people who made submissions subsequently appeared as witnesses before the Committee. We here record our appreciation for the time and effort they have made to assist us in the inquiry. A list of witnesses is contained in Appendix 2.
- 1.3 At the beginning of its consideration of the reference, the Committee comprised Senators Alan Missen, Gareth Evans, Noel Crichton-Browne, Robert Hill, Susan Ryan and Michael Tate. With

he commencement of the new Parliament, Senators Gareth Evans, Noel Crichton-Browne and Susan Ryan were replaced by Senators Nick Bolkus, Robert Cook and Austin Lewis. The new members of the Committee did not have the opportunity to take evidence from various groups and Aboriginal communities around Australia, apart from a major public hearing held in Canberra. Indeed, the Committee as a whole had its inquiry disrupted by the calling of the federal election early in 1983. While the Committee, and particularly its new members, could have benefitted from a further round of meetings, including return visits to various parts of Australia, that has not proved possible given our obligation to report to the Senate in a timely way.

- 1.4 It is for the Aboriginal people to decide whether some form of major agreement of the kind contemplated by the National Aboriginal Conference (NAC) and promoted by the recently disbanded Aboriginal Treaty Committee (ATC) is the best means to achieve their aims. The NAC is an elected Aboriginal body which represents Aboriginal and Torres Strait Island people at the political level. The ATC was a non-Aboriginal body, the purpose of which was to raise interest in and promote knowledge of the idea of a compact in the non-Aboriginal community.
- The central issue to decide is whether some form of major agreement ought to be pursued. Clearly such an agreement were understood and only succeed if it throughout the whole Australian community. As to the Aboriginal community, there needs to be a comprehensive consultative process throughout Australia, a thorough understanding systematic consideration of the legal issues involved and of the various options available to achieve legal implementation of any final agreement, a clear accord as to the objectives of the agreement, the securing of proper representational processes and of a timetable for implementation. The relevance of these issues to the narrower question of legal feasibility became apparent during the course of the inquiry and we hope that this report will provide some assistance in these matters as well.

- 1.6 The Committee is primarily concerned with the legal feasibility of implementing a compact between the Commonwealth and Aboriginal Australians. Questions in this area include whether the Aboriginal people's claim to sovereignty can be upheld, whether a compact with constitutional backing is desired and, if so, whether the full text or just a broad enabling power should be included within the Constitution. Other issues to be considered are whether the compact should be supported by legislation based on the Commonwealth's existing constitutional authority or should take the form of a simple agreement or contract. The question of who should be the parties to the proposed compact also needs to be considered. A further issue is whether there should be one or several separate agreements.
- To enable the Committee to consider these questions, 1.7 wide-ranging evidence was taken in an informal way from Aboriginal and Torres Strait Island communities living tribal, semi-tribal or fringe-dwelling situations. The Committee visited communities in the Northern Territory, Torres Strait, North Queensland, Central Australia and the Kimberley region of Western Australia. Our purpose in making these visits was to inform ourselves at first hand as to what matters should be covered in a compact and who should represent the Aboriginal people. In the course of these visits the level of knowledge about the proposed compact became apparent. While communities had some awareness of the compact, in others knowledge of the idea was almost non-existent. 2 Much of the value of these visits lay in the insights they provided to the Committee into the daily concerns of Aboriginal existence. Evidence was also taken in a more formal way from Aboriginal people living in an urban environment, members of Aboriginal organisations and academics.

- 1.8 During these visits to aboriginal communities, the Committee was at pains to make it clear that its role was not to promote the treaty concept. Rather it saw its function as one of bringing knowledge of the concept and of the problems associated with its implementation to the attention of the Parliament and Government.
- 1.9 In accepting this reference the Committee was conscious of the many delicate issues involved in conducting an inquiry in pursuit of it. By our analysis of the legal issues which must be confronted if it is thought desirable to conclude such a compact, we hope to create a rational framework within which debate about the options for reaching an agreement and the form of the agreement can be advanced. We have made it clear during the course of numerous public hearings that we see our role as one of sorting through issues which, although important, are essentially subsidiary to the major issue of whether some form of agreement between Aboriginal and non-Aboriginal Australians should be concluded. The Committee also emphasises the need for wide ranging political discussion between Aboriginal non-Aboriginal Australians on the desirability of concluding some formal expression of mutual commitment.

# Endnotes

- 1. Australia, Senate, <u>Journals</u>, p. 531.
- 2. Evidence, pp. 114, 133.

#### Chapter 2

#### THE DEVELOPMENT OF THE IDEA OF A TREATY OF COMMITMENT

## Origins and rationale

- 2.1 In recent times there has been an increasing awareness among some Australians that traditional perceptions of historical relationship between Aboriginal and non-Aboriginal people from the time of European settlement in this country require reappraisal. On the one hand is the legal concept that this country was not conquered or ceded but peacefully settled, a concept that has served as the basis for the settled colony principle, whereby the law has regarded Australia at the time of white settlement as terra nullius or land belonging to no one (see discussion in Chapter 3). On the strength of this view, Britain's original claim to sovereignty had been upheld at law and therefore Aboriginal claims to then-existing and now-continuing sovereign rights have been consistently denied by the courts.
- On the other hand is the growing appreciation of 2.2 evidence that there were in existence at the time of white settlement Aboriginal people with complex systems of social, cultural and religious networks and of land tenure. Furthermore, Aboriginal people set out to defend their lands those Europeans superior force of society against the dispossessing them of those lands which were the basis of their identity. Professor Henry Reynolds, Associate Professor of History at James Cook University, writes of the Aboriginal response in the Introduction to his important book, The Other Side of the Frontier:

The black response to the invaders was more complex and more varied than anyone has hitherto suggested ... In the past European writers depicted a rigid and unchanging Aboriginal society unable to cope with new challenges and which consequently collapsed suddenly and completely under the pressure of intrusion. The evidence marshalled below discredits that view. The Aborigines white society curious about incorporate new experiences endeavoured to within the resilient bonds of traditional culture. They reacted creatively to European ideas, techniques, language and commodities. Nor were the blacks a particularly peaceful or passive people as conventional studies often suggest. Frontier conflict was apparent in almost every part of Australia though it varied in duration and intensity. suffering disproportionately Aboriginal clans levied a considerable toll on pioneer communities - not just in death and injury but in property loss and prolonged anxiety as well. The costs of colonisation were much higher than traditional historical accounts have suggested.2

2.3 Reynolds' book goes on to examine Australian history from the Aboriginal viewpoint, 'the other side of the frontier'. He traces the history of European colonial beginnings insofar as they relate to relations between the newly-arrived Europeans and the long-time Aboriginal inhabitants.

In Aboriginal eyes the whites were invaders who came preaching the virtues of private property; people who talked much of British justice while unleashing a reign of terror and behaving like an ill-disciplined army of occupation once the invasion was effected; fornicators who pursued black women in every fringe camp on the continent but in daylight disowned both lovers and resulting offspring.<sup>3</sup>

Reynolds suggests that much of Aboriginal history since 1788 is political history. Recent events, such as those at Aurukun and Noonkanbah, are, in his view, no more than highlights in a long

range of political experience dating from the start of European settlement. He says that the Aboriginal Tent Embassy in 1972 was not the beginning of Aboriginal involvement in Australian politics; rather it '... reminded white Australians of old truths temporarily forgotten'. Reynolds continues:

The questions at stake - land, ownership development, progress - arrived with Governor Phillip and have been at the pivot of white-Aboriginal relations ever since. They are surely the most enduring issues of Australian politics and will in the long run prove to have been of much greater consequence than many questions which since the middle of last century claimed the attention of parliaments and public for a season or two.4

2.4 Referring to this matter, Dr H.C. Coombs, Chairman of the Aboriginal Treaty Committee, stated to us in evidence:

I think it is important to undermine the respectability of the view that this country was peacefully settled. I think it has changed already. Of course it is a very important thing from the legal point of view because it is built into the whole concept of Australian law that Australia was peacefully settled.<sup>5</sup>

On the same matter Mr Bryan Keon-Cohen writes:

As a matter of historical fact, the absurdity of this account has now been recognised. Australia was colonised by a slow process of occupation often in the face of armed resistance from Aborigines - yet the constitutional doctrines denying Aboriginal sovereignty and title to land remain. 6

2.5 The significance of these issues was, indeed, borne out frequently in the course of our inquiry. Time and again witnesses spoke of the need for recognition of Aboriginal rights to traditional lands and to compensation for land lost. Issues

of Aboriginal rights to self-determination, to control of their own development and to recognition of their culture were constantly put before the Committee as pressing Aboriginal demands. These were often seen as taking priority over any treaty negotiating processes or indeed, as pre-conditions of a treaty.

2.6 The submission of the Central Australian Aboriginal organisations reflects in very strong terms the points made by Reynolds:

Since 1788 our nation has been invaded by ever-increasing numbers of Europeans who, with superior weapons, have attempted to defeat our people and destroy our law and culture and seize, without compensation, our land. We have never conceded defeat and will continue to resist this ongoing attempt to subjugate us. The crimes against our nation have been carefully hidden from those who now make up the constituency of the settler state The people Aboriginal . . . have surrendered to the European invasion and assert that sovereignty over all of Australia lies with them. The settler state has been illegally set up on Aboriginal land. The settler state has never recognised the prior ownership of this land belonging to the Aboriginal nation. We demand that the colonial settlers who have seized the land recognise this sovereignty and on that basis negotiate their right to be there. 7

2.7 At Mornington Island, Mr Nelson Gavenor, a witness before the Committee, put a similar view. He said that:

... as 200 years had passed since the white man came to Australia it was time that he recognised the Aborigine. The younger white generation should know that the Aboriginal people were in Australia before the white men came. Land rights mean a lot to the Aboriginal people because they are the basis of Aboriginal customary law. The Aborigines are very close to mother earth. When they die they go down to the earth and their bones rot

away ... They do not talk about land rights just because they want to get some thing back. They were in Australia generations before the white man and lived off the land for many thousands of years. They did it the hard way ... The Aboriginal people should not be afraid to say what they think about land rights and customs.<sup>8</sup>

- 2.8 In Reynolds' view 'frontier violence was political violence'.9 He estimates that in the 70 years between the first settlement in north Queensland in 1861 and the early 1930s as many as 10 000 blacks were killed in skirmishes with the Europeans in north Australia. He compares this with about 5000 Europeans from Australia, north of the Tropic of Capricorn, who died in the five wars between the start of the Boer War and the end of Australia's involvement in the Vietnam war a similar period of years.
- 2.9 Reynolds concludes by asking a question, the answer to which he sees as vital to the future of this nation:

How, then, do we deal with the Aboriginal dead? White Australians frequently say 'all that' should be forgotten. But it will not be. It cannot be. Black memories are too deeply, too recently scarred. And forgetfulness is a strange prescription coming from a community which has revered the fallen warrior and emblazoned the phrase 'Lest We Forget' on monuments throughout the land ... If we are to continue to celebrate the sacrifice of men and women who died for their country can we deny admission to fallen tribesmen? ... If they did not die for Australia as such they fell defending their homelands, their sacred sites, their way of life.10

Without necessarily endorsing every element of the above thesis, the Committee found Reynolds' analysis of great value in coming to an understanding of Aboriginal peoples' claims to be bearers of sovereign rights in relation to their land and culture, peoples whose forebears were dispossessed, in many cases

violently, of their tribal lands by an occupying power which saw no need to negotiate or come to agreement over the terms of its occupation.

- 2.10 These, then, are the sorts of considerations which have increasingly become the subject of discussion and concern, not only among Aboriginal community leaders but also among many non-Aboriginal Australians. This has in turn resulted in calls for some form of agreement with significant legal status, however expressed, between the Commonwealth Government, representing the descendants of European settlers in Australia, and the Aboriginal people.
- 2.11 Demands for some form of treaty have their conceptual basis in the absence of any negotiated agreement by Aboriginal people to the British occupation and settlement of Australia and the subsequent dispossession and ill-treatment of the Aboriginal people by the new settlers and their descendants. Some formal recognition of this situation was accorded by the Senate on 20 February 1975 when it unanimously adopted the following motion of Senator Bonner:

That the Senate accepts the fact that the indigenous people of Australia, now known as Aborigines and Torres Strait Islanders, were in possession of this entire nation prior to the 1788 First Fleet landing at Botany Bay, urges the Australian Government to admit prior ownership by the said indigenous people, and introduce legislation to compensate the people now known as Aborigines and Torres Strait Islanders for dispossession of their land. 11

This resolution was referred to on numerous occasions in our meetings with Aboriginal people, being seen by some as a starting point for negotiations towards a treaty. 12

- 2.12 Stewart Harris, a member of the Aboriginal Treaty Committee, wrote about a treaty in an article for a special report on Australia by The Times of London in July 1976. The Aboriginal Treaty Committee (ATC), formed in 1979 with the aim of influencing and mobilising non-Aboriginal opinion in favour of a treaty, and disbanded in 1983<sup>12A</sup> publicly launched its campaign with a 'Guest of Honour' talk by its Chairman, Dr H.C. Coombs, on ABC radio on 2 June 1979. The ATC proposed that a treaty with the Aboriginal people should include:
  - (i) The protection of Aboriginal identity, languages, law and culture;
  - (ii) the recognition and restoration of rights to land by applying, throughout Australia, the recommendations of the Woodward Commission;
  - (iii) the conditions governing mining and exploitation of other natural resources on Aboriginal land;
    - (iv) compensation to Aboriginal Australians for the loss of traditional lands and for damage to those lands and to their traditional way of life;
      - (v) the right of Aboriginal Australians to control their own affairs and to establish their own associations for this purpose.<sup>14</sup>
- 2.13 In January 1980, the ATC published a book by Stewart Harris, called <u>It's Coming Yet...An Aboriginal Treaty Within Australia Between Australians.</u> 15 The book traces the historical and legal background to the treatment of the people of the United States, Canada, New Zealand and Papua New Guinea and notes that, although they were often broken, agreements recognising indigenous land title were made in those countries.

This situation is contrasted with the absence of any such agreements in Australia and Harris then develops the case, as he sees it, for a comprehensive treaty to be negotiated.

2.14 While these developments were occurring among non-Aboriginal Australians, some Aboriginal people and Torres Strait Islanders were also looking at the idea. In April 1979 the National Aboriginal Conference passed the following resolution:

That we, as representatives of the Aboriginal Nation (NAC) request that a Treaty of Commitment be executed between the Aboriginal Nation and the Australian Government. The NAC request, as representatives of the Aboriginal people, that the Treaty should be negotiated Aboriginal Conference. the National resolved that Accordingly we immediately convey our moral, legal and traditional rights to the Australian Government and that we immediately proceed to carry from our people the suggested areas to which Treaty should be relevant and that we proceed also to draft a Treaty and copies of the Motion to be sent to the Prime Minister and to all members of the Australian all Parliament.15A

In support of demands for a treaty and an Aboriginal Bill of Rights embracing such concepts as sovereignty and land rights, Aboriginal people erected tents on Capital Hill, Canberra, on 7 August 1979.

#### Evolution of the concept

2.15 In response to the NAC resolution of April 1979 (see para. 2.14), the Prime Minister indicated on 21 August 1979 that the Minister for Aboriginal Affairs was examining the NAC proposal and would be bringing the matter to the Government for its consideration. He also indicated his preparedness to discuss the concept of a treaty with the NAC at a mutually convenient time. 16

2.16 At a meeting on 12 November 1979, the NAC Executive formed a sub-committee to consult Aboriginal people organisations on the proposal and expressed the view that this process would take about 18 months. 17 At the same meeting the term 'Makarrata' was adopted in place of the term 'Treaty of Commitment' used in the resolution of April 1979. 'Makarrata' is a Yolnu word from North-East Arnhem Land. The NAC has attached several meanings to the word 'Makarrata', the most common being 'a coming together after a struggle'.18 (The question of terminology used to describe the agreement is of significance, and not a little sensitivity, and is discussed in more detail below at paras. 2.31 - 2.35).

2.17 The following day the Minister for Aboriginal Affairs, Senator the Hon. F.M. Chaney, issued a press statement on behalf of the Government welcoming the NAC initiatives with respect to the Makarrata proposal and stating the Government's willingness to '... join any discussions as the proposal moves forward.' The statement went on to note that '... the Prime Minister has agreed to meet the NAC Executive as the proposal develops.' Subsequently, on 25 March 1980, at a dinner for NAC members, the Prime Minister, Mr J.M. Fraser C.H., welcomed the NAC's Makarrata initiatives. 19

2.18 In July 1980, the Makarrata sub-committee of the NAC issued, in pamphlet form, a 'Makarrata Report', following the conclusion of the sub-committee's first journey of investigation around Australia. The Makarrata Report contains a 'faithful expression of the expectations of the Aboriginal and Torres Strait Island people' to whom the sub-committee had listened up to that time. This report states that the Makarrata

recognises that the Aboriginal people were the prior owners of the Australian continent, and the Aboriginal people enter this agreement and negotiate with the Australian Government as an equal party. The Makarrata seeks compensation for the losses of the Aboriginal people.

- 2.19 The losses of the Aboriginal people are said to be primarily of land and culture. The report then states that the loss of culture is to be compensated by the compulsory teaching of Aboriginal culture in Australian schools. As compensation for loss of land, it is stated that the Makarrata seeks the return specific lands, namely: (a) Aboriginal sacred (b) existing land occupied by the tribal people; and (c) freehold title of all that land upon which Aboriginal people presently live, including inviolate rights to the fishing and hunting associated with such lands.
- 2.20 Furthermore, the Makarrata would seek cash compensation for those losses which cannot be recovered in kind at the annual rate of one to one-and-one-half percent of GNP or at that percentage represented by the Aboriginal population of Australia, whichever is the greater. This cash compensation is to be used by Aboriginal people for the improvement of housing, education, health, employment opportunities and in any other areas of concern to the Aboriginal people.
- 2.21 Other matters listed as objectives of the Makarrata at that time were abolition of statutes in any part of the Commonwealth which make Aboriginal status in any way different from that of other citizens; the reservation of several seats for Aboriginal people in the Commonwealth and State Parliaments and local governments; recognition of National Aborigines Day as a public holiday; the identification of places of significant Aboriginal happenings or struggles and the honouring of Aboriginal heroes; the compulsory employment in government and quasi-government agencies of a fixed proportion of Aboriginal people, irrespective of their established skills; and the

immediate return of Aboriginal skeletons and artefacts from government museums to enable Aboriginal people to have full control of them.

- 2.22 On 17 February 1981, the Minister for Aboriginal Affairs met the NAC Executive to inform them of the Government's response to the Makarrata proposals. This response was subsequently conveyed in writing on 3 March 1981.20 The Minister's reply included an attachment setting out in detail the Government's response to each of the demands listed by the NAC in its Makarrata pamphlet.
- 2.23 In his letter, the Minister stated the 'general basis upon which the Government is prepared to pursue the concept'. First, he noted that the Government is prepared to acknowledge prior Aboriginal occupation of Australia. However, in pursuing the development of the Makarrata concept the Government wished it to be clear that any agreement ' ... must reflect the special place of Aboriginal and Torres Strait Island people within Australian society as part of one nation.' Accordingly, the Minister pointed out, the Government ' ... cannot legitimately negotiate anything which might be regarded as a "treaty", implying as it does an internationally recognised agreement between two nations.' This touches upon the very sensitive question of the terminology used to describe the agreement, a matter which we discuss later in this chapter (see paras 2.31 - 2.35). In the Minister's view, by choosing the word 'Makarrata' the NAC has helped to settle this question.
- 2.24 The Minister then reminded the NAC that in any discussions on the Makarrata the Commonwealth Government was not prepared to act unilaterally in areas where the States have an interest. By way of example, the Minister suggested that the question of land rights would have to be negotiated directly with the States as well as with the Commonwealth.

- 2.25 In the Attachment to the Minister's letter the Government's response to the various demands made in the Makarrata pamphlet is discussed. Among the more important of these, the following can be listed:
  - return of tribal lands including sacred sites and freehold title - should be taken up by NAC with the States separately;
  - compensation in cash as percentage of GNP or percentage equivalent to Aboriginal proportion of total Australian population - Government cannot agree to such a fixed percentage nor to any fixed financial commitment into the future;
  - reserved seats for Aboriginal people in Commonwealth Parliament - Government cannot agree for such reasons as doubt about 'necessary public support' and questioning of the merits of such systems in other countries; special representation in State parliaments and local government bodies is a matter for the States;
  - compulsory employment of a fixed proportion of Aboriginal people in government bodies Government will continue to promote existing schemes designed to stimulate employment and promotion opportunities for Aboriginal people in the Commonwealth sphere, but does not believe a system whereby Aboriginal employment is subject to a rigidly fixed formula is appropriate.
- 2.26 In response to a question in the Senate on 25 March 1981, the Minister summarised the contents of his correspondence with the NAC and also reported that NAC representatives had attended the recent meeting of the Australian Aboriginal Affairs Council (consisting of State and Commonwealth Ministers for

Aboriginal Affairs) and, as a result, had '... opened up the matter (of the Makarrata) further with the State governments.'21

- 2.27 On 26 March 1981, the Chairman of the NAC Makarrata sub-committee, Rev. Cedric Jacobs, issued a press release stating that the Government's failure to accept some of the specific proposals put forward by the NAC for inclusion in the Makarrata would not deter the NAC from establishing its own priorities. The NAC would continue to pursue these proposals as well as the 'concept... of Aboriginal ownership of the Australian continent prior to white settlement'.22
- 2.28 Subsequently, on 29 September 1981, the NAC Executive sent to the Government a list of 21 'items' to be added to the Makarrata proposal. Three further 'demands' were made two days later. <sup>23</sup> These items and demands, which are listed in Appendix 3 of this Report, are wide-ranging. Among the matters sought are:
  - substantial land and resources rights, including land 'vested in freehold title to the Aboriginal people and ... given in perpetuity';
  - extensive self-government in 'tribal territories' with the right for Aboriginals to 'freely determine their political status and freely pursue their economic, social and cultural development';
  - . five percent of GNP for 195 years;
  - freehold title in perpetuity to all houses currently occupied by Aboriginal people;
  - extensive welfare services such as Aboriginal medical services, legal aid, schools;
  - extensive tax exemptions.

- 2.29 Following NAC elections in October 1981, the Makarrata Sub-committee was re-constituted. In May 1982 the NAC appointed consultants to the Makarrata Sub-committee in the fields of law, economics and politics. It was proposed to appoint additional consultants to advise in the fields of education and international affairs. 24 On 17 June 1982 the NAC Executive resolved that Makarrata proposals would be a top priority for the NAC's future activities. 25
- 2.30 The Australian Labor Party, in its policy statement on Aboriginal affairs given before the 1983 elections, supported continued investigation of the concept of a treaty of commitment between Aboriginal and non-Aboriginal and Australians. It also indicated that the concept had been supported for some years by both groups. However, the ALP expected that many years of consultation would precede the development of consensus on this matter among Aboriginal people. No public statement specifically relating to the Makarrata proposal has been made by the Minister for Aboriginal Affairs since the ALP took office in March 1983.

## Terminology

2.31 It is appropriate at this point to refer to the terminology by which the proposed agreement should be described. We have already alluded to the sensitivity which surrounds this matter. The early preferred term was 'treaty'. It was used consistently by the Aboriginal Treaty Committee and was initially the term used by the National Aboriginal Conference. In fact, in discussions of the subject, 'treaty' is probably the word with the widest currency. The Commonwealth Government, however, notified the NAC through the Minister for Aboriginal Affairs in March 1981 that 'the Government cannot legitimately

negotiate anything which might be regarded as a "treaty", implying as it does an internationally recognised agreement between two nations. 26

- 2.32 This view was based on advice from the Attorney-General's Department to the effect that, as the word 'treaty' was ordinarily used to refer to a kind of international agreement, it was '... clearly inapplicable to any form of agreement between the Commonwealth and Aborigines since the latter are not a "nation"', quoting in support Coe v. The Commonwealth (1978) 52 ALJR 334 at pp. 335-336 per Mason J; (1979) 53 ALJR 403 at p. 408 per Gibbs J with whom Aickin J agreed at p. 412.27 The Government wished to make it quite clear, the Minister for Aboriginal Affairs stated, '... that any agreement must reflect the special place of Aboriginal and Torres Strait Islander people within Australian society as part of one Australian nation.'
- 2.33 Largely in response to the Government's opposition to the use of the word 'treaty', which it asserted carries an implication of some form of internationally recognised sovereignty residing in an 'Aboriginal nation', the NAC adopted instead the word 'Makarrata' to describe the proposed agreement. As mentioned earlier, the NAC in its Makarrata pamphlet described Makarrata as meaning 'a coming together after a struggle', and this has been the meaning usually attributed to it in the context of a binding agreement between the Commonwealth Government and Aboriginal people. In his letter of March 1981, the Minister for Aboriginal Affairs expressed the view that, in choosing the word 'Makarrata', '... the NAC has itself helped to settle this important area of concern.'28
- 2.34 In our experience, however, there is some confusion about the meaning of 'Makarrata' and, therefore, about its appropriateness to describe such an agreement. During the course of its inquiry, the Committee visited Yirrkala in North-East

Arnhem Land, from where the word originates, and held discussions with the elders of communities in that area. It was put quite strongly at that meeting that 'Makarrata' was not the appropriate word; rather the word 'garma' should be used, as it means, among other things, the bringing of everybody together as one.<sup>29</sup> One Yirrkala witness expressed it this way: 'Makarrata relates to taking sides whereas garma stands in the middle. It brings peace between two, groups.'<sup>30</sup> In Aboriginal communities we visited in other parts of Australia, we found that 'Makarrata' was not understood. Usually it was regarded as a foreign word, rooted geographically and linguistically in a place with which there was no contact. The difficulty was clearly expressed by Father Pat Dodson, speaking to the Committee in Alice Springs on behalf of Central Australian Aboriginal organisations:

I think it is better to use a white man's word in this regard. The translation of the word in the respective languages may approximate the white man's understanding of it but I think it is a futile exercise to get one word from one linguistic group, cultural group or law group that is acceptable to other linguistic and cultural law groups ... It is as foreign as if you used a German or French word. 31

2.35 Quite clearly, the label which ultimately attaches to any agreement is a matter for decision between the parties. And the question of whether any Aboriginal word is appropriate must take into account the difficulties encountered with 'Makarrata'. We do not regard it as part of our function to make recommendations on that matter. Nevertheless, for purposes of discussing the concept during the rest of this report it is useful, given the considerable sensitivity and, indeed, confusion, which exists as to the use of terminology, for us to adopt some neutral descriptive word. We have decided to use 'compact', the word which appears in our terms of reference, for this purpose. It adequately covers the concept with which this

report is concerned, without giving rise to any of the difficulties caused by adopting throughout the report either 'treaty' or 'Makarrata', each of which has been considered to be inappropriate to cover the varying notions encompassed within the concept under discussion.

#### Endnotes

- 1. Recently described by Murphy J. in <u>Coe v. The Commonwealth</u> (1979) 53 ALJR 403 at 412 as a 'convenient falsehood'.
- Henry Reynolds, The Other Side of the Frontier, Melbourne, 1982, p. 2.
- 3. ibid, p. 199.
- 4. ibid, p. 200.
- 5. Evidence, p. 1114.
- 6. B. Keon-Cohen, <u>The Makarrata</u>, <u>A Treaty Within Australia</u>
  <u>Between Australians</u>, Current Affairs Bulletin, Feburary
  1981, p. 5.
- 7. Evidence, p. 248.
- 8. Evidence, p. 115.
- 9. Reynolds op. cit., p. 200.
- 10. ibid, p. 201
- 11. Australia, Senate, Journals, p. 367.
- 12. See e.g. Evidence, pp. 172, 174-5, 262-264, 333, 373.
- 12A. In the Committee's newspaper 'Aboriginal Treaty News' no. 8
  March-June 1983, it was stated that the Committee was
  disbanding because its work in influencing non-Aboriginal
  attitudes had been significant, political parties now gave
  greater weight to Aboriginal issues and it had mobilised
  greater support for independent Aboriginal initiatives. The
  Committee had also found that resources were limited and
  members were unable to sustain the effort they had devoted
  to the Committee in the past.
- 13. Stewart Harris, 'A Treaty of Commitment' in <u>Proceedings of the Symposium on the Impact of Environment and Lifestyle on Human Health</u>, Australian National University, Canberra, 2-4 September 1976, published by Society for Social Responsibility in Science, Canberra, 1977, pp. 187-194.
- 14. Aboriginal News, Vol. 3, No. 8, 1980, p. 8.
- 15. The Aboriginal Treaty Committee, Canberra, 1979.
- 15A. Brochure 'Makarrata Report', issued by NAC, July 1980.
- 16. In a letter to Kevin Gilbert information provided in submission from Department of Aboriginal Affairs, No. 16, p. 3.

- 17. NAC Press Statement, 12 November 1979.
- 18. See e.g. brochure issued by NAC describing Makarrata concept. Another meaning, contained in the document 'Interim analysis of a survey of Aboriginal Demands as related to the formulation of a Makarrata conducted by the National Aboriginal Conference April 1979 October 1981' written by Michael Anderson, NAC Research Officer, is as follows: 'To start a fight and to keep up the fight in order to settle a dispute'.
- 19. See Submission No. 16 (Department of Aboriginal Affairs), p. 4.
- 20. A copy of the letter and an attached document form Attachment C to the submission from the Department of Aboriginal Affairs.
- 21. Australia, Senate, Hansard 25 March 1981, pp. 712-13.
- 22. NAC Secretariat Press Statment, Canberra, 26 March 1981.
- 23. Both the 'items' and 'demands' were contained in telexes dated 29 September and 1 October, respectively.
- 24. Evidence, p. 660.
- 25. ibid.
- 26. Attachment to letter of 3 March 1981 from Minister for Aboriginal Affairs to National Chairman, NAC.
- 27. Memorandum of 28 July 1980 from Secretary, Attorney-General's Department to Secretary, Department of Aboriginal Affairs.
- 28. Attachment to Minister's letter of 3 March 1981.
- 29. Evidence, p. 106.
- 30. ibid.
- 31. Evidence, pp. 313-14.

## PART B

THE LEGAL ISSUES

#### INTRODUCTION

- B.1 This Part is concerned with a discussion of the principal legal solutions put forward as potential means of implementing any compact which may emerge from negotiations between Aboriginal and non-Aboriginal Australians.
- B.2 The legal solutions with a full discussion of their advantages and disadvantages are considered by the Committee in the following order:
  - Agreement in the form of a treaty;
  - agreement with constitutional backing;
  - agreement with legislative backing;
  - . simple agreement.

Before discussing these options in detail, it is convenient to summarise them.

Agreement in the form of a treaty. This option proposes that two sovereign parties, the Commonwealth of Australia and the Aboriginal people would enter an agreement enforceable under the international law of treaties. Implicit in discussion of this option is the question of the existence of Aboriginal sovereignty in a sense akin to nationhood.

Agreement with constitutional backing. There are two alternative means of implementing this option, both of which require the assent in a referendum of the majority of Australian voters including the majority of voters in the majority of States. The first would be to incorporate the full text of the compact as part of the Constitution. The terms of the compact would become a new section of the Constitution. The second possibility would be a section in more general terms, giving the Commonwealth

power to enter a compact with representatives of the Aboriginal people and to carry out its terms. It would further provide that the compact would be binding on the Commonwealth and States, notwithstanding any other provision of the Constitution and would set out in broad terms the sorts of areas to be covered by the compact. Acceptance of such a constitutional amendment would be followed by legislative measures putting into effect the terms agreed upon between both sides to the negotiations.

Agreement with legislative backing. Several approaches could be adopted whereby the Commonwealth Parliament could give legislative force to the compact. The first could be legislation based on existing Commonwealth powers, e.g. ss.51(xxvi) (races power) and 51(xxix) (external affairs power). Another possible approach would be for the States to refer power to the Commonwealth under s.51(xxxvii) to enable it to enact legislation to implement a compact, especially in any areas where doubt might exist as to the extent of Commonwealth power.

<u>Simple agreement</u>. Under this alternative the compact would derive its legal force as a binding agreement enforceable by ordinary legal processes insofar as it imposed obligations between the parties, presumably the Executive Government of the Commonwealth and representatives of the Aboriginal people.

The Committee's conclusions to Part B are contained in paragraphs B.3 - B.9 and can be found on p. 114

### Chapter 3

# AGREEMENT IN THE FORM OF AN INTERNATIONAL TREATY AND THE ISSUE OF SOVEREIGNTY

In April 1979, the National Aboriginal Conference (NAC) passed a resolution requesting that a 'Treaty of Commitment be executed between the Aboriginal Nation and the Australian Government'. By this request, the NAC sought formal recognition of, and redress for, the deprivations suffered by the Aboriginal people since European colonisation and settlement of the continent in 1788. At about the same time the Aboriginal Treaty Committee, comprising white Australians and chaired by Dr H.C. Coombs, was formed with the object of sponsoring the concept of a treaty among Australia's non-Aboriginal community. This Chapter examines the legal feasibility of implementing such a 'treaty of commitment' in the form of an international law treaty.

The meaning and functions of treaties in modern law

The expression 'treaty' has been used in international law as a generic term to cover many different forms of international agreement, often referred to by a variety of names. Before 1969, the law governing treaties consisted of the customary rules of international law. To a large extent, these rules were codified and reformulated in the Vienna Convention on the Law of Treaties, concluded in 1969, to which Australia is a party. As a contemporary code on international law treaties, this Convention defines a treaty as an agreement whereby two or more States establish, or seek to establish, a relationship between themselves governed by international law. In general terms, the object of a treaty is to impose binding obligations on the States who are parties to it.

- 3.3 In modern international law, for an agreement to constitute a treaty, it should satisfy the following four criteria:  $^4$ 
  - (a) The parties must have the capacity to conclude treaties under international law; that is, they must be sovereign entities possessing international personality;
  - (b) the parties must intend to act under international law and that any dispute arising under the treaty be arbitrated according to international legal principles and by international legal institutions;
  - (c) there must be a meeting of minds between the parties to the treaty; and
  - (d) the parties must have the intention to create legal obligations.

As a fifth criterion, though perhaps not a requirement, it is the usual practice for treaties to be in written form.

3.4 The Committee deals with the difficult issue of parties in Chapter 8 which discusses representation. Assuming that the parties can be satisfactorily identified, it appears to the Committee that all of these criteria, with the exception of the first one, could be satisfied by the Commonwealth and the Aboriginal people. It is the need to satisfy the first requirement - that the parties must have the capacity as entities possessing international personality enabling them to conclude treaties under international law - which the Committee foresees as the major impediment to the conclusion of an international law treaty between the Aboriginal people and the Commonwealth of Australia.

- 3.5 In a submission to the Committee, Professor D.H.N. Johnson, Professor of International Law at the University of Sydney, argued that a consequence of the Aboriginal people's lack of a recognised international personality would be the Nations' inability to recognise and hence adjudicate upon an agreement between the Commonwealth and Aboriginal people. 5 He noted that the United Nations would be reluctant to register a proposed compact if the request for registration came from a body that is not recognised as a state. 6 Professor argued that even if a Commonwealth request for registration was granted, the registered status of the agreement, though it may have a 'certain political and psychological effect as appearing internationalise" relations between the Government and Aboriginal people, would 'strictly be without legal effect'.7
- In addition to the meaning which it had 3.6 international customary law, the term 'treaty' was used to describe international commercial agreements. During the 18th and 19th centuries, treaties were made by large trading companies, such as the Dutch East India and Hudson's Companies, acting on their own behalf. These treaties were made with a variety of indigenous chiefs or princes and secured privileges for the companies. trading arrangements and Ultimately, the rights obtained by such companies were assumed by the country which had granted the company its charter. Rather than being considered as treaties in the international sense, such 'treaties' have always been considered as commercial contracts.
- 3.7 The term 'treaty' has occasionally been used in domestic law in the context of an agreement between individuals, for example, for the sale or purchase of property. Taking advantage of the full range of meanings of the word, the NAC in its submission suggested that

the word 'treaty' may be used in a domestic sense (to describe an arrangement between Aborigines and the Commonwealth) providing of course there are words specifically used to identify this as a domestic treaty bound only by Australian domestic law and not international law.8

The Committee foresees difficulties with this approach. Once the term is used, it invariably attracts the meaning ascribed to it in international law as set out in the Vienna Convention of 1969. This is because in domestic law there are a wide variety of instruments to choose from such as contracts, settlements and acknowledgements, whereas the term treaty is today used almost exclusively to describe agreements concluded between States and governed by international law.9

3.8 Consideration of an Aboriginal claim to international personality, and a consequent capacity to conclude treaties under international law, requires first that the current legal view as to the sovereign status of the Aboriginal people be ascertained.

## Definition of sovereignty

- 3.9 Definitions of the concept of sovereignty vary according to the context in which the word is placed and, as a consequence, it eludes precise definition. The concept has been variously defined as 'that power in a State to which none other is superior' 10 and 'the supreme authority in an independent political society.' 11 The concept thus signifies autonomy, independence and capacity for self-determination in all matters.
- 3.10 This broad definition has been gradually restricted in some respects by the obligations of living within the international community. For example, the ratification of a multitude of international treaties (covering such diverse

matters as human rights, employment standards, and freedom of association), has imposed restrictions of varying degrees on the independence of a signatory State's domestic legislative, executive and judicial action. For this reason it has been suggested that now, 'it is probably more accurate to say that the sovereignty of a State means the residuum of power which it possesses in the confines laid down by international law.'12

- 3.11 Within these confines, however, the notion of a single sovereign within a nation state remains the constant requirement. Although it is recognised that the degree of sovereignty enjoyed varies from State to State according to each State's power and influence in international affairs, it would appear from the many definitions and the functions of a sovereign government that there is no legal prospect for recognising competing sovereign claims within any one State.
- 3.12 Thus, as sovereignty is understood in contemporary international law, it refers to a singular and exclusive power in any one State. For example, the notion that one claim alone may prevail has been authoritatively determined by the House of Lords in The Arantzazu Mendi, 13 a case which dealt with conflicting claims to sovereignty of the parties in the Spanish Civil War. It will be readily apparent that much of this case reflected the requirements of international dealings between European nation states and their extended entities following colonisation of other parts of the world. It therefore emerges that sovereignty means an exclusive and indivisible power and capacity for self-government together with international recognition of that power.

The acquisition of sovereignty

3.13 Customary international law recognised certain traditional modes of acquiring territory. Depending on the mode of acquisition, the nation acquiring the territory could obtain

either an original and independent title or a derivative title in those instances where the validity of the soverignty of a pre-existing occupant of the territory needed to be recognised.  $^{14}$ 

- 3.14 Under the British Constitution, the Crown exercises all sovereign rights within its dominions. During the periods of British colonial expansion, the British Government took the view that sovereignty could be acquired over new-found territories in several ways. One mode of acquisition by the British Crown depended upon the terra nullius doctrine ('land belonging to no one' or 'a piece of territory not under the sovereignty of any state').15
- 3.15 Though strictly referring to uninhabited land, the terra nullius doctrine was extended by the British to cover the acquisition of any territory inhabited by peoples whose civilisation was thought to be less developed, and whose political organisation did not correspond to European norms. Such territories would then vest automatically in the first 'more civilised' power which chanced to occupy them, regardless of the wishes or resistance of the indigenous population.
- 3.16 On the other hand if the land was occupied by peoples possessing a cohesive and recognisable central political system, it was accepted that sovereignty was already vested in its inhabitants and could therefore only be obtained derivatively through conquest of, or agreement and negotiation with, those inhabitants. Such negotiation or conquest led to a cession or occupation of the territory and a legal transfer of sovereignty from the original inhabitants to the British Crown.
- 3.17 It was thus the practice of the British Government to recognise and uphold the prior ownership of indigenes in all those colonies in which European eyes perceived an organised political structure of authority and, even while acquiring

sovereignty in those territories by means of conquest or peaceful negotiation, to grant statutory recognition to the prior indigenous ownership for example this occurred to varying extents in Canada, the United States of America, New Zealand, new Guinea, the Solomon Islands, India and Africa. 16 In the case of Australia however, this did not occur because of the cultural blindspots under which it is assumed Captain Cook and the early administrators of the colonies laboured in their perception of the exercise of authority within tribes and clans and the nomadic lifestyle under which the Australian Aboriginal people lived. These British policies of acquiring sovereignty either by occupation of uninhabited land or derivatively, with the consent of the inhabitants, are to be found in the instructions under which Captain Cook took possession of Australia in 1788:

With the consent of the natives, to take possession of convenient situations in the country in the name of the King of Great Britain, or if the country [is] uninhabited take possession for his Majesty by setting up proper marks and inscriptions as first discoverers and possessors.17

The disputed question of sovereignty in Australia

- 3.18 Some would say that sovereignty inhered in the Aboriginal people inhabiting Australia at the time of settlement by Europeans and that this sovereignty still subsists even though not recognised by the occupying power or its legal system. Certainly the question of sovereignty was one frequently raised by Aboriginal witnesses who appeared before us. 18
- 3.19 Aboriginal attitudes to, and assertions of, sovereignty are still evolving. 19 The National Aboriginal Conference Makarrata Sub-committee advised the Committee that sovereignty is a matter of central concern to many Aboriginal communities in their quest for self-government. 20 As yet there has not been a

clear expression whether self-government is sought for individual Aboriginal communities or for an Aboriginal nation as a whole. However, the general claim to sovereignty by right of history is asserted by representatives of the Aboriginal people.21

- 3.20 Aboriginal assertions of sovereignty in Australia are a conclusion drawn from the historic fact that Aboriginal people were in sole and undisputed occupation of the continent of Australia for some forty thousand years before European discovery. Their claim is that rights of land usage throughout the continent belonged exclusively to them and that they have been dispossessed of the land and their sovereignty without either compensation or even judicial recognition of their prior habitation of the continent.
- 3.21 A significant justification for the British taking of Aboriginal land was that the Aboriginal people were not using it or cultivating it in a European sense. As a consequence, according to European concepts, they had forfeited any right of possession.<sup>22</sup>
- 3.22 The facts of the Aboriginal relationship to land are now better known. The relationship comprised an economic element (hunting and gathering) together with a more significant cultural and religious element. The significance of this latter element has only recently been better and more widely understood.

No English words are good enough to give a sense of the links between an Aboriginal group and its homeland ... When we took what we called 'land' we took what to them meant hearth, home, the source and locus of life, and everlasting oneness of spirit.<sup>23</sup>

- 3.23 The significance of the religious aspect of the relationship between Aboriginal people and their land has been judicially recognised. Blackburn J in Milirrpum commented 'As I understand it, the fundamental truth about the Aboriginals' relationship to the land is that whatever else it is, it is a religious relationship.'24
- 3.24 In a more recent case, <u>Ex Parte Meneling Station</u>, in the High Court, Brennan J contrasted the European and Aboriginal relationships to land as follows:

Owners of land under Anglo-Australian law are understood to be vested with a bundle of rights.  $^{25}$ 

By way of contrast, the only 'rights' which Aborigines have according to the tenets of their culture is a right to forage. The significant remaining feature of their relationship with the land is a spiritual one:

The connection of the Aboriginal group with the land does not consist in the communal holding of rights with respect to the land, but in the group's spiritual affiliations to a site on the land and the group's spiritual responsibility for the site and for the land. Aboriginal ownership is primarily a spiritual affair rather than a bundle of rights. 26

3.25 It is apparent that the Aboriginal relationship with land is complex, and attempts to define it have perplexed anthropologists.<sup>27</sup> There is no doubt that at the time of the establishment of English law in Australia this Aboriginal relationship with the land was both underestimated and misunderstood, perhaps because it was beyond the comprehension of recognised English legal principles of land tenure. For example, principles such as ownership and sale of land, fundamental to English land law, are meaningless in the context of the traditional Aboriginal relationship with land. When Captain Cook arrived and took possession of the continent under

English law, his actions when considered in an Aboriginal context could only be a purported taking of possession, since actual possession of land is a concept foreign to Aboriginal culture.

Alienation of land was not only unthinkable, it was literally impossible. If blacks often did not react to the initial invasion of their country it was because they were not aware that it had taken place. They certainly did not believe that their land had suddenly ceased to belong to them and they to their land. The mere presence of Europeans, no matter how threatening, could not uproot certainties so deeply implanted in Aboriginal custom and consciousness.'28

Hence in Aboriginal cultural terms if they, who had enjoyed occupational and religious use of the land for approximately 40,000 years, could not alienate the land, still less could the newly-arrived Europeans. It is conceivable that, had the early administrators understood the Aborigines' relationship with their land as it is understood now, they may have come to the different conclusion that some form of sovereignty over the Australian continent did inhere in the Aboriginal people, and that therefore it would have been appropriate to negotiate with the Aboriginal people in relationship to their land.

3.26 In arguing that there was already some system of sovereignty or rights in land in existence in Australia before 1788, and vested in the Aboriginal people, some judicial support has been sought from the Western Sahara Case. 29 In that case, the International Court of Justice was asked in 1975 to decide whether the Western Sahara at the time of its colonisation by Spain in 1884 was terra nullius. The Court found that at the appropriate time, the Western Sahara was inhabited by people organised in tribes and as a consequence, the Western Sahara was not terra nullius.

The nomadic peoples of the Shinguitti country should ... be considered as having in the relevant period possessed rights, including some rights relating to the land through which they migrated.  $^{30}$ 

In a separate declaration one judge made an even more explicit statement of the migratory tribes' rights.

I consider that the independent tribes travelling over the territory, or stopping in certain places, exercised a <u>de facto</u> authority which was sufficiently recognised for there to have been no <u>terra nullius</u>. 31

3.27 It is argued on behalf of Aborigines that the case is authority for an Aboriginal assertion of sovereignty over the Australian continent since they too, as independent tribes travelling throughout the continent, exercised a <u>de facto</u> authority sufficient to refute a claim of <u>terra nullius</u>. <sup>32</sup> The Aboriginal Legal Service argued, however, that little if any benefit could be obtained by Aborigines from the <u>Western Sahara Case</u> since

it would not be possible for Aboriginal people to establish standing in the International Court and even if they did, it is submitted that the rule of prescription in international law would operate whereby Australia has remained under the continuous and undisturbed sovereignty of Britain and her successors in title for so long a period that the position has become part of the established international order which could not be upset by a decision of the International Court. 133

The Service also observed that if a court were to take the contrary stand on this issue, the basis of sovereignty of the majority of countries in the world could be overturned. 34 Nevertheless, in this context the Committee remains very much aware of the significance of the sovereignty issue to the proposal for a compact. Professor Nettheim advised the Committee that

it is likely that the 1980s will see the emergence of some new human rights convention to provide a basis in international law for protecting the interests of indigenous minorities. There will be pressures on Australian Governments to ratify such a convention and to comply with its terms. 35

- Linked to their assertion of long and exclusive occupation of the continent as the basis of their sovereignty, Aborigines (as a further indicator of their sovereignty claim) can also point to a history of violent physical resistance to British colonial expansion which belies British claims that the colony was settled peacefully. As was noted in Chapter 2 (paras 2.2-2.9), frontier conflict between the Aboriginal people and the settlers was frequent and violent and extended throughout the continent. 33 Full-scale war was not possible, perhaps because of the nature of Aboriginal social organisation particularly because Aborigines lacked a unified, European-style political organisation. Another factor was the superiority of European weaponry and military tactics. Resistance therefore followed the pattern of querilla tactics. 37 Aboriginal assertions of sovereignty have continued to the present day: they now take the form of legal proceedings and public protests such as street marches and demonstrations.
- 3.29 Despite this forceful opposition to British occupation, 'Australian historians have paid little attention to the Aboriginal groups' resistance to white settlement.'38 Rather than treat the hostilities as war, the British government of the day, because it had declared sovereignty over the continent, regarded the opposition by Aborigines as either a criminal activity or open rebellion; it was never construed as an assertion of sovereignty in opposition to the British claim.<sup>39</sup>

3.30 It is true that the opposition to British assertions of sovereignty was not couched in the formalities required by contemporary international law, yet the physical resistance was evidence of a fundamental repudiation of British claims to sovereignty. Nevertheless, successive British governments and their Australian successors have judicially ignored this fact of opposition and resistance when considering the relative sovereign status of the Commonwealth and Aborigines. Australian courts have continually refused to find that the Aboriginal people held any sovereign or proprietary rights in the continent and have been consistent in asserting that the continent was settled peacefully and colonised without conquest.

The Commonwealth's claim to sovereignty in Australia 3.31 derives from its position as successor to the title which the British Crown derived from Captain Cook's purported taking of possession of the 'whole Eastern Coast' of the continent in the name of the British Crown in 1770, and the gradual expansion of the settlement which followed. As has been seen the claim evolved from the assumption that the continent was terra nullius at the time of Cook's discoveries 40 and the principle that, since Australia was colonised by gradual and peaceful expansion, settled colony, no recognition was given Australian pre-colonial land and social systems of the Aborigines. The 'settlement' of a colony is used to distinguish the manner of its occupation from that of conquest. The legal consequence is that, whereas the inhabitants of a conquered colony retain their lands and their rights until these are specifically changed by their conqueror, the inhabitants of a settled colony are immediately subject to the laws of the colonising nation. 41 The colonising nation refuses to recognise that the original inhabitants have a recognisable system of law and disregards their relationship to their land.

- This principle 'that the Australian Colonies became British possessions by settlement and not by conquest' has been described as 'fundamental' to the accepted legal view of the foundation of Australia. 42 The consequences of this principle for the Aboriginal people have been threefold. They were and are subject to the colonial and now State and Commonwealth courts; their status in law was defined by English common law; and their pre-colonial land ownership and social systems have not been recognised.43 In 1889, judicial recognition was given to the principle that the Australian colonies were 'settled' rather than 'conquered'. In that year, the Privy Council in Cooper v Stuart stated its opinion that the colony of NSW was settled because at the time of its peaceful annexation it 'consisted of a tract of territory practically unoccupied'.44 The Court also described New South Wales as belonging to that class of colonies 'without settled inhabitants or settled law', which 'peacefully annexed to the British Dominions'.45 The Privy Council sought support for this analysis from Sir William Blackstone's Commentaries on the Laws of England. 46
- Principles applied to the acquisition of colonial territory were also discussed in the case Milirrpum v. Nabalco Ptv. Ltd and the Commonwealth of Australia. 47 This was the first case brought by Australian Aborigines seeking legal recognition of their customary land rights. The plaintiffs were unsuccessful in obtaining this recognition. The primary finding of the Court was that the plaintiffs were unable to prove their assertion that their predecessors in 1788 had the same links to the same areas of land as they were claiming 180 years later. In the case, Justice Blackburn provided a further judicial statement of Australia's status as a settled colony and concluded that therefore a doctrine of 'communal native title' (by which his Honour categorized the Aborigines complex combination individual and joint proprietary interests in land) to land 'does not form, and never has formed, part of the law of any Australia'.48 Once again reliance part of

placed on Blackstone's <u>Commentaries</u> and Justice Blackburn argued that Blackstone's words 'desert and uncultivated...have always been taken to include territory in which live uncivilised inhabitants in a primitive state of society'.<sup>49</sup>

- 3.34 His Honour cited American authority for his view that the attribution of a colony to a particular class is a matter of law 'which becomes settled and is not to be questioned upon a reconsideration of the historical facts', 50 and concluded that in his opinion 'there is no doubt that Australia came into the category of a settled or occupied colony'.51
- 3.35 The view expressed by Justice Blackburn is an example of the application of a principle of international law known as the <u>inter-temporal</u> law. According to this principle, an assessment of the legal validity of a claim to land title or sovereignty is to be appreciated in the light of the law prevailing at the time of the original claim and not in terms of the law in force at the time when a dispute regarding the original claim arises.<sup>52</sup>
- 3.36 Having regard to international legal principles prevailing at the time of the British acquisition of the Australian continent, there is no doubt that Britain did acquire sovereignty over Australia, a sovereignty which no other nation has ever challenged. Therefore, however repugnant that acquisition of sovereignty may appear to contemporary morality, it stands beyond challenge under the <u>inter-temporal</u> law.
- 3.37 Closely allied to the <u>inter-temporal</u> law in its effect of supporting the Commonwealth's claim to sovereignty over the Australian continent is the rule of prescription as it applies to territorial acquisition. A prescriptive title to sovereignty arises in circumstances where no clear title to sovereignty can be shown by way of occupation, conquest or cession, but the territory in question has remained under the continuous and

undisputed sovereignty of the claimant for so long that the position has became part of the established international order of nations. The conclusion to be drawn from the application of this rule to the Commonwealth's position, is that if there were any defect in Australia's title, the rule of prescription would apply to overturn the defect and to vest sovereign title in the Commonwealth Government. 53

- 3.38 The settled colony principle was the subject of litigation in 1979. In that year, in the case of Coe v. The Commonwealth of Australia, the plaintiff, an Aboriginal, claimed to sue on behalf of the Aboriginal community and nation of Australia on the basis that Captain Cook had wrongfully proclaimed sovereignty over the territory of the east coast of Australia in 1770 and that Captain Phillip had wrongfully asserted possession and occupation of the eastern part of Australia for King George III in 1788.54 The 'wrongs' arose from a failure to recognise the existing sovereignty of the Aboriginal people. In addition, it was claimed that Australia had been acquired by conquest.
- 3.39 The High Court dealt with the matter in a way which did not give rise to decisions on the sovereignty issues. Even though the sovereignty issues were not fully argued, two members of the Court took the view that the Aboriginal people had no legislative, executive or judicial organs by which sovereignty might be exercised and that the claim of a continuing sovereignty in the Aboriginal people could not be sustained because it was inconsistent with the accepted legal foundations of Australia. 55 Gibbs J also stated the principle that, as a fundamental basis to the legal system, sovereignty over Australia was gained by settlement and not by conquest. 56 Although not actually conceding sovereignty to the Aboriginal people, Murphy J did go further than other judges when he stated that the Aboriginal plaintiff was

entitled to argue that the sovereignty acquired (over Australia) by the British Crown did not extinguish 'ownership rights' in the Aborigines and that they have certain proprietary rights (at least in some lands) and are entitled to declaration and enjoyment of their rights or compensation.<sup>57</sup>

- 3.40 Aborigines have asserted to the Committee rejection of the settled colony principle; so too have other witnesses. Dr Coombs, in arguing that the general practice of the British occupation as presented in historical records of Australia was 'grossly in error' said that 'it is important to undermine the respectability of the view that this country was peacefully settled'.58 Mr Peter Bayne, Member and Legal Adviser, Aboriginal Treaty Committee and lecturer in law, Canberra College of Advanced Edcuation, noted that the assertion of the settled colony principle is grossly offensive to the Aboriginal people: 'that it really proceeds on the assumption that they were not there, or, if they were, their institutions should not be recognised as being civilised'.59
- 3.41 The Commonwealth has conceded that it is prepared to acknowledge Aboriginal occupation of Australia before British settlement, though no mention was made of the relevance of this concession to the matter of sovereignty 60. The Commonwealth has also restated its commitment to the principle of recognising the 'past dispossession and dispersal of the Aboriginal people, and the community's resulting obligation to the Aboriginal people'.61 More recently still, the Commonwealth has given an indication that the settled colony principle itself may require reappraisal. The Minister for Aboriginal Affairs, the Hon. A.C. Holding MP, said at a recent seminar on Aboriginal customary law:

We must not dwell on the past, but we have to be prepared to face up to the past and what has happened in order to apply effective solutions to the future. We have to face the fact that Australia as a country was conquered, not settled. If you take the view that Australia was settled, then you see it as a colony which was uninhabited and had no system of law. But in the Gove case, although the plaintiffs were unsuccessful in their main claim, Mr Justice Blackburn distinctively held that Aboriginal customary law was recognisably a system of law. 62

## Request and consent legislation

- 3.42 Before concluding its discussion in this area the Committee considers it appropriate to refer to evidence from Mrs Barbara Hocking, a Melbourne barrister. She submitted that the easiest way to provide a legal foundation for a Makarrata or compact between Aboriginal and non-Aboriginal Australians is to give legislative recognition to the fact that Aboriginal people were in possession of the continent of Australia in 1788, that the land belonged to them, and that they had rights in land throughout the continent. Mrs Hocking asserted that the method proposed (and which is referred to in the paragraphs) may be the only constitutional method available because, unless such a procedure were adopted, 'the Commonwealth Parliament/Government would be unable to make any Makarrata or compact that recognised Aboriginal ownership prior to 1901 and this ... would not form an adequate basis for the negotiation of a Makarrata or compact with the Aboriginal people.'63.
- 3.43 Mrs Hocking argued that, following the 1967 referendum, the Australian Government is able to legislate pursuant to s.51(xxvi) of the Constitution, in conjunction with an existing inherent national power, to recognise traditional Aboriginal ownership in existence in 1967 and, following the usual principles of statutory interpretation, in 1901. It is not, however, able to recognise pre-existing ownership in 1788. This can be done only by the British Government as the successor in title to the then sovereign power. Therefore the Australian Government must request and consent to an Act of the United

Kingdom Parliament which recognises that in 1788 the Aboriginal people were possessors and owners of, and had land rights in, Australia. This procedure is available to former dominions under the Statute of Westminster 1931; examples of this procedure in the Australian context are the Cocos Islands Act 1955 (UK) and the Christmas Island Act 1958 (UK).

- 3.44 Mrs Hocking is of the opinion that the Australian Government is unable legally to recognise ownership belonging to the Aboriginal people in 1788 because it cannot legislate in relation to something that was in existence before it came into existence itself, but that this recognition is a pre-requisite to any Makarrata or compact with the Aboriginal people of Australia.
- 3.45 Without concerning itself with a necessarily technical discussion as to the validity of this proposal, the Committee must reject it solution to the problem. as a Attorney-General has recently announced, following agreement by the Commonwealth and States at the 1982 Premiers' Conference, that the British Government has agreed to enact the necessary UK legislation to sever residual constitutional links between the Commonwealth of Australia and the UK. This involves the removal of all remaining categories of appeal from Australian courts to the Privy Council, the removal of any remaining capacity in the British Parliament to make laws binding in Australia, and the removal of certain remaining colonial fetters on the powers of signify Australia's will State parliaments, and independence from the UK. Once this process - which will be achieved by the enactment of request and consent legislation has been completed, it would clearly not be possible for the enactment of the sort of legislation which Mrs Hocking has proposed.

#### Conclusion

It may be that a better and more honest appreciation of the facts relating to Aboriginal occupation at the time of settlement, and of the Eurocentric view taken by the occupying powers, could lead to the conclusion that sovereignty inhered in the Aboriginal peoples at that time. However, the Committee concludes that, as a legal proposition, sovereignty is not now vested in the Aboriginal peoples except insofar as they share in the common sovereignty of all peoples of the Commonwealth of Australia. In particular, they are not a sovereign entity under our present law so that they can enter into a treaty with the Commonwealth. Nevertheless, the Committee is of the view that if it is recognised that sovereignty did inhere in the Aboriginal people in a way not comprehended by those who applied the terra nullius doctrine at the time of occupation and settlement, then certain consequences flow which are proper to be dealt with in a compact between the descendants of those Aboriginal peoples and other Australians.

## Domestic treaties of other nations as a model for Australia

3.47 During its consideration of the feasibility of implementing a treaty which would be recognised at international law, the Committee's attention was drawn to the treaties concluded by colonising powers with indigenous peoples, such as those in New Zealand, United States of America, and Canada. Some witnesses have sought to draw analogies between the situations in such countries and that in Australia at the time of colonisation, suggesting that they provide useful precedents to support the need for a treaty in Australia. With this in mind, it will assist in a consideration of the issues if the position in New Zealand, the United States and Canada is briefly examined.

#### New Zealand

- 3.48 The Treaty of Waitangi of 1840 was concluded between the British Government and the Maoris of the North Island of New Zealand. The Treaty protected Maori rights and formed the basis for British annexation of New Zealand. The Treaty's three articles provided for the Maori signatories' acceptance of the British Crown's sovereignty in their lands and the Crown's protection of Maori possessions, with the Crown having the exclusive right to purchase Maori land. In return, as the third article of the Treaty, the Maori signatories were granted the full rights of British subjects. Following the Treaty, Britain annexed all of New Zealand: the North Island on the basis of the Treaty and the South Island by right of discovery.
- 3.49 Despite many requests, the Treaty has never been ratified, although it has been given domestic legislative recognition. In 1975 the Treaty of Waitangi Act was passed to provide for the 'observance and confirmation, of the principles of the Treaty of Waitangi by establishing a tribunal to make recommendations on claims relating to the practical application of the Treaty ...', in effect providing statutory acknowledgement of the principles of the Treaty.<sup>64</sup>
- 3.50 It has been argued that the Treaty was not a true of cession because international law did not capable of exercising recognise the Maori tribes as sovereignty necessary to conclude such a treaty. It also appears that in the prevailing view of the domestic law of New Zealand, neither the status nor the land rights of the New Zealand Maoris were based, as a matter of law, upon the Treaty of Waitangi,65 but rather on Anglo-New Zealand common law.

- 3.51 Relations between the United States Congress and the American Indians are explicitly provided for in Article I section 8 of the American Constitution which empowers the Congress
  - 3. To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; 66
- 3.52 Until 1871, the Government of the United States had entered into treaties with Indian tribes, but the status of amounted to agreements was such that they never instruments governed by international law. This was because the tribes were considered to have no international legal status and United States subject to the sovereign power of the Government which had acquired the land they occupied. The policy of the United States Government in making the treaties was to purchase the lands occupied by the Indians, and in the period from 1778 to 1842, 242 of such 'treaties' or purchases were made, 67
- 3.53 In 1871, the Indian Appropriations Act was passed, providing that 'no Indian nation or tribe within the territory of the United States shall be acknowledged or recognised as an independent nation, tribe or power with whom the United States may contract by Treaty ...'68 Henceforth, the legal status of the tribes was one of wards of the nation.
- 3.54 The status of these 'treaties', rather than being analogous to a modern international law treaty, is more appropriately compared with a contract for the sale of land (in some instances coupled with a right of continued permissive occupancy for the Indians). The treaties were regarded as a voluntary cession to the United States Government of the Indians' right to the lands which they occupied.<sup>69</sup> More

significantly, the treaties have always been regarded as domestic arrangements, exclusively within the jurisdiction of the domestic law of the United States.

3.55 The United States Supreme Court considered the matter of these treaties entered into by the United States Government and Indian Tribes in Cherokee Nation v. State of Georgia. 70 In that case, the complainants described themselves as 'the Cherokee nation of Indians, a foreign state, not owing allegiance to the United States, nor to any State of this Union, nor to any prince, potentate or state, other than their own. 71 In rejecting this description, Chief Justice Marshall described the position of Indian tribes in relation to the United States in the following manner:

Though the Indians are acknowledged to have unquestionable and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by voluntary cession to our government, yet it may well be doubted whether those tribes reside within the acknowledged which boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations ... living in a state of pupillage. Their relationship to the United States resembles that of ward to guardian. 72

3.56 In a submission to the Committee it was argued by Professor D.H.N. Johnson, Professor of Inter-national Law at the University of Sydney, that too much should not be read into the statements of the Court in the Cherokee case. 73 Use of the term 'domestic dependent nation' in reference to American Indians does not contemplate recognising them as an independent or foreign nation; it is used specifically to contrast the position of the Indians with that of a foreign nation. In using the term, Marshall C.J. expressly rejected the claim of the Cherokees that

from time immemorial the Cherokee nation have composed a foreign and independent State, and in this character have been repeatedly recognised, and still stand recognised by the United States, in the various treaties subsisting between their nation and the United States. 74

The treaties between the United States and the American Indians have also been the subject of international litigation during which their international status was rejected. In the <u>Cayuga Indians' Claim</u>, of 1926 the American-British Claims Commission considered the effect of treaties between the Indians, who had settled over the Canadian border, and the United States. It was affirmed by the Tribunal that an Indian tribe is not a subject of international law and is a legal unit only in so far as the law of the country in which it lives recognises it as such. 75

- 3.57 The extent of the rights granted to the American Indian tribes under the treaties can only be characterised as domestic. It was submitted to the Committee by Professor Johnson that they afforded protection to the Indians against State governments and private interests, but that they have not been regarded as binding on the United States Government. 76
- 3.58 A further significant factor defeating the drawing of a comparison between the American and Australian positions is that, unlike the American Constitution, the Australian Constitution (according to current interpretations) does not appear to provide for an assertion by Australian Aboriginal communities that they are 'domestic dependent nations' in the same manner in which American Indian reservation communities have been able to do.77

#### Canada

3.59 In 1763, King George 11I, by Royal Proclamation, guaranteed protection to the North American Indian (Canadian) peoples under the sovereignty of his crown. 78 The Proclamation acknowledged the Indians' interest in the land they inhabited and according to its terms, land was to be reserved for the Indians with rights of undisturbed possession. Private individuals were prevented from purchasing Indian land, with the Governor, in the Crown's name, having exclusive right of purchase.

3.60 The Proclamation is regarded by the present Canadian Government as the fountainhead of fair dealing with the natives. 79 In his discussion of the Proclamation, Professor Green writes of United States Chief Justice Marshall's opinion of the Proclamation in the following terms:

It is clear that in Marshall's eyes the Proclamation was in no way an acknowledgement of existing rights, but an ideological cover for the predatory claims of the Crown and a sop to the Indians; it was the price that the Crown was prepared to pay, at least on paper, in order to buy their goodwill ...<sup>80</sup>

Treaties were concluded between Canadian Indians and the British Government after this proclamation as an implementation of the latter's policy of land purchase in advance of colonial expansion to prevent the warfare which had occurred in the United States.

3.61 In treaties concluded after 1867 the Indians agreed to 'cede' all rights to designated territories in return for annual payments, smaller areas reserved for their exclusive use, as well as special hunting and fishing rights over the land ceded to the Canadian Government. Sixty seven such treaties were made

between 1725 and 1919 embracing half of the Indians of Canada.81 All of these treaties were formal written agreements to which both parties attached great significance at the time. The representatives of the colonial government sought peace to reduce the costs of their colonial expansion and the Indians, negotiating under duress, sought good faith and permanency in the agreements.

3.62 The Treaties made between the British Government and, subsequently, the Canadian Government and the Canadian Indians, have, like the American treaties, been regarded as agreements to be governed by domestic law. Professor L.C. Green, in discussing the status of the treaties, wrote:

Those treaties are not treaties in the international sense of that term. Since they are only of legal significance in municipal law there is no doubt that the Canadian Parliament is able to terminate them with the concomitant consequence that the courts would be obliged to give effect to the legislation, denying even any moral obligation upon the Crown. But even without such legislation, the courts have been unwilling, despite the activities of individual judges, to give the treaties any legal validity, ignoring the idealistic language and long-term promises of the treaty-makers. 82

3.63 Recently an English Court was concerned with a case involving the Royal Proclamation of 1763 and the status of the treaties made with Canadian Indians. The Indians were concerned that their rights under the treaties should be safeguarded with the repeal of the British North America Act 1867 and the repatriation of the Canadian constitution. The court concluded that, as the treaties were not between independent sovereign states, they would possibly be adjudicated upon by municipal courts. Had the obligations set out in the treaties been of an international character, the English courts would have had no

jurisdiction over the matter at all. 83 Section 35 of the new Canadian Constitution now provides that 'The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed'. 84 Professor Johnson in evidence to the Committee stated 'It remains to be seen how the Canadian courts will apply this provision. 85 The rights of Canadian Indians are now regarded as being in part derived from the old treaties and in part from Anglo-Canadian common law. Their rights are therefore all domestic, and they have no separate rights under international law.

## Conclusion concerning domestic treaties

3.64 The Commonwealth Attorney-General's Department as a basis for its opinion that the Commonwealth lacks the power to enter into a 'treaty' with Australian Aborigines notes that the social organisation of Aboriginal tribes and other communities in Australia is different in significant respects from that of other indigenous communities (for example, Cherokee Indians in the United States).86

3.65 In the Department's opinion, there is scope for 'an Australian Aboriginal "community" to develop to the point where, if the United States' models are followed it might conceivably become appropriate to speak of an arrangement between that organised community and the Commonwealth as a "treaty"'.87 The Department hastened to negate the use of the term, however, because of its international legal implications, and reiterated recent advice by the Attorney-General to the Prime Minister that any such arrangement would require the insertion of

...any provisions needed to make it clear that Aborigines were not being treated as if they were a community separate from the Australian community, and provisions to ensure that the arrangement was not conceived as being analogous to a treaty between separate nation States.<sup>88</sup>

Such a precaution was necessary to preclude all possibility of an Aboriginal self-determination claim. For the same reasons the Commonwealth should avoid against the use of the term 'Aboriginal Nation'.  $^{89}$ 

It can be seen that not a great deal is to be achieved in attempting to use these past treaties as precedents for a compact between Aborigines and the Commonwealth. They were concluded at a time when the term 'treaty' did not possess so fixed a meaning in international law as it does today. Thus these treaties have no status as instruments of international law. In addition the purpose and effect of the treaties must be considered. It is significant for the contemporary debate that they were, for the most part, treaties imposed by a powerful colonising nation on an indigenous population with no choice other than to agree to the terms. (Neither party in the current Makarrata negotiations would brook this form of agreement today). While the language of the treaties may indicate an intent and concern to safequard indigenous rights, their principal purpose was to sanction the colonising powers' alienation of land from the indigenes. It can be seen from the Canadian, United States and New Zealand examples that, for the most part, what rights the indigenes now possess arose not out of the treaties, but out of the domestic law applying to everyone, colonist and indigene alike, within the territorial boundaries of the nation.

#### Endnotes

- 1. Evidence, p. 901.
- For example, 'Convention, Protocol, Agreement, Arrangement, Process Verbal, Statute, Declaration, Modus Vivendi, Exchange of Notes (or of Letters), Final Act and General Act.' J.G. Starke, Q.C., An Introduction to International Law, London 1977, p. 462.
- 3. According to Article 2, paragraph 1(a) of this Convention, 'for the purposes of the present Convention, "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.' Evidence, p. 852.
- 4. 'An international person is an entity having the power of independent action on the international plane.' D.W. Greig, International Law, London, 1976, p. 92.
- 5. Evidence, p. 854.
- 6. Evidence, p. 854.
- 7. Evidence, p. 854.
- Submission by the National Aboriginal Conference, Evidence, p. 627.
- 9. Starke, op. cit. p. 458.
- 10. <u>Jowitts Dictionary of English Law</u>, London, 1977, p. 1678.
- 11. P.G. Osborn, A Concise Law Dictionary, London 1964, p. 297.
- 12. Saunders, Words and Phrases Legally Defined, 2nd Ed, 1970 Vol. 5, p. 92.
- 13. The Arantzazu Mendi (1939) A.C. 256, per Lord Atkin, at pp. 263-265, cited in Evidence, p. 716 by B.A. Keon-Cohen.
- 14. See generally Greig, op cit., p. 157.
- 15. '79 ... The expression was a legal term of art employed in connection with "occupation" as one of the accepted legal methods of acquiring sovereignty over territory. "Occupation" being legally an original means of peaceably acquiring sovereignty over territory otherwise than by cession or succession, it was a cardinal condition of a valid "occupation" that the territory should be terra nullius a territory belonging to no one at the time of the act alleged to constitute the "occupation" ... a

determination that Western Sahara was a <u>terra nullius</u> at the time of colonisation by Spain would be possible only if it were established that at that time the territory belonged to no one in the sense that it was then open to acquisition through the legal process of "occupation".

80 ... The state practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organisation were not regarded as terrae nullius. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through "occupation" of terra nullius by original title but through agreements concluded with local rulers. On occasion, it is true, the word "occupation" was used in a non-technical sense denoting simply acquisition of sovereignty; but that did not signify that the acquisition of sovereignty through such agreements with authorities of the country was regarded as an "occupation" of a "terra nullius" in the proper sense of these terms. On the contrary, such agreements with local rulers, whether or not considered as an actual "cession" of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of terrae nullius.

81 ... At the time of colonisation Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organised in tribes and under chiefs competent to represent them.

... In colonising Western Sahara, Spain did not proceed on the basis that it was establishing its sovereignty over terrae nullius.' Western Sahara, ICJ Reports, 1975, 6 at p. 39. Evidence, pp. 970, 971.

See also Greig, op. cit. p. 161.

16. There is abundant authority for British recognition of prior native ownership of land. Some relevant cases on the point are as follows: Canada, St Cathrines Milling and Lumber Co. v. R (1888) L.R. 14 App Cas 46, Attorney-General for Quebec v. Attorney-General for Canada (1921) 1 A.C. 401; United States of America, Fletcher v. Peck (1810) 6 Cranch 87, Johnson v. McIntosh (1823) 8 Wheat. 543, Worcester v. Georgia (1832) 6 Pet. 515; New Zealand, Treaty of Waitangi, Hoani Teheuheu Tukino v. Aotea District Maori Land Board (1941) A.C. 308; New Guinea, The Administrator of Territory of Papua New Guinea v. Guba Doriga, Unreported, 12 Dec 1973, (1973-4) 2 ALR xxiii The Solomon Islands; Hana siki v. O.J. Symes (1951) Solomon Islands, unreported judgement of Charles J, cited in B. Hocking, Native Land Rights, unpublished master's thesis, Monash

- University, Melbourne, 1970, Appendix 2; India, <u>Vayjesingji Joravarsingji v. The Secretary of State for India</u> (1924) L.R. 51 I.A. 357; Africa, <u>Amodo Tijani v. Secretary Southern Nigeria</u> (1921) 2 A.C. 399.
- 17. Cited in research paper, Interim Analysis of a Survey of Aboriginal Demands, prepared by Michael Anderson for the NAC Makarrata Sub-committee.
- 18. Evidence, p. 652.
- 19. Evidence, p. 652.
- 20. Evidence, p. 652.
- 21. Evidence, pp. 626, 652. 'Since 1788 our nation has been invaded by ever-increasing numbers of Europeans who, with superior weapons, have attempted to deport our people and destroy our law and culture and seize without compensation, our land. We have never conceded defeat...The Aboriginal people have never surrendered to the European invasion and assert that sovereignty over all of Australia lies with them. The Settler state has never recognised the prior ownership of this land belonging to that of the Aboriginal nation. We demand that the colonial settlers who have seized the land recognise this sovereignty and on that basis negotiate their right to be there.' Evidence, p. 248.
- 22. 'They bestowed no labour upon the land and that and that only it is which gives a right of property to it.' Herald, Sydney, 1838, cited in First Report from the Select Committee of the Legislative Assembly upon Aborigines, Sydney, 13 August 1980, p. 33.
- Professor W.E.H. Stanner, <u>White Man Got No Dreaming</u>, Canberra, 1979, p. 230.
- 24. <u>Milirrpum and Others v. Nabalco Pty Ltd and the Commonwealth</u> (1970) 17 FLR 141.
- 25. Ex Parte Meneling Station (1982) 57 ALJR 59, (1982) 44 ALR 63.
- 26. ibid.
- 27. R.M. & C.H. Berndt, <u>The World of the First Australians</u>, Sydney 1977, provides a good anthropological study of this subject.
- 28. H. Reynolds, <u>The Other Side of the Frontier</u>, Townsville, 1981, p. 53.
- 29. Evidence, pp. 970, 904.

- 30. Western Sahara Case, cited by Professor Johnson in Evidence, p. 861.
- 31. ibid.
- 32. P. Bayne, The Makarrata, <u>Legal Service Bulletin</u>, October 1981, p. 234. 'In pursuing the Makarrata (Treaty) we assert our basic rights as sovereign Aboriginal nations who are equal in political status with the Commonwealth of Australia in accordance with the principal espoused by the International Court of Justice in the Western Sahara Case that sovereignty has always resided in the Aboriginal people'. Evidence, p. 626.
- 33. Evidence, pp. 904-5.
- 34. Evidence, p. 905. This rule regards a prescriptive title to sovereignty as arising in circumstances where no clear title to sovereignty can be shown by way of occupation, conquest or cession, but the territory in question has remained under the continuous and undisputed sovereignty of the claimant for so long a period that the position has become part of the established international order of nations.
- 35. Evidence, p. 772.
- 36. See for example H. Reynolds, <u>Aborigines and Settlers</u>, Melbourne, 1972 and H. Reynolds, <u>The Other Side of the Frontier</u>, Townsville, 1981.
- 37. C.D. Rowley, <u>The Destruction of Aboriginal Society</u>, Canberra, 1970, Vol. I, p. 5.
- 38. ibid.
- 39. Official British attitudes did not however have unanimous support among contemporary opinion. For example, 'our brave and conscientious Britons whilst taking possession of their territory, have been most careful and anxious to make it universally known, that Australia is not a conquered country ... and ... have repeatedly commanded that it must never be forgotten "that our possession of this territory is based on a right of occupancy". "A Right of occupancy!" Amiable sophistry! Why not say readily at once, the right of power? We have seized upon the country, and shot down the inhabitants, until the survivors have found it expedient to submit to our rule. We have acted exactly as Julius Caesar did when he took possession of Britain. But Caesar was not so hypocritical as to pretend any moral right to possession ... We have a right to our Australian possessions; but it is the right of conquest, and we hold them with the grasp of power.' E.W. Landor, The Bushman, Or Life in a New Country, London, 1847, pp. 187-9, cited in H. Reynolds, Aborigines and Settlers, Melbourne, 1972, p. 102.

- 40. 'There was no land law or tenure existing in the Colony (of New South Wales) at the time of its annexation to the Crown; ... 'Cooper v. Stuart (1889) 14 App. Cas. 286 at 292.
- 41. 'Aboriginals within the boundaries of the Colony are subject to the laws of the Colony ...' R v. Jack Congo Murrell (1836) Legge 72.
- 42. Coe v. The Commonwealth (1979) 53 ALJR 403 per Gibbs J. at 408.
- 43. Evidence, p. 549, and see <u>Milirrpum and Others v. Nabalco</u>

  <u>Pty Ltd and the Commonwealth of Australia</u> (1970) 17 FLR

  141.
- 44. Cooper v. Stuart (1889) 14 App. Cas. 286, 291.
- 45. (1889) 14 App. Cas. 291.
- 46. ibid, p. 291, see also W. Blackstone, Commentaries on the Laws of England, Oxford, 1766. It has been suggested that such an analysis is an 'unwarranted extension of Blackstone', Evidence, p. 549. Blackstone wrote of territory which can be acquired by occupation as being 'desert and uncultivated', or 'uninhabited'. (Cited in Evidence, p. 549.) However, he did not extend the category to include 'practically unoccupied' land. Indeed he firmly stated that the right of acquisition of lands by occupation existed 'provided he (i.e. the occupier) found them unoccupied by anyone else. ibid, Vol. II, p. 9.
- 47. (1970) 17 FLR 141.
- 48. (1970) 17 FLR 141 at 245.
- 49. (1970) 17 FLR 141 at 201.
- 50. (1970) 17 FLR 141 at 203.
- 51. (1970) 17 FLR 141 at 242.
- 52. Greig, op. cit., p. 183.
- 53. G.J.L. Coles, The International Significance of a Treaty, Identity, Vol. 4(2), January 1981, p.32.
- 54. (1979) 53 ALJR 403.
- 55. Gibbs J, with whom Aickin J agreed. (1979) 53 ALJR 403 at 408.

- 56. (1979) 53 ALJR 403 at 408.
- 57. (1979) 53 ALJR 403 at 412.
- 58. Evidence, p. 1114.
- 59. Evidence, p. 588.
- 60. Letter from Senator the Hon. P. Baume, Minister for Aboriginal Affairs to Mr W.F. Bird, National Chairman, National Aboriginal Conference, 3 March 1981. See also speech by Senator the Hon. P. Baume, Senate Hansard, Page 713, 25 March 1981.
- 61. Letter from Secretary, Attorney-General's Department to Secretary, Department of Aboriginal Affairs, 28 July 1980.
- 62. Hon A.C. Holding MP, Australian Law Reform Commission Australian Institute of Aboriginal Studies Workshop on the Aboriginal Customary Law Reference, Law School, University of New South Wales, Sydney, 7 May 1983, cited in Professor C. Tatz, Aborigines and the Age of Atonement, paper for the Third International Conference on Hunter-Gatherers, Bad Homburg, Federal Republic of Germany, 13-16 June 1983, p. 5, Submission No. 35.
- 63. Evidence, p. 974.
- 64. Treaty of Waitangi Act, 1975.
- 65. Coles, op. cit., p. 33.
- 66. 'In 1973, in a highly significant footnote to a case involving Indians, Justice Marshall speaking for the Court observed: "The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognised that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making." 'H.W. Chase, C.R. Ducat, The Constitution, Princeton, 1978, p. 83.
- 67. Milirrpum and Others v. Nabalco Pty Ltd and the Commonwealth of Australia, (1970) 17 FLR 141 at 209.
- 68. Cited in L.C. Green, Canada's Indians: Federal Policy, International and Constitutional Law, Ottawa Law Review, Vol. 4(1) 1970, p. 101 at 107.
- 69. Marshall, C.J. (USA) cited in (1970) 17 FLR 141 at 215.
- 70. (1831) 5 Pet. 1.
- 71. Cited in (1970) 17 FLR 141 at 215.

- 72. ibid and G. Bennett, <u>Aboriginal Rights in International Law</u>, London, 1978, p. 5.
- 73. Evidence, p. 857.
- 74. ibid.
- 75. Bennett, op. cit., p. 5.
- 76. Evidence, p. 862.
- 77. Coe v. The Commonwealth (1979) 53 ALJR 403 cited by B. Keon-Cohen, Evidence, p. 725.
- 78. See L.C. Green, Human Rights & Canada's Indians, <u>Israel Yearbook on Human Rights</u> 1971 for relevant extracts of the Proclamation (at page 158) and for a thorough discussion of the history and legal interpretations of the relationship between Canadian Indians and the Canadian Government. See also L.C. Green, Canada's Indians: Federal Policy, op. cit. pp. 101-131.
- 79. <u>In All Fairness, A Native Claims Policy</u>, Ministry of Indian Affairs & Northern Development, Ottawa, 1981, p. 9.
- 80. Green, Israel Yearbook on Human Rights, op. cit., p. 175.
- 81. Brown & Macguire cited in D. Barwick, <u>Making a Treaty, the North American Experience</u>, paper prepared for the Aboriginal Treaty Committee, p. 6.
- 82. Cited in Evidence, p. 857.
- 83. Evidence p. 863, <u>in re Indian Association of Alberta</u>, decision of Woolf J., <u>The Times</u>, London, 10 December 1981.
- 84. Evidence p. 863 (this section has not yet been tested in the Canadian courts).
- 85. Evidence, p. 863.
- 86. Letter from Secretary, Attorney-General's Department to Secretary Department of Aboriginal Affairs, 28 July 1980.
- 87. ibid.
- 88. ibid.
- 89. ibid.

### Chapter 4

## AGREEMENT WITH CONSTITUTIONAL BACKING

#### Introduction

- 4.1 In discussion about legal implementation of a compact one of the most frequently suggested options is one whereby the compact would rely for its validity upon a sound basis within the Constitution. A specific reference to the compact within the Constitution would enhance its status. Such status would be of important symbolic value. Perhaps more importantly, it would require the voters of Australia, by means of the necessary referendum to amend the Constitution, to show their commitment to the concept of a compact. At the same time, once thus enshrined in the Constitution, a degree of immutability would attach to the compact thereby protecting it from any damage due to short-term political or social expediency. A further argument in support of this option is that it would put beyond doubt the Commonwealth's power to negotiate a compact and, once agreement was reached, to fulfil its obligations under it. Clearly, then, matter of entrenchment in this way requires careful the consideration. The Committee finds attractive arguments emphasising the desirability of giving any ultimate compact constitutional status.
- 4.2 There are two suggested ways of providing a specific constitutional basis for a compact:
  - (a) inclusion within the Constitution of the full text of the compact once it is settled; or

- (b) amendment of the Constitution by the insertion of a broad enabling power (similar to s.105A, whose purpose was to give effect to the Financial Agreement of 1927 negotiated between the Commonwealth and States), giving specific constitutional power to negotiate a compact between the Commonwealth and Aboriginal people based on certain principles.
- (a) Inclusion of full text within Constitution
- 4.3 Under this proposal the full text of the compact, once it was negotiated and agreement was reached between the parties, would be inserted as a new section of the Constitution. There would thus be enshrined within the Constitution, as a permanent feature of the institutional processes of the nation, the basis upon which relations between the Aboriginal people and the Commonwealth of Australia (embracing as it does the idea of the whole Australian community) would henceforth be conducted.
- 4.4 Nevertheless, it seems to the Committee that this particular approach has serious drawbacks. While inclusion of the full text within the Constitution would confer certainty, making removal or change very difficult, the resulting lack of flexibility could be a major disadvantage.
- 4.5 A more formidable difficulty lies in the need to ensure the passage of such a detailed constitutional amendment by way of referendum. The requirements of s.128 of the Constitution that a proposed constitutional alteration be approved by a majority of electors in a majority of States and also by an overall majority of electors throughout the Commonwealth have made amendment of the Constitution a rare occurrence. It only requires a relatively small proportion of voters to stand in the way of constitutional alteration, for the success of a referendum proposal to be prevented. In a proposal such as we are considering here, where there would be a vast amount of

detail to be inserted in the Constitution, opposition to even one term, or apprehension about the overall length and complexity of the proposed amendment, could spell failure.

4.6 The nature of these difficulties was referred to by a number of witnesses. Thus, the Aboriginal Legal Service of NSW noted in this regard: 'Such a change would require a very sophisticated political campaign in order to win the support of the Australian people'.¹ Writing with a slightly different emphasis, Bayne states: 'The practical point may be made that an amendment which does not specify the content of the agreement might excite less opposition'.² The Committee's point is the different one that detail might prevent understanding, not that it would encourage opposition. But from all points of view it is concluded that an attempt to include the full text of a compact in the Constitution would almost certainly result in the failure of a referendum.

## (b) Broad enabling power

- 4.7 Proponents of this type of constitutional amendment favour it because a simple enabling power would provide the status and degree of entrenchment seen as necessary to denote the seriousness with which the compact should be viewed. Yet it does not have the disadvantages which attach to the proposal to incorporate the full text of the compact within the Constitution.
- 4.8 Professor Garth Nettheim, in a paper which formed part of the submission made by the International Commission of Jurists, took the following view of this approach:

Such an approach has much to commend it. It would give Aboriginal people the sort of security in the terms of a Makarrata that the importance of such a document requires. It would avoid the need to rely on [other] Commonwealth legislative powers which may

prove insufficient to support the whole agreement. It would avoid the need to rely on collaboration by State governments which might be withheld by the governments of those States where the problems are greatest - a constitutional amendment would confer plenary power on the Commonwealth Parliament if it won approval from a majority of the total electorate and majorities of the electors in a majority of the States.<sup>3</sup>

- 4.9 In order to assess the value of this approach, it is useful to look at the background to section 105A of the Constitution, including its history, usage and interpretation by the High Court. The section, which has been described as 'probably the major constitutional amendment since federation', 4 had its origins in the 1920s. The Commonwealth, anxious to reorganise the financial arrangements of the nation, obtained the concurrence of the States to the Financial Agreement of 1927, which was enacted by the Commonwealth Parliament and approved at a referendum in 1928, and inserted in the Constitution as s.105A in 1929.
- 4.10 The wording of the section is as follows:
  - 105A.-(1) The Commonwealth may make agreements with the States with respect to the public debts of the States, including -
    - (a) the taking over of such debts by the Commonwealth;
    - (b) the management of such debts;
    - (c) the payment of interest and the provision and management of sinking funds in respect of such debts;
    - (d) the consolidation, renewal, conversion, and redemption of such debts;
    - (e) the indemnification of the Commonwealth by the States in respect of debts taken over by the Commonwealth; and

- (f) the borrowing of money by the States or by the Commonwealth, or by the Commonwealth for the States.
- (2) The Parliament may make laws for validating any such agreement made before the commencement of this section.
- (3) The Parliament may make laws for the carrying out by the parties thereto of any such agreement.
- (4) Any such agreement may be varied or rescinded by the parties thereto.
- (5) Every such agreement and any such variation thereof shall be binding upon the Commonwealth and the States parties thereto notwithstanding anything contained in this Constitution or the Constitution of the several States or in any law of the Parliament of the Commonwealth or of any State.
- (6) The powers conferred by this section shall not be construed as being limited in any way by the provisions of section one hundred and five of this Constitution.
- 4.11 The Commonwealth's power to legislate under s.105A was challenged in 1932 following the failure of the NSW Government, trapped by the exigencies of the Depression, to meet interest payments due on overseas loans. The Commonwealth paid the State's debts under the Financial Agreement Act. Pursuant to sub-section 3 of s.105A the Commonwealth then enacted the Financial Agreement Enforcement Act 1932 to operate for a two year period. That Act provided for recoupment by the Commonwealth from State revenue of interest not paid by the State which now constituted a debt owing to the Commonwealth. The State of New South Wales challenged the Financial Agreement Enforcement Act on the basis that a power which allowed the Commonwealth to control a State's sources of revenue would be valid only if it was granted in very express terms and that

s.105A failed to do that. The High Court rejected the State's argument by a majority of 4 to 2. Two of the majority judges, Rich and Dixon JJ, placed particular emphasis on sub-section 5 of s.105A. Their comments have some significance in the context of the proposal for a provision along the lines of s.105A to support a compact.

Subsection 5 of that section provides with respect to agreements of the description contained in subsection 2 that every such agreement and any variation thereof shall be binding upon the Commonwealth and the States parties thereto notwithstanding anything contained in this Constitution, or the Constitution of the several States, or in any law of the Parliament of the Commonwealth, or of any State. In our opinion the effect of this provision is to make any agreement of the required description obligatory upon the Commonwealth and the States, to place its operation and efficacy beyond the control of any law of any of the seven Parliaments, and to prevent any constitutional principle or provision operating to defeat or diminish or the obligatory force of the condition Agreement.5

4.12 The words emphasised in the above quotation indicate the overriding strength which could be built into a compact deriving its efficacy from a provision modelled on s.105A. The proposed constitutional provision would consist of an enabling clause conferring power on the Commonwealth to enter into agreements with bodies or persons representing Aboriginal people and Torres Strait Islanders. There would follow a non-exclusive list of those matters which would form an important part of the terms of the compact, expressing in broad language the types of subjects to be dealt with. There would also be a power of validation in respect of any compact entered into before the new section took effect, a power for the parties to vary or rescind the compact and a power vested in the Parliament to make laws for the carrying into effect of the terms of the compact.

In a valuable paper by Mr Gil Shaw, tabled on behalf of the International Commission of Jurists at its hearing with the Committee on 28 June 1982, two alternative forms of a s.105A-type amendment were annexed. The Committee finds these drafts useful as a guide to the sort of approach which could be taken. The second draft is basically similar to the first, except that it does not provide for laws made under the provision to prevail over anything contained in Commonwealth or State Constitutions (sub-section (5)), nor for the entrenchment of the provision by requiring a special procedure for its alteration. The Committee therefore directs its attention to the first draft. For purposes of discussion we reproduce it here:

Possible Constitutional amendment to provide an enabling power:

- (1) The Commonwealth may make agreements with persons or bodies recognised as representative of the Aboriginal and Torres Strait Islander people of Australia with respect to the status and rights of those people within Australia including but not limited by the following:
  - (a) restoration to Aboriginal and Islander people or some of them of rights to lands within the jurisdiction of Australia which were vested in said people prior to 1770;
  - (b) compensation for loss of any land incapable of being restored to said people or some of them;
  - (c) matters of health, education, employment and welfare of said people or some of them
  - (d) the law relating to the exercise of judicial power by the Commonwealth of Australia or any State or any Territory within Australia in respect to said people;

- (e) any matter of concern or matter seen as significant by the Aboriginal and Islander people in relation to their status as citizens of Australia. (possible sovereignty clause).
- (2) The Parliament shall have the power to make laws for validating any such agreement made before the commencement of this section.
- (3) Any such agreement made may be varied or rescinded by the parties thereto and as such shall supersede any prior agreement for the purposes of this section.
- (4) The Parliament shall have the power to make laws for the carrying out by the parties of any such agreement.
- (5) Any law passed pursuant to clause 2 and clause 4 shall be binding upon the Commonwealth and the States, notwithstanding anything contained in this Constitution or the Constitutions of the several States or any law of the Parliament of the Commonwealth or of any State.
- (6) Any variation or alteration or rescinding of this section shall occur in the following manner:
  - (a) ... (constitutional alteration notwithstanding section 128).
- 4.14 Sub-section (5) of this draft provision is in similar form to sub-section (5) of s.105A. It constitutes a 'notwithstanding' clause which provides that laws passed pursuant to the compact shall be binding upon the Commonwealth and the States notwithstanding anything contained in the Commonwealth or State Constitutions or in any Commonwealth or State law. Shaw supports this provision on the basis that it will give the constitutional amendment '... full force and allow the greatest latitude in legislative creativity ... '6

- 4.15 Shaw suggests as a further reason for sub-clause (5) that any law passed under it could contain special provisions requiring more than just a simple majority in each House of the Commonwealth Parliament to pass, repeal or amend legislation to put the compact into effect. As the section would operate 'notwithstanding' anything contained in the Constitution, it would not be necessary to abide by sections 23 and 40 of the Constitution, which require simple majority votes in both the Senate and the House of Representatives. A provision such as the 'notwithstanding' clause, in Shaw's view, overcomes any doubts which may exist about the Commonwealth's power to pass 'manner and form' provisions. Shaw also suggests that a provision by recognised requiring special legislative concurrence Aboriginal representative groups to any change to, or even initial passage of, legislation based on a compact could be passed pursuant to sub-clause (5).
- 4.16 Shaw goes on to raise the possibility of a provision, such as outlined in his sub-section (6), requiring special modes of alteration or repeal of this enabling section of the Constitution. He suggests:

There is even the possibility that any constitutional alteration or repeal of this enabling amendment would be dictated by its own terms, notwithstanding section 128, either providing for easier or more difficult methods of referendum. There is some thought that this would be possible particularly if such provision within the amendment allowing a referendum procedure contrary to s.128 was seen as essential to ultimately achieving Makarrata. 7

4.17 The history and use of s.105A suggest that it may be worth emulating the approach taken in that section as a way of achieving the objectives sought by the proponents of a compact. A provision of the s.105A-type would provide the necessary constitutional status without the same risk of rejection on

grounds of complexity which would accompany an attempt to incorporate a detailed compact within the Constitution. Once that status is achieved, however, there is a flexibility of action in negotiating and drafting the terms of the compact which has much to commend it.

#### Endnotes

- 1. Evidence, pp. 907-8.
- P. Bayne, 'The Makarrata: A Treaty with Black Australia', <u>Legal Service Bulletin</u>, October 1981, incorporated in Evidence, p. 61.
- 3. Evidence, p. 781.
- R.D. Lumb and K.W. Ryan, <u>The Constitution of the Commonwealth of Australia Annotated</u>, Second Edition, 1977, p. 341.
- NSW v. Commonwealth (1932) 46 CLR 155 at 177 (emphasis supplied).
- G. Shaw, 'Makarrata, Problems and Possibilities of Implementation', tabled as Committee Document, 28 June 1982, p. 23.
- 7. ibid.

# AN AGREEMENT WITH LEGISLATIVE BACKING WITHIN THE COMMONWEALTH'S EXISTING CONSTITUTIONAL AUTHORITY

Any legislation passed by the Commonwealth Parliament concerning a compact between the Commonwealth and the Aboriginal people must be within the scope of the powers given to the Parliament by the Commonwealth of Australia Constitution Act. In considering the potential heads of power to enact legislation to give effect to a compact, the Committee examined sections 51(xxvi) the 'races power', 51(xxix) the 'external affairs power' and 51(xxvii) the power to legislate on matters referred by the States to the Commonwealth. Of these, s.51(xxvi) is, in our view, potentially the most useful as the basis for a compact.

## Section 51(xxvi): the 'races power'1

- 5.2 The framers of the Constitution apparently gave little thought to the particular situation and requirements of the Aboriginal people.<sup>2</sup> It has been noted that, as a consequence, the Constitution in its original form was 'highly negative' in its references to them.<sup>3</sup>
- 5.3 A source of the Commonwealth Parliament's power to make laws with respect to the Aboriginal people is s.51(xxvi) of the Constitution:
  - 51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:
  - (xxvi) the people of any race for whom it is deemed necessary to make special laws:

This power, in its original form, specifically excluded the Aboriginal race from its operation. However, this exclusion was deleted by referendum in 1967.

Background to section 51(xxvi)

5.4 Quick and Garran wrote of s.51(xxvi) in its original form:

It enables the Parliament to deal with the people of any alien race after they have entered the Commonwealth; to localize them within defined areas, to restrict their migration, to confine them to certain occupations, or to give them special protection and secure their return after a certain period to the country whence they came. 4

It is clear from the emphasis given by Quick and Garran, and from the cases cited in their analysis, that they considered the primary function of the provision was to empower the Commonwealth to legislate with respect to such influxes of Chinese and Pacific Islanders as had already occurred in Australia's history, and with any future influxes of people of any race which might occur. They concluded that the placitum gave the Commonwealth Parliament quite wide powers, which they described as enabling 'special and discriminating laws relating to the people of any race' to be passed. The provision conferred no legislative power on the Commonwealth with respect to Australian Aborigines, specifically excluding them as they were considered to be a State matter.

5.5 The effect of the 1967 referendum was to amend s.51(xxvi) by deleting the words 'other than the Aboriginal race in any State'. The purpose of this amendment was to give the Commonwealth Parliament the power to legislate with respect to the Aboriginal people, a power which had previously been enjoyed

exclusively by State legislatures. For example, in his second reading speech for the <u>Constitution Alteration (Aboriginals)</u>
<u>Bill</u> 1967, the then Prime Minister, Mr Harold Holt, noted that the effect of omitting the words from the placitum

... will be the removal of the existing restriction on the power of the Commonwealth to make special laws for the people of the if Aboriginal race in any State Parliament considers it necessary. As the Constitution stands at present, Commonwealth has no power, except in Territories, to legislate with respect to people of the Aboriginal race as such. If the words "other than the Aboriginal race in any State" were deleted from section 51(xxvi), the result would be that the Commonwealth Parliament would have vested in concurrent legislative power with respect to Aboriginals as such, they being the people of a race, provided that Parliament deemed it necessary to make special laws for them. It the view of the Government that the National Parliament should have this power.6

5.6 When the amendment proposal was put to the electorate at the referendum, its purpose was clearly indicated:

First, it will remove words from our Constitution that many people think are discriminatory against the Aboriginal people. Second, it will make it possible for the Commonwealth Parliament to make special laws for the people of the Aboriginal race, wherever they may live, if the Parliament considers it necessary. 7

Commentaries on Section 51(xxvi)

5.7 In an opinion on s.51(xxvi) prepared in 1978 for this Committee's Report on Aboriginals and Torres Strait Islanders on Queensland Reserves, Mr Michael Crommelin considered the effect of deleting the express exclusion in 1967 in the following terms: 8

In my view, the effect is no more than to nullify the original result of incorporation of the express exclusion; in other words, the effect is to place the "Aboriginal race" squarely within the ambit of section 51(26).

As a general principle, the High Court does not refer to the Convention Debates or Parliamentary debates in interpreting provisions of the Constitution. Nevertheless, Prime Minister Holt's second reading speech on the Constitution Alteration (Aboriginals) Bill 1967 and the speeches of others participating in the debate leave no doubt that the Commonwealth legislature's intent in proposing the amendment was to gain a plenary legislative power (concurrent with the States) with respect to the Aboriginal race. Lumb and Ryan make it quite clear that the provision confers such a power on the Commonwealth:

This amendment has ended any doubts which may have existed as to the power of the Commonwealth to enact laws for the benefit of the Aboriginals, for example by providing a special system of Aboriginal social services or bringing in resettlement and land-owning schemes for the Aboriginal populations of the States. 10

5.9 The Rt. Hon. E.G. Whitlam, A.C. Q.C. gave an opinion in 1981 of the scope of the Commonwealth Parliament's authority in this area. He said:

After the 1967 referendum the Federal parliament had the spontaneous and unilateral power to pass laws to ratify treaties affecting Aborigines, like ILO Convention number 107.11

5.10 This Committee's earlier consideration of the placitum (in its Report on Aboriginals and Torres Strait Islanders on Oueensland Reserves) concluded that the Commonwealth does have

plenary power, concurrent with the States, with respect to Aborigines and Torres Strait Islanders subject to certain express and implied limitations within the Constitution.12 Examples of express limitations cited by the Committee were freedom of interstate trade and commerce (s.92), freedom of religion (s.116) and freedom from discrimination based on State residence (s.117). The High Court may impose limitations upon broad words of the Constitution by implication. The scope of a general power may be confined in order to give effect to limitations placed upon the scope of a more specific power. An example of this cited by the Committee was that the power to make laws with respect to the people of any race could not be exercised so as to acquire property free of the restrictions imposed by section 51 (xxxi) of the Constitution. 13 This does not amount to a limitation precluding the possibility of the Commonwealth entering into a compact with the Aboriginal people.

5.11 In its 1978 consideration of the scope of the Commonwealth's legislative power with respect to the Aboriginal race, the Committee rejected the view put by the Western Australian Government that the States

... have the primary, general and and in most circumstances, the final responsibility for all people, including Aboriginal people, within their territorial jurisdiction. 14

The Committee agreed that it may be appropriate in some circumstances for the Commonwealth to enter into co-operative arrangements with the States and that the Commonwealth was empowered to do this, 'but the Commonwealth Parliament is in no way precluded from taking unilateral action (with respect to Aborigines) when such action appears warranted.'15

5.12 The operation of s.51(xxvi) has been given detailed consideration by the High Court only in the last two years. The provision had been briefly considered, however, in several contexts. In 1906, when s.51(xxvi) still excluded the Aboriginal race from its operation, in Robtelmes v. Brenan Barton J, in considering whether the Commonwealth had the legislative authority to deport Pacific Island labourers, concluded that it did.

Possibly (by way of) the power in sub-section 26, and I think much more clearly the powers as to immigration and external affairs in paragraphs 27 and 29.16

- 5.13 The placitum was also given oblique consideration by Murphy J in the case of <u>Victoria v. Commonwealth</u> in the context of whether it could be relied upon to support a social welfare plan. He noted that 'legislative power has also been exercised to provide social welfare for Aborigines and other peoples (under s.51(xxvi)).'17
- The placitum arose for consideration by the High Court again in two recent cases, Koowarta v. Bjelke-Petersen and Others (1982) 39 ALR 417 and Commonwealth v. Tasmania (the Tasmanian Dam Case) (not yet reported). In Koowarta the plaintiff, an Aboriginal, brought an action under the Racial Discrimination Act 1975 (Cth) alleging racial discrimination on the part of the Queensland Government by virtue of its refusal to approve the transfer to him and other members of an Aboriginal group of a pastoral lease acquired by the Aboriginal Land Fund Commission on their behalf. The refusal was based on Queensland Government policy which did not view favourably proposals to acquire large areas of additional freehold or leasehold land for development by Aborigines or Aboriginal

groups in isolation. The Court examined the constitutional validity of certain sections of the Racial Discrimination Act and the plaintiff's standing to sue under the Act. Although the case turns on a majority view of the external affairs power (s.51 xxix), it nevertheless contains interesting comments on the scope of the races power. All members of the Court, with the exception of Murphy and Mason JJ, considered the placitum in some detail. Gibbs CJ, with whom Aickin and Wilson JJ agreed, considered the placitum to have a wide meaning, while Stephen J introduced some limitations on the potential scope of the power.

Gibbs CJ affirmed that the early purpose of 5.15 placitum had been to enable the legislature to control administer influxes of foreign racial groups but that, addition, after its amendment in 1967 and 'in its present form', the placitum empowered the Commonwealth legislature to pass laws 'prohibiting discrimination against people of the Aboriginal race by reason of their race.'18 Gibbs CJ then clarified some of the terminology used in placitum (xxvi). For example, the ambit racial groups to which the placitum referred had previously been considered, the only parameter being 'the people of any race.' Gibbs CJ provided a narrower interpretation of the word 'any', stating that it was used in the sense of 'no matter which' and in the context of the placitum did not mean 'all'. He noted that it is not possible to construe par. (xxvi) as if it read simply 'The people of all races.'19 The Chief Justice then explained that the method of identifying those racial groups to which the placitum could be applied is the qualification 'for whom it is deemed necessary to make special laws.'

The Parliament may deem it necessary to make special laws for the people of a particular race, no matter what the race. If the Parliament does deem that necessary, but not otherwise, it can make laws with respect to the people of that race. The opinion of Parliament that it is necessary to make a

special law need not be evidenced by an express declaration to that effect; it may appear from the law itself. However, a law which applies equally to the people of all races is not a special law for the people of any one race. 20

It follows therefore that if the Commonwealth Parliament deems it necessary either by express declaration or by implication, it may make special laws for the Aboriginal people.

5.16 Like Gibbs CJ, Stephen J also concluded that placitum (xxvi) authorises the enactment of 'special' laws. However, his interpretation of a 'special' law differed from that of Gibbs CJ to the extent that he considered there was a requirement that there be in fact a necessity for special action before 'special' laws authorised by the placitum could be enacted.

It cannot be that the grant becomes plenary and unrestricted once a need for special laws is deemed to exist; that need will not open the door to the enactment of other than special laws.

Although it is people of 'any' race that are referred to, I regard the reference to special laws as confining what may be enacted under this paragraph to laws which are of their nature special to the people of a particular race. It must be because of their special needs or because of the special threat or problem which they present that the necessity for the law arises; without this particular necessity, as the occasion for the law, it will not be a special law such as s.51(26) speaks of. No doubt it may happen that two or more races will share particular problems within the Australian community and that this will make necessary the enactment of one law applying equally to those several races; such a law will not necessarily forfeit the character of a law under par. because it legislates for several (26)races.21

5.17 Mr Gary Rumble, a lecturer in Commonwealth constitutional law at the Australian National University, in submissions to the Committee before and after the High Court's decision in <u>Koowarta</u>, concluded that the Commonwealth has sufficient power to enact legislation to carry out the sorts of undertakings likely to be the subject of a compact. In reaching this conclusion, he analysed, among other powers, the potential scope of section 51(xxvi).<sup>22</sup>

5.18 In his second submission to the Committee, in which among other things he discussed the High Court's conclusions on section 51(xxvi) in <u>Koowarta</u>, Mr Rumble noted the wide, though still largely undefined, powers over Aboriginal matters which the Court in that case appears to have guaranteed the Commonwealth Parliament. After quoting from Gibbs CJ's judgment, he commented:

That discussion suggests no significant restraint on the kind of laws that can be enacted under s.5l(xxvi), but it does not say that the power is unlimited.  $^{23}$ 

Later, in a summary of the Court's approach Mr Rumble stated:

Apart from Stephen J (and to a lesser extent Wilson J) the members of the Court in Koowarta did not indicate the limits to the kind of laws that may be enacted under  $\rm s.51(xxvi).^{24}$ 

The limitation expressed by Stephen J was that s.51(xxvi) would only permit the Commonwealth to legislate to deal with an existing special need associated with a race.<sup>25</sup> However, Mr Rumble considered that this limitation may prove to be of little assistance in determining the scope of the power:

This test would be unpredictable in its application and could therefore hinder Makarrata implementation. Large doubt, however, exists as to whether this test will be developed.  $^{26}$ 

- In the <u>Tasmanian Dam Case</u> the High Court was concerned with the validity of Commonwealth legislation based on, among other things, the external affairs and races powers, which sought to make illegal the continued construction of the Gordon-below-Franklin dam by the <u>Tasmanian</u> government. In that case the members of the High Court took a wide view of the scope of the races power. In the event, however, three Justices (Gibbs CJ, Wilson and Dawson JJ) found that the provisions purportedly based on the races power were invalid because they did not constitute special laws for the people of the Aboriginal race but were of the nature of general laws.
- 5.20 Mason J (at p. 121) said that the power under s.51(xxvi) was wide enough to enable the Parliament
  - (a) to regulate and control the people of any race in the event that they constitute a threat or problem to the general community; and
  - (b) to protect the people of a race in the event that there is a need to protect them.

Subsequently, in answer to an argument that, as a subject of the legislative power, the cultural heritage of the people of a race is distinct and divorced from the people of that race so that a power with respect to the latter does not include power with respect to the former, Mason J stated (at p. 122):

The answer is that the cultural heritage of a people is so much of a characteristic or property of the people to whom it belongs that it is inseparably connected with them, so that a legislative power with respect to the people of a race, which confers power to make laws to protect them, necessarily extends to the making of laws protecting their cultural heritage.

This statement clearly has considerable significance in the context of legislation to enact the likely terms of a compact.

## 5.21 Murphy J said (at p. 147):

A broad reading of this power is that it authorizes any law for the benefit, physical and mental, of the people of the race for whom Parliament deems it necessary to pass special laws.

This goes beyond the view taken by Stephen J in <u>Koowarta</u> (to which reference was made at para. 5.16) in that it leaves it to the Parliament to determine whether the necessity for special laws exists, rather than requiring, as Stephen J appeared to do, that the need exists <u>in fact</u>. Stephen J's view was quoted by Mason J in the <u>Tasmanian Dam Case</u> (at p. 121) and must be taken to have his implicit support. Wilson J (at p. 174) and Dawson J (at p. 305) were of the view that it is for the Parliament alone to deem it necessary to make the law, although the Court must still determine whether the law answers the description of a special law.

5.22 Brennan J (at p. 220) inferred from the passage of the 1967 referendum that the primary object of the power under s.51(xxvi) is beneficial. He continued:

The passing of the <u>Racial Discrimination Act</u> manifested the Parliament's intention that the power will hereafter be used only for the purpose of discriminatorily conferring benefits upon the people of a race for whom it is deemed necessary to make special laws. Where Parliament seeks to confer a discriminatory benefit on the people of the Aboriginal race, par. (xxvi) does not place a limitation upon the nature of the benefits which a valid law may confer, and none should be implied.

Continuing his broad interpretation of the power, His Honour stated (at p. 223):

I would not construe par. (xxvi) as requiring the law to be "special" in its terms; it suffices that it is special in its operation.

By way of contrast to the characterisation as general rather than special laws, which Gibbs CJ, Wilson and Dawson JJ placed upon the provisions in question, Brennan J took the following view (at p. 224):

To confine the legislative power conferred by par. (xxvi) so as to preclude it from dealing with situations that are of particular significance to the people of a given race merely because the statute on its face does not reveal its discriminatory operation would be to deny the power the high purpose which the Australian people intended when the people of the Aboriginal race were brought within the scope of its beneficial exercise.

5.23 Deane J said that the words 'people of any race' have a wide and non-technical meaning and that the phrase is apposite to refer both to all Australian Aboriginal people collectively and to any identifiable racial sub-group among them (p. 255). His Honour stated that:

The relationship between the Aboriginal people and the lands which they occupy lies at the heart of traditional Aboriginal culture and traditional Aboriginal life ... one effect of the years since 1788 and of the emergence of Australia as a nation has been that Aboriginal sites which would once have been of particular significance only to the members of a particular tribe are now regarded by those Australian Aboriginals who have moved, or been born away from ancient tribal lands, as part of a general heritage of their race (pp. 256-57).

With this in mind, although a law to protect such sites was in the sense a law for all Australians the fact that its operation was to protect and preserve sites of universal value which are of particular significance to the Aboriginal people made it also a special law for them.

# 5.24 Subsequently, Deane J continued (at p. 258):

The reference to "people of any race" includes all that goes to make up the personality and identity of the people of a race: spirit, belief, knowledge, tradition and cultural and spiritual heritage. A power to legislate "with respect to" the people of a race includes the power to make laws protecting the cultural and spiritual heritage of those people by protecting property which is of particular significance to that spiritual and cultural heritage.

5.25 However, Deane J thought that an acquisition of land by the Commomonwealth would be involved in the provisions seeking the protection and conservation of the Aboriginal sites and that compensation on just terms as required by s.51(xxxi) was not provided. Accordingly, he ruled that the races power was not effectively used in this instance, thereby leading to a majority of the Court (Gibbs CJ, Wilson, Deane and Dawson JJ) rejecting the purported exercise of the power in this particular case. Nevertheless the scope of Deane J's remarks in relation to the races power is very wide and suggests that he also would uphold the kinds of provisions likely to be enacted in pursuit of the terms of a compact. Indeed if the legislation under challenge had contained provisions satisfying the 'just terms' requirement for acquisition, it is likely that a majority of the Court would have upheld the validity of the Act under the 'races' power, as it did under the external affairs and corporations powers.

- 5.26 On the narrowest view of s.51(xxvi) which emerges from these judgments, it would appear that if the Parliament deems that the necessity exists and passes special laws for the benefit of people of the Aboriginal race, such laws will be valid. This amounts to a significant power vested in the Commonwealth Parliament to legislate with respect to the Aboriginal race.
- 5.27 The question is whether this power is sufficiently extensive to authorise legislation for a compact between the Aboriginal people and the Commonwealth. In large measure, the determination of this question will arise in the context of the content of a proposed compact. Nevertheless without pre-determining what such a compact might contain, it is possible to reach conclusions as to whether the general concept of such a compact could be upheld under s.51(xxvi).
- 5.28 The Committee has noted the scope which the provision might offer as a basis for legislation enacting the likely themes of a compact. These could include, for example, laws dealing with the language and culture of Aboriginal communities; laws for the protection of Aboriginal sacred sites and artefacts; laws recognising and giving effect to Aboriginal law; and laws protecting language rights so as to guarantee the assistance of interpreters to Aboriginal people involved with police, the courts or government departments.<sup>27</sup> All such laws would be special laws for the Aboriginal people. Indeed they call to mind a further comment of Brennan J in the Tasmanian Dam Case (at p. 223):

... the historic, religious, spiritual and cultural heritage are acquired and are susceptible to influences for which a law may

provide. The advancement of the people of any race in any of these aspects of their group life falls within the power.

The Committee, fortified by the views of the judges in <u>Koowarta</u> and the <u>Tasmanian Dam Case</u>, is confident that s.51(xxvi) is capable of supporting legislation to carry out the themes of a compact.

5.29 That having been stated, however, it is necessary to point out the obvious political limitation on the use of this power. This arises from the vulnerability of any legislation to substantial amendment or repeal by later Parliaments. Such vulnerability is not, of course, unique to legislation dealing with a compact; it is a risk to which all legislation is subject. Even legislation passed under the general terms of a s.105A-type amendment to the Constitution could later be repealed by the Parliament, but in a political sense there would be some inhibition on the Parliament if it decided to withdraw from the exercise of its undoubted powers, conferred in a special referendum. Nevertheless, given the significance of legislation enacting a compact, exposure to such vulnerability represents a serious draw-back to the use of existing powers as a method of implementation.

## Section 51(xxix): the external affairs power

- 5.30 The source of the Commonwealth's power to make laws with respect to external affairs is as follows:
  - 51. The Parliament shall, subject to the Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:

(xxix) External affairs:

It is well established that this placitum authorises the Commonwealth Parliament to enact legislation covering all matters affecting Australia's relations with other countries.28 The power is wide and in respect of international relations and in practical terms, exclusive affairs it is, Commonwealth.<sup>29</sup> It is not the only expressly mentioned source of Commonwealth legislative power with respect to external affairs, but it is the only one stated in such general terms. 30 The conduct of external affairs is accomplished by executive action and does not require legislative support except for appropriation of money for expenses. Thus the provision is not essential to the conduct of Australia's external affairs by the Commonwealth Government. Section 51(xxix) is, therefore, a source of power to legislate to put into effect arrangements made as part of the conduct of external relations. It has been stated by Professor Howard as to the scope of the provision that it

... enables the Commonwealth to legislate on an <u>indefinite number of subjects</u> not otherwise within its powers provided that it is doing so pursuant to an external affair (emphasis supplied).31

Therein lies the provision's relevance to the matter of a compact between the Aboriginal people and the Commonwealth. Howard notes the possibility that section 51(xxix) is 'a vast potential source of legislative power for the Commonwealth' but that this raises a significant question of the power's extent. 32 (The Commonwealth's otherwise strictly defined authority under the Constitution in general is in marked section 51(xxix) contrast to this interpretation that possibly a very wide ambit.) Is the external affairs power then to be limited in some way, and, if so, what constraints would future High Court interpretations place on the power's scope? Would the scope of the provision encompass authority to legislate for a compact, or would the High Court consider such legislation to be beyond power?

Effect of aboriginal affairs on Australia's external relations

- 5.32 The relevance of section 5l(xxix) lies in the possibility that a compact could be said to relate to Australia's external affairs. If such a connection can be found, then it is possible that legislation to enforce the provisions of a compact could be enacted under the authority of s.51 (xxix).
- 5.33 There are two possible methods whereby the question of a compact could come within the external affairs power. The first could arise if there was shown to be a strong link between the legislation and Australia's relations with other countries. In this way what would otherwise appear to be a matter of internal Australian concern only the condition of the Aboriginal people could very well be regarded by the High Court as a legitimate subject for the enactment of legislation based on the external affairs power.
- 5.34 In his first submission, Mr Rumble suggested that this link could possibly be established by the High Court taking judicial notice of facts demonstrating the relevance of the legislation to Australia's foreign relations. Such facts could include the following:
  - The treatment of indigenous races is a matter of concern to many nations, especially developing nations;
  - Australia's ability to speak with credibility and force on the international issues of South African Apartheid and Civil Rights in USSR is severely undercut by its own record of ill-treatment and neglect of Australian Aborigines;

. The condition of Australian Aborigines is a matter of concern to people around the world (as the recent visit by the World Council of Churches demonstrated). 33

A further consideration could be the attempt by the Aboriginal people in 1982 to effect a boycott of the Brisbane Commonwealth Games by African nations in support of land rights.

5.35 The second means by which compact legislation could come within the orbit of the external affairs power is as a result of Australia's entering into international treaties such as the International Convention on the Elimination of All Forms of Racial Discrimination or ILO Convention 107 relating to the protection of indigenous minorities. As a result of entering into such treaties it is arguable that what would otherwise be a matter of internal concern and one beyond Commonwealth power under the Federal division of powers could be brought within power because, by entering such treaties, the Commonwealth accepts certain international obligations which it can then put into effect by means of legislation based on s. 51(xxix).

5.36 These questions came to be examined recently by the High Court in Koowarta v. Bjelke-Petersen (1982) 39 ALR 417 in which the Court specifically directed its attention to whether legislation relying upon the external affairs power could be used effectively to outlaw discrimination against Aborigines in a matter relating to land. The Court, by a majority of 4 to 3, upheld the validity of the Racial Discrimination Act 1975 as an exercise of the Commonwealth's external affairs power. The fundamental question facing the Court was what effect the fact of Australia's having an international obligation relating to a subject matter within Australia has on the Commonwealth's power under s.51(xxix). Mr Rumble summarised the attitude of members of the Court to this question in the following way:

Mason, Murphy and Brennan JJ answered:

the existence of a treaty (or other international) obligation prima facie
generates correlative legislative power to fulfil the obligation and the existence of such an obligation can therefore convert a subject matter not otherwise an external affair into an external affair.

Gibbs CJ, Stephen, Aickin and Wilson JJ answered:

the existence of a treaty (or other international) obligation does <u>not</u> automatically generate a correlative power;

Gibbs CJ, Aickin and Wilson JJ (and arguably Stephen J) added that:

the fulfilment of international obligations would only come within s.51(xxix) if the subject matter of the obligation was inherently an external affair independently of the obligation.34

5.37 Of the majority, Brennan J took the following broad view:

When a particular subject affects or is likely to affect Australia's relations with other international persons, a law with respect to that subject is a law with respect to external affairs. The effect of the law upon the subject which affects or is likely to affect Australia's relationships provides the connection which the words 'with respect to' require. 35

Having adopted remarks of Stephen J in <u>New South Wales v. The Commonwealth</u> (1975) 135 CLR 337 at 449,450, including a comment that 'conduct on the part of a nation, or its nationals, which affects other nations and its relations with them are external affairs of that nation', Brennan J added:

Today it cannot reasonably be asserted that all aspects of the internal legal order of a nation are incapable of affecting relations between that nation and other nations. No doubt there are questions of degree which require evaluation of international relationships from time to time in order to ascertain whether an aspect of the internal legal order affects or is likely to affect them, but contemporary experience manifests the capacity of the internal affairs of a nation to affect its external relationships. 36

5.38 Stephen J, although not sharing the view of Mason, Murphy and Brennan JJ that the very existence of a treaty (or other international) obligation converted a subject not otherwise an external affair into an external affair, nevertheless took a broad view of the potential scope of the power:

Thus areas of what are of purely domestic concern are steadily contracting and those of international concern are ever expanding. Nevertheless the quality of being of international concern remains, no less than ever, a valid criterion of whether a particular subject-matter forms part of a nation's 'external affairs'. A subject matter of international concern necessarily possesses the capacity to affect a country's relations with other nations and this quality is itself enough to make a subject matter a part of a nation's 'external affairs'.37

In his judgment Stephen J concluded that the Racial Discrimination Act was based on an international treaty or convention that did relate to a matter of international concern and was therefore constitutionally valid. The judgments of Mason and Murphy JJ can be read as according with the view of Brennan J that international concern about a subject matter is sufficient to make that matter an external affair. 38

5.39 The minority judges (Gibbs CJ, with whom Aickin J agreed, and Wilson J) rejected the validity of the Racial Discrimination Act and voiced strong fears that permitting the Commonwealth to enact domestic legislation on the grounds that Australia was a party to an international convention or treaty, and for no other reason, could amount to an unbridled expansion of the Commonwealth's power.

If Parliament is empowered to make laws to carry into effect within Australia any treaty (made) the result will be that the executive can by its own act, determine the scope of Commonwealth power ... It is impossible to envisage any area of power which could not become the subject of Commonwealth legislation if the Commonwealth became a party to an appropriate international agreement.39

A significant consequence of such an expansion of Commonwealth power which could meet resistance from the Court in future is that the expansion would take place at the expense of the States' powers.

There would be no field of power which the Commonwealth could not invade and the federal balance achieved by the Constitution would be entirely destroyed.  $^{40}$ 

- 5.40 The majority of the Court including Stephen Jultimately upheld the validity of the implementation legislation because the elimination of racial discrimination was very much part of Australia's external affairs.
- 5.41 The extent of the external affairs power was again considered by the Court in the <u>Tasmanian Dam Case</u>, as the Commonwealth legislation under challenge sought to rely in part upon an exercise of that power as a means of meeting its obligations as a party to the World Heritage Convention. The

majority (Mason, Murphy, Brennan and Deane JJ) gave a wide interpretation to s.51(xxvi). Their consideration was largely given over to the connection between treaty obligations and the external affairs power. Nevertheless it is possible to draw tentative conclusions about the likely attitude the Court would take about matters of international concern not the subject of a treaty.

5.42 Mason J suggested (at pp. 83-86) that the <u>Koowarta</u> decision could be taken as turning on Stephen J's view of the external affairs power, as it reflected the narrowest expression of it by the majority Justices. On this basis, the case is authority for the proposition that the power authorises a law giving effect to an obligation imposed on Australia by a bona fide international convention or treaty to which Australia is a party, at any rate so long as the subject matter of the convention or treaty is one of international concern, or of concern to the relationship between Australia and the other party or parties. The question which arises then is: What is meant by the requirement that the subject matter of a treaty should be of international concern or of special concern to the relationship between Australia and the other parties?

After considering this question, Mason J concluded (at p. 86):

All this indicates an absence of any acceptable criteria or guidelines by which the Court can determine the "international character" of the subject matter of a treaty or convention. The existence of international character or international concern is established by entry by Australia into the convention or treaty.

5.43 Another member of the majority, Brennan J (at pp. 192-93) examined the judgments in <u>Koowarta</u>, including that of Stephen J, but said he would adhere to his own view in that case ((1982) 56 ALJR 625 at p. 664):

A treaty obligation stamps the subject of the obligation with the character of an external affair unless there is some reason to think that the treaty had been entered into merely to give colour to an attempt to confer legislative power upon the Commonwealth Parliament. Only in such a case is it necessary to look at the subject matter of the treaty, the manner of its formation, the extent of international participation in it and the nature of the obligations it imposes in order to ascertain whether there is an international obligation truly binding on Australia.

On the basis both of this test and of that of Stephen J, His Honour had no difficulty in holding that there was sufficient power to make a law to fulfil the obligation which Australia had undertaken in the World Heritage Convention.

5.44 Murphy J (at pp. 136-37) took a very expansive view of the provision, albeit stating that it was preferable that the circumstances in which a law was authorised by the external affairs power be stated in terms of what was sufficient rather than in exhaustive terms. In his view it was sufficient that the law:

- (a) implements any international law, or
- (b) implements any treaty or convention whether general (multilateral) or particular, or
- (c) implements any recommendation or request of the United Nations Organization or subsidiary organizations such as the World Health Organization, The United Nations Education, Scientific and Cultural Organization, The Food and Agriculture Organization or the International Labour Organization, or
- (d) fosters (or inhibits) relations between Australia or political entities, bodies or persons within Australia and other nation States, entities, groups or persons external to Australia, or

- (e) deals with circumstances or things outside Australia, or
- (f) deals with circumstances or things inside Australia of international concern.

5.45 The fourth member of the majority, Deane J, also expressed a view which went beyond the link with a treaty obligation, harking back perhaps to the sort of 'matter of international concern' alluded to by some members of the majority in Koowarta. His Honour said (at p. 239):

The establishment and protection of the means of conducting international relations, the negotiation, making and honouring observing and carrying into effect) international agreements, and the assertion of rights and the discharge of obligations under both treaties and customary international law lie at the centre of a nation's external affairs and of the power which s.51(xxvi) confers. They do not, however, cover the whole field of "external affairs" or exhaust the subject matter of the legislative power. The full scope of the power is best left for determination on a case by case basis - "by a course of decision which the application of general statements is illustrated by example" (per Dixon J. in Burgess' Case, at p. 669). It is, however, relevant for present purposes to note that the responsible conduct of external affairs in today's world will, on occasion, require observance of the spirit as well as the letter of international agreements, compliance with recommendations of international agencies and pursuit of international objectives which cannot be measured in terms of binding obligation ... Circumstances could well exist in which a law which procured or ensured observance within Australia of the spirit of a treaty with an international compliance recommendation or pursuit of an international objective would properly be characterized as law with respect to external affairs notwithstanding the absence of any potential breach of defined international obligations or of the letter of international law.

These views of Murphy and Deane JJ, taken together with the broad views expressed by the other majority judges in the Tasmanian Dam Case as to the necessary connection between treaty obligations and the law to effect those obligations, suggest a considerable expansion of the area of operation of the external affairs power. Taken in conjunction with the views of Mason and Murphy JJ in Koowarta, that international concern subject is sufficient to bring that matter within the ambit of the external affairs power, it seems likely that the stance of the High Court is such that it may well be sufficient to support a law under s.51(xxix) if it can be shown that the subject matter of the law is a matter of international concern, whether that concern is evidenced by the existence of a treaty to which Australia is a party or by other evidence. Thus, for example, it may be that those arguing the validity of the law would seek to show that the conditio of the Aboriginal people could be shown to be a subject of international concern, likely to affect Australia's relations with other nations. The link could be established as a result of the High Court taking into account either by way of judicial notice (as Mr Rumble suggested - see para 5.34) of certain facts, or by way of evidence led by the Commonwealth. Alternatively, it seems clear that by legislation for a compact to Australia's obligations under such treaties as the International Convention on the Elimination of All Forms of Racial Discrimination or ILO Convention 107, it could be brought within the power of s.51(xxix).

5.47 The Committee, having considered the external affairs and races power, is of the view that, there exists adequate constitutional power to support carefully considered legislation for a compact. That having been stated, however, we must reiterate our concern at the political vulnerability to which any such compact legislation would be subject, due to the possibility of amendment or repeal by subsequent Parliaments.

# Section 51(xxxvii): reference of powers by States

- 5.48 The Commonwealth Parliament has power to enact legislation with respect to matters referred to it by State Parliaments. Section 51 (xxxvii) of the Commonwealth Constitution provides as follows:
  - 51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(xxxvii) Matters referred by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.

This power would operate to enable the States to refer to the Commonwealth their concurrent power with reference to the people of the Aboriginal race thus leaving the field exclusively to the Commonwealth to achieve an agreement affecting all Aboriginal people and Torres Strait Islanders. If it were desired to achieve uniformity, throughout Australia, this technique would require all States to refer power authorising the Commonwealth to legislate for a compact. However, following the inability of all States to agree in recent years to refer family law matters to the Commonwealth, doubts have been expressed about the likelihood of getting all States to agree to such a reference.

5.49 Nevertheless, in the event that the High Court determined that some particular exercise of legislative power purportedly based on the races or external affairs powers was invalid, then a reference of the necessary legislative power could be sought from the States or any one, or some, of them. Section 51(xxxvii) has not been much used because of the difficulties and uncertainties relating to the termination by a State of the reference of power. It is noted, however, that a

Bill for a referendum to alter the Constitution to enable mutual inter-change of powers between the States and Commonwealth is currently before the Parliament. One effect of this constitutional alteration will be to clarify the right of a State to terminate the reference of power. This may make the States more willing to use this type of device in future. However, it will be apparent that this exposes the compact to serious vulnerability as a State could withdraw the reference at any time.

#### Endnotes

- 1. This Committee has previously considered the Commonwealth Parliament's powers to make laws with respect to Aboriginals and Torres Strait Islanders, see Senate Standing Committee on Constitutional and Legal Affairs, Report on Aboriginals and Torres Strait Islanders on Oueensland Reserves, Canberra, AGPS, November, 1978 (Parl. Paper 330/1978).
- Neither Deakin nor any other delegate ever suggested even in passing that there might be some national obligation to Australia's earliest inhabitants.' G. Sawer, 'The Australian Constitution and the Australian Aborigine', (1966) 12 F.L. Rev. p. 17.
- 3. ibid p. 18, note that this article was written before the 1967 amendments to the Constitution. The two references to Aborigines which Sawer considered to be negative were sections 51(26) and 127 both of which were subsequently amended.
- 4. J. Quick, R.R. Garran, <u>The Annotated Constitution of the Australian Commonwealth</u>, London, 1901, p. 622.
- 5. ibid, p. 623.
- Australia, House of Representatives, <u>Debates</u>, 1967, Vol. 56, p. 263.
- 7. Arguments For and Against the Proposed Alteration Together With a Statement Showing the Proposed Alteration, p. 13.
- 8. Report on Aboriginals and Torres Strait Islanders, op. cit., p. 57.
- 9. Barwick CJ stated the risk of using the Convention Debates in Attorney-General for Australia (at the relation of McKinlay) and Others v. Commonwealth of Australia and Others (1975) 7 ALR 593 at 600. An example of the rule that courts will not look at proceedings in Parliament or to Parliamentary Debates as an aid to the interpretation of a statute is South Australian Commissioner for Prices and Consumer Affairs v. Charles Moore (Aust) Ltd (1977) 139 CLR 449.
- 10. R.D. Lumb, K.W. Ryan, <u>The Constitution of Australia</u>, <u>Annotated</u>, 2nd ed., Sydney 1977 p.145.
- 11. Evidence p. 809, <u>Australia's International Obligations on Aborigines</u>, speech by Hon. E.G. Whitlam, A.C., Q.C., University of NSW, 31 October 1981.
- 12. Report on Aboriginals and Torres Strait Islanders on Queensland Reserves, op. cit., p. 3.

- 13. ibid, p. 4.
- 14. ibid, p. 13.
- 15. ibid.
- 16. (1906) 4 CLR 395 at 415.
- 17. (1975) 134 CLR 338 at 419.
- 18. (1981-82) 39 ALR 417 at 429.
- 19. (1981-82) 39 ALR 417 at 429.
- 20. (1981-82) 39 ALR 417 at 429.
- 21. (1981-82) 39 ALR 417 at 447.
- 22. Evidence, pp. 451-513.
- 23. Evidence, p. 499.
- 24. Evidence, p. 508.
- 25. (1981-82) 39 ALR 417 at 447, quoted at p. 86 above.
- 26. Evidence, p. 509.
- 27. Evidence, pp. 464-5.
- 28. R. v. Burgess; Ex Parte Henry (1936) 55 CLR 608.
- 29. Lumb and Ryan, op. cit., p. 151.
- 30. s.51(i) trade and commerce with other countries; 51(x) fisheries in Australian waters beyond terrtorial limits; 51(xxx) relations with islands of the Pacific: C. Howard, Australian Federal Constitutional Law, 2nd ed. Sydney, 1972, p. 442.
- 31. ibid.
- 32. ibid, p. 443.
- 33. Evidence, p. 485.
- 34. Evidence, p. 510.
- 35. <u>Koowarta v. Bjelke-Petersen and Others</u>, per Brennan J (1981-82) 39 ALR 417 at 431.
- 36. ibid, at p. 486.

- 37. ibid, at p.453.
- 38. Evidence, (G. Rumble) p. 512.
- 39. (1981-82) 39 ALR 417 at 438.
- 40. Per Gibbs CJ (1981-82) 39 ALR 417 at 438.

## Chapter 6

# A COMPACT IN THE FORM OF A SIMPLE AGREEMENT OR CONTRACT

## Nature of the proposal

- 6.1 An alternative legal device by which a compact between the Commonwealth and representatives of the Aboriginal people could be given effect is for the parties to put the principles and terms of the compact within a simple agreement or contract. Such a device has been proposed as a means of placing the agreement within the realm of the statutory and common law of contract. In so far as it was desired to enter into an agreement stating certain principles and objections and agreeing to the expenditure of money to undertake them, this could be done without constitutional difficulty. Following the decision in Victoria v. Commonwealth (AAP Case) (1975) 134 CLR 338, s.81 of the Constitution enables the Parliament to appropriate monies for 'the purposes of the Commonwealth' as these are determined by the Parliament and without any necessity to derive support from a head of power under s.51 of the Constitution.
- 6.2 However, if it is desired to create legally enforceable rights and obligations in relation to a contract or agreement, then there are suggestions by the High Court that the capacity to enter into the agreement is limited to what might be achieved under the heads of legislative power under the Constitution. That is, while there is no necessity for statutory authorisation of such a legally enforceable contract, the potential must exist for such statutory backing. As the Committee has concluded in

Chapter 5 that constitutional power exists to legislate with respect to an agreement or compact, then it would seem that any executive contract covering the same field could also be upheld.

6.3 The Committee's attention was drawn to the treaties concluded by the British Government with the United States Indians and the Canadian Indians (see paragraphs 3.51-3.65 above) as examples of such an arrangement. As discussed at paragraphs 3.67-3.69 above, it is clear that the contemporary colonial attitude and subsequent judicial interpretations have regarded these agreements not as international law treaties but as agreements which have been enforced at law with varying degrees of success by the parties to them.

# Advantages of the contract form

6.4 Some potential advantages in placing the proposed compact in contractual form were suggested to the Committee. The form of a contract would permit the inclusion of any and every aspect of the compact in written form, no matter how long the agreement was, whereas there would be practical constraints on the size of any agreement which was intended to be included in the Constitution. Furthermore, a contract is recognised and enforceable at law. A contract between the Australian Aborigines and the Commonwealth could specify who (e.g. the High Court) would supervise the execution of the contract and adjudicate on any disputes which arose out of it. The law of contract also provides for a wide range of remedies, such as specific performance and damages, in the event of any breach. In the case of an agreement between Aborigines and the Commonwealth, it has been suggested that perhaps the most significant advantage of employing the contract form is that the signing of a contract could provide a formal occasion at which representatives of the two parties assert their public commitment to carrying out the matters and principles stated in the contract.<sup>2</sup> Nevertheless, it should be noted that this formality could attach to the signing of an agreement in whatever form.

## Disadvantages of the contract form

- disadvantages brought to the Committee's attention which, in the opinion of witnesses appearing before the Committee, weigh heavily against using the contract form. These include the fact that the Commonwealth Government would be one of the parties to the proposed contract and it cannot bind its own and successive governments' policy-making function by any means, including a contract. A contract, moreover, is suited more to a strictly defined commercial agreement; it is inappropriate as a means of implementing a general and policy-oriented agreement.
- 6.6 A further disadvantage which has been suggested is that the enforcement of such a contract, despite the nomination of an would adjudicator, prove contentious and difficult. Establishment of the breach itself would be problematic. Finally, in the event that a breach was proved, finding an appropriate remedy, whether specific performance or damages (how would they be assessed?) would also prove very difficult.
- precedents in Australian history 6.7 There are contracts between European settlers or explorers and Aborigines. In 1835 John Batman concluded an agreement with the Aboriginal tribes of the Port Phillip area. He made gifts to the Aborigines in return for obtaining land for his pastoral enterprises and for 'recognising' land rights of the tribes in the area. This subsequently officially repudiated by Governor 'treaty' was Bourke. More recently commercial contracts have been made between Aborigines and mining companies for the development of natural resources and the establishment of mining facilities on Aboriginal land. Examples of these contracts are the Ranger and Jabiluka uranium agreements.

- The Ranger Uranium Agreement, for example, sets out the terms and conditions agreed between the mining companies, the Commonwealth Government and the Northern Land (representing the traditional Aboriginal owners of the land to be mined), for the mining of uranium at the Ranger Project Area located on Aboriginal land in the Northern Territory. Agreement is a very detailed contract, covering aspects such as payments and royalties, mining operations, access to the site, environmental protection and the rights of traditional owners. It also includes less tangible principles such as respect for Aboriginal sacred sites and a requirement for the non-Aboriginal workforce at the mine to learn about Aboriginal culture. It comprises 590 clauses set out over 81 pages, 2 schedules, 4 related annexures and a lease with a separate agreement relating to the Kakadu National Park. 5 The Agreement has been described as complex, technical, confusing and contentious.6 It difficult for a trained lawyer to come to terms with the Ranger Agreement documents, let alone traditional Aboriginals with little or no grasp of the English language. As yet the Agreement has not been translated into Aboriginal languages and, indeed, in view of the cultural gap between the parties, translation may prove to be impossible. These factors, together with the contention surrounding the manner in which the Aboriginals' acceptance and signing of the Agreement were obtained, make the Ranger Agreement an inappropriate model on which to base a compact between the Aboriginal people and the Commonwealth which, it is hoped, will form the basis of future harmony between the parties. The Agreement also serves to indicate some of the practical difficulties of the contract form as a vehicle for implementing a compact.
- 6.9 The nature of these difficulties is such as to make a simple agreement an unsatisfactory method of implementing a compact. More importantly, however, a simple agreement would not have the necessary legal security which ought to attach to a national compact between the Aboriginal peoples and the Commonwealth of Australia.

#### Endnotes

- 1. Evidence, p. 775.
- See, for example, P. Bayne, 'The Makarrata: A treaty with Black Australia', <u>Legal Service Bulletin</u>, October 1981, p. 232, incorporated in Evidence, p. 561.
- 3. National Aboriginal Conference Submission, incorporated in Evidence, p. 630; Professor G. Nettheim, Submission on behalf of International Commission of Jurists (Aust. Section), incorporated in Evidence, p. 905; P. Bayne, ibid
- 4. Ansett Transport Industries (Operations) Pty. Ltd. v. Commonwealth of Australia and Others (1977-78) 17 ALR 513, South Australia v. Commonwealth (1962-63) 108 CLR 130.
- Ranger Uranium Project, Agreement Under Section 44 of the <u>Aboriginal Land Rights (Northern Territory) Act</u> 1976, between the Commonwealth of Australia and the Northern Land Council, 3 November 1978.
- 6. Felix, 'From Glass Beads to Gold Pens', 3 <u>Legal Service</u>
  <u>Bulletin</u> 225, December 1978.

#### CONCLUSION

- B.4 Having considered the various legal options available for the implementation of a compact, the Committee is of the view that the preferable course is the insertion within the Constitution of an enabling power similar to s.105A. This option, which was also preferred by a significant number of witnesses, 1 has a twofold advantage.
- B.5 First and by no means insignificant is the symbolic value of the necessary referendum process to insert the provision in the Constitution, whereby the non-Aboriginal community would be given the opportunity to recognise the failings of the past 200 years and to acknowledge their commitment to a new beginning in relations between themselves and the descendants of the nation's original inhabitants. The necessary educative process preceding such a referendum would be an important part of the longer process of reconciliation symbolised by the passage of the referendum.
- B.6 The second advantage is the flexibility it provides to carry out legislative and executive action pursuant to the enabling power, which would be lacking in the other option for constitutional amendment: insertion of a final and complete agreement within the Constitution. Under the preferred option there is created a specified head of power within certain broad parameters to be followed by detailed legislation.
- B.7 We have discussed in detail earlier in this Part the advantages and disadvantages or in the case of the international treaty option, the unreality of the other suggested options. Certainly it seems to the Committee that there is much to be said for the possibility of enacting legislation pursuant to the Commonwealth's existing constitutional authority, subject only to the danger of

amendment or repeal by subsequent Parliaments. If the Committee's preferred option of the insertion of an enabling provision within the Constitution is not pursued or, if pursued, fails, then there is nothing to prevent the adoption of this latter course as an alternative.

B.8 We recognise the possibility that legislation to implement programs that may have been considered apposite to be included in a compact may be enacted before the conclusion of a formal compact. This would not necessarily preclude the conclusion of a compact carrying the symbolic significance to which we have referred.

## RECOMMENDATION:

B.9 The Government should, in consultation with the Aboriginal people, give consideration, as the preferred method of legal implementation of a compact, to the insertion within the Constitution of a provision along the lines of section 105A, which would confer a broad power on the Commonwealth to enter into a compact with representatives of the Aboriginal people. Such a provision would contain a non-exclusive list of those matters which would form an important part of the terms of the compact, expressing in broad language the types of subjects to be dealt with.

# Endnote

 B.A. Keon-Cohen, Evidence, p. 729, Professor G. Nettheim, Evidence, p. 781, Dr H.C. Coombs, Evidence pp. 1107-08.

# PART C

# FURTHER ISSUES INVOLVED IN ANY IMPLEMENTATION DECISION

#### INTRODUCTION

- C.1 In this Part, the Committee examines issues (other than the strictly legal issues canvassed in Chapters 3-6 above), which will require consideration by the parties during the negotiation and implementation stages of a compact. In Chapter 7 we discuss the objectives of a compact, because it became clear to us during the inquiry that the compact proposal must compete with many other objectives which the Aboriginal and Torres Strait Island communities seek to attain. At the same time, it is useful for the non-Aboriginal community to assess the purpose of a compact from its own perspective.
- C.2 The question of who should be the parties to a compact is a significant issue which emerged from the Committee's evidence. While it is apparent that the Commonwealth is the appropriate party to represent the non-Aboriginal community, the issue of who should represent the Aboriginal community is not so clear and was raised frequently during the hearings. Chapter 8 examines this question and draws some conclusions.
- C.3 It emerged during the Committee's inquiry that the idea of a compact is not well understood in either community. It will be a necessary precondition for the successful conclusion of a compact that there be dissemination of further information to enable a full understanding of the compact idea. In Chapter 9, the Committee discusses ways in which this could be done.
- C.4 A further significant issue is that of the timetable for negotiating and implementing a compact. It has been suggested, for example, that 1988 is a possible date for concluding the compact. In Chapter 10 the Committee discusses problems inherent in this timetable.

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## Chapter 7

#### **OBJECTIVES**

- As part of the process of deciding whether a compact is a worthwhile goal an attempt should be made to determine its purpose; that is, to establish what expectations the prospective parties to a compact would place upon its achievement. Putting it another way: what are the objectives of the parties in working towards the achievement of a compact? A related question is that of the priority to be given to the conclusion of a compact when set against other pressing goals of the Aboriginal community.
- 7.2 Indeed this question of competing priorities is one which arose frequently in evidence before the Committee. We are concerned that the movement for a compact be a true expression of the desire of Aboriginal peoples throughout Australia and not a concept imposed upon them, or forcing the resolution of their many demands into a single political concept. There can be no doubt that many of the specific objectives which the proponents of a compact see as being part of its terms are also high priorities among other Aborigines, both those who are unfamiliar with the concept of a compact and those who, although aware of it, do not strongly support it.
- 7.3 Thus, for example, the Committee commonly took evidence of Aboriginal demands for recognition of their prior ownership of the Australian continent and, as a necessary consequence of that, restoration of land or compensation for land lost. The following extract from the summary of evidence at Fitzroy Crossing is typical of the attitude of many Aboriginal communities we visited:

Dick Skinner [Chairman of the Yungngora Community Incorporated] said that many people do not know what the treaty means. He had tried to tell people in the Fitzroy area what it means. Mr Skinner said that the main problem was land. White people took the land from the Aboriginal people. He said that it should be given back. Aboriginal people were sitting on their land but it was run by somebody else. He said the Federal Government should recognise Aborigines as owners of the land through federal laws. Mr Skinner said that land was the most important thing to people. He said that the Lands Department should give the land back to the Aborigines.

Mr Skinner said that the first thing to look at was the land. He said that the Aboriginal law was there before the white law. The land was taken away from the Aboriginal people and was not given back. The Aborigines did not get any compensation. At the moment Aboriginal people have no right to their own land.

... Senator Ryan asked whether the Aborigines would like to settle the land rights question before dealing with the agreement. Jimmy Bieundurry said that people did not want to wait six years for land. That would be too long. People started to argue about land in Western Australia four years ago. They do not want to wait any more years. They want land rights now. He said that it was the right time to talk about land rights. He said that they were equally important to people in the Kimberleys as the treaty. Mr Bieundurry said that people would not mind waiting for another six years for the treaty but that was different from the land rights issue.1

7.4 Another high priority item among Aboriginal communities is an adequate standard of housing and health and welfare facilities, with the right to operate such services for themselves. We heard frequently in evidence that the need for recognition of Aboriginal culture and traditional law was also a priority. Mr Vincent Forrester, an NAC member from Central Australia, put this view to the Committee in the following terms:

I have been going around communities in the southern part of the Territory to talk to people on Makarrata. So many things came up. To quote one fellow, he said: 'I want to be free like my grandfather and therefore if we want to be free like our grandfathers we have to get rid of the assimilation policy. We have to get rid of all those things which are detrimental to Aboriginal culture and ways by getting back all our traditions and protecting our sacred sites'. A lot of wisdom was spoken in those couple of words ...2

7.5 All these matters are contemplated by proponents of a compact as being contained within its terms. Yet it was put to us on several occasions that the long and complex process of negotiating a compact would be a critical and unwarranted diversion from the urgent daily tasks facing Aboriginal organisations in meeting the immediate concerns of the people for whom they work. This case was put most forcefully on behalf of Central Australian Aboriginal organisations at our hearings in Alice Springs:

We have many urgent problems facing our people and the organisations that support them. Our children die more frequently than life expectancy is less than yours, our yours, a higher percentage of our people are in gaol than yours. We have a lower income and more people unemployed than you. We have to meet racism and disadvantage, often hostile police and other threats to our people. We have limited time, energy and resources and we must allocate them carefully and most effectively. To divert our efforts from our daily, local struggles to participate in the formation of a Makarrata or treaty would require a high level of confidence on our part; an assurance that such an exercise was going to result in something worthwhile - a meaningful advance of Aboriginal people towards self-management of our own affairs.

Nothing in the current proposals for the Makarrata or treaty has given us reasons to have that confidence. We will continue to devote our energy, through our land councils, organisations and federations to counter the effects of miners, pastoralists, the courts, local town councils and State and Commonwealth governments who seek to undermine our people. 3

7.6 The Committee accepts the force of these arguments and notes that in its travels it found that many communities and most Aboriginal organisations were indeed pre-occupied with solving immediate problems and either expressed the view that these took clear priority over pursuit of a treaty or, because of the pressing nature of their more immediate problems, they had given no thought to the compact at all. In some communities it was apparent to the Committee that the concept had not yet been heard of. For example the Reverend Jim Downing, Co-ordinator of Community Development with Aboriginal Advisory and Development Services in the Northern Territory advised the Committee in evidence:

I would say that the people here, and especially the tribal people, do not know anything about the treaty. $^4$ 

The Committee sympathises with the view that these organisations, as currently funded and staffed, cannot afford to divert the time and resources necessary for the processes of education, consultation and negotiation which would be involved in the run-up to the finalising of a compact. Such a diversion would be at the cost of their vital role in attempting to raise the basic living standards of the Aboriginal people.

7.7 The issue therefore becomes whether, in the light of this reality, a comprehensive compact ought to be pursued at all and, if so, as an immediate goal, an ultimate goal or contemporareously with the continuing movement towards such goals as land rights and improved health and general living standards.

- 7.8 In its second appearance before us the National Aboriginal Conference appeared to be moving towards the position that negotiation of a compact was to be regarded as one of several contemporaneous goals. In response to a question of the priority to be given between negotiation of a Makarrata and the achievement of land rights, this view was put by Mr Rob Riley, Deputy Chairman:
  - ... it means that land rights is a short term goal, it is something that is achieveable; it is something that is attractive; it is something that is a very real need; and it is an integral part of the Makarrata treaty. Makarrata is virtually the long term goal. It is something that we have to work upon, that we have to develop as a basis ... for incorporating all the needs of the Aboriginal community right throughout Australia ... If anything, land rights might be emphasised as of being a major concern that has to be addressed immediately and Makarrata is something that continues to develop. 5
- 7.9 It appears to the Committee, upon a consideration of the views put to it, that the preferable objective is to work towards a compact contemporareously with the resolution of specific issues. Such a compact would go beyond simply being the sum total of a 'shopping list' of demands for compensation, in one form or another, for the injury done to the Aboriginal people since the time of European settlement. It would be the formal symbol, denoting the achievement of a sound footing in Aboriginal and non-Aboriginal the relationship between Australians. It would witness the establishment of a totally new framework within which this relationship would in future be conducted. This relationship would be marked by acts of good faith in relation to specific matters such as Aboriginal claims to land rights, education, housing, health and legal aid, all of which (including those matters in which progress has already been made) would be incorporated within the compact. The compact

would be a recognition that the Aboriginal people have a legitimate right to such claims, not as a disadvantaged group within the Australian community, but as recognised prior owners of the Australian continent. In accordance with this recognition, certain consequences would be seen to flow - set out in the terms granting land rights, compensation and other rights to the descendants of those original owners of the land.

- 7.10 In the broader context it is useful to set down the underlying objectives which, it seems to the Committee, form the basis of the concept of a compact. With regard to Aborigines and Torres Strait Islanders, their aims can be ascertained relatively easily, as they were consistently raised during the inquiry in submissions, public hearings and discussions. They include:
- (a) Recognition of Aborigines and Torres Strait Islanders as separate and distinct peoples with their own cultural identity and heritage;
  - (b) recognition that they were the prior owners of this country;
  - (c) the achievement of justice and equality, and the restoration of dignity to a people who have been progressively annihilated, deprived and dispossessed since 1788;
  - (d) the achievement of self-determination;
  - (e) reparation and compensation for past injustices including the restoration of land and compensation for loss of land unable to be restored;
  - (f) restoration and protection of sacred sites and of items of religious or cultural significance; and

- (g) the right to adequate housing, a reasonable standard of education and an adequate level of health care, commensurate with the rest of the Australian community.
- 7.11 As for the aims of the non-Aboriginal community they could be said to include at least the following:
  - (a) Recognition on the part of non-Aboriginal Australians of the grave injustice which has been perpetrated against Aboriginal people since the beginning of European settlement and of the consequent need to remedy the effects of that injustice;
  - (b) the promotion of social harmony and stability within Australia; and
  - (c) the improvement of Australia's standing among other nations in respect of the treatment accorded to its indigenous inhabitants.
- 7.12 The emphasis given to each of these objectives varied according to the organisation or community and the geographic area concerned. Nevertheless their essence can be simply stated: proponents of the concept of a compact consider that the current relationship between the Aboriginal and Torres Strait Island community and the rest of the Australian community is inequitable, unjust and immoral. Accordingly, they seek a fundamental re-appraisal and re-ordering of this relationship, not only to atone for the past but to establish a firm foundation for the future.

# Endnotes

- 1. Evidence, p. 386; p. 388.
- 2. Evidence, p. 274.
- 3. Evidence, pp. 251-52.
- 4. Evidence, p. 86.
- 5. Evidence, p. 1144.

## Chapter 8

#### REPRESENTATION OF THE PARTIES TO A COMPACT

- 8.1 Throughout the Report, reference has been made to Aboriginal Australians and the Commonwealth as the two prospective parties to any compact which might be made. The Comittee considers that it is necessary to canvass the definition of these two parties, how they should be represented during the stages of negotiation and final settlement, and by what means each party could adopt, ratify or accept a compact.
- 8.2 The conclusion of such a compact would be an event of major significance in Australia's history, as a definitive and symbolic statement of the relations between the two parties. It is therefore important that each party to the compact fulfils the following essential criteria. First, each signatory's acceptance of the compact must be the legitimate and representative act of the community concerned. It follows that the legitimacy and representative character of each signatory must also be recognised and accepted by the other party.
- 8.3 As a second criterion, flowing from the first, it is important that each signatory has the capacity and authority to bind its respective party to a lasting future observance of the terms of the compact. Equally it is essential that each signatory be clearly perceived to be independent of the other party to the compact.
- 8.4 The question of who should be the representatives of the Aboriginal and non-Aboriginal communities in a compact between them, especially with regard to the negotiating and decision-making process, is largely unresolved, and we now turn to a consideration of this issue.

### Non-Aboriginal representation

- 8.5 The Committee sees the negotiation of a compact with Aboriginal Australians to be a national rather than a State responsibility. Since the 1967 referendum, responsibility for Aboriginal matters has been viewed as a Commonwealth matter (see para 5.5 above). Moreover, preliminary discussions and negotiations about a compact have already been conducted at Commonwealth level and it is appropriate that this arrangement should continue and, in fact, be strengthened.
- 8.6 The Committee also considers that it is only by the Commonwealth representing the national, as opposed to a State or local, interest in dealing with the Aboriginal people on the matter of a compact that a conformity and consistency in the treatment of Aboriginal people throughout the nation will be possible.
- 8.7 The Commonwealth of Australia is the legitimate representative of the Australian community as a whole. It therefore holds all necessary authority to conduct, on behalf of the Australian people, any negotiations and conclude any agreements, such as alliances, treaties, trade agreements and contracts to which the nation as a whole is party. The people of the Commonwealth, including Aboriginal Australians, choose their parliamentary representatives who determine the direction of Commonwealth policies and actions. An apparent anomaly is immediately evident in that this means the Aboriginal people are represented within the very body with which they are to make a compact.
- 8.8 This is not, however, a substational problem and was quite readily explained by Mr Rumble in his submission to the Committee. He said

At first it may seem incongruous that the Aboriginal people should be represented in the very body - the Commonwealth - with which they are to make a compact. Our society is well used, however, to smaller communities being at once within and separate from, the larger community. Individuals may be trade unionists, members of employer businessmen etc. (compare the Two Airlines experience) dealing with the Commonwealth and still be part of the Commonwealth of people joined by the Constitution. The Founding Fathers saw no great difficulty in having a Commonwealth which might deal with, separate entities, the very States which were represented in its own Senate. (Indeed, numerically, the claim of the Aboriginal people to recognition as a separate political entity is comparable to that of Tasmania's people.)

Thus the fact of the inclusion of the Aboriginal people within the people of the Commonwealth is quite compatible with the concept of a compact between the two peoples.1

- 8.9 Without being specific as to which particular agent of the Commonwealth would be appropriate or acceptable as the signatory to the compact, the National Aboriginal Conference (NAC) has agreed that the Commonwealth of Australia should be the representative of non-Aboriginal Australians.<sup>2</sup> The NAC has also made it quite clear that it does not wish to deal with State Governments on this matter of a compact and will only deal directly with the Federal Government.<sup>3</sup> The Aboriginal Treaty Committee considered, also without being specific that the Commonwealth would be the appropriate party to represent the non-Aboriginal community in the compact. This suggestion was contained in a draft resolution for the consideration of members of both Houses of the Parliament of the Commonwealth as follows:
  - 1. The Commonwealth should invite the Aboriginal people of Australia to negotiate a Treaty with the Commonwealth of Australia.  $^4$

- 8.10 The agents of the Commonwealth who could possibly be a signatory to the compact include the Governor-General, the Prime Minister or a particular Minister. The choice would depend upon political considerations, the chief one of which would be to indicate the importance which the Commonwealth attached to the compact with the Aboriginal people.
- 8.11 The Ranger Uranium Agreement and the Kakadu National Park agreement provide examples of who has represented the Commonwealth in its dealings with Aboriginals. For example, the Government's Deed<sup>5</sup> for the Ranger uranium project embodies the Commonwealth's and the Northern Land Council's wish to enter into an agreement. The Deed was signed, sealed and delivered for and on behalf of the Commonwealth of Australia by the Hon R.I. Viner MP, Minister of State for Aboriginal Affairs. The Aboriginal party was represented by J.G. Yunupingu, Chairman of the Northern Land Council, and the Common Seal of the Council was affixed to the Deed.
- 8.12 In the Agreement between the Northern Land Council and the National Parks and Wildlife Service to establish the Kakadu National Park, the Governor-General, pursuant to Commonwealth legislation, executed deeds of grant of an estate in fee simple in the land to the Kakadu Aboriginal Land Trust. This execution was recognised by agreement between the Chairman of the Northern Land Council, J.G. Yunupingu, for the Northern Land Council, and by the Director of the National Parks and Wildlife Service, Mr J.D.Ovington, countersigned for the Commonwealth of Australia by the Hon R.I. Viner MP, Minister of State for Aboriginal Affairs.
- 8.13 In each instance, the Commonwealth was bound by the signature of its Minister of State. This was the conclusion of a long process of negotiation which had been conducted for the Commonwealth's part by officers of its Departments of State, acting at the direction of the relevant Ministers. The Committee

considers that such a process is an appropriate model for the preliminary negotiation of a compact. The relevant Commonwealth Departments would be the Department of Aboriginal Affairs in conjunction with the Department of Prime Minister and Cabinet. As an alternative procedure, it might be considered appropriate for the Commonwealth to establish a commission responsibility for conducting preliminary negotiations for a compact. Whatever body is chosen to undertake the negotiations on behalf of the Commonwealth, the Department of the Prime Minister and Cabinet ought to undertake the conclusion of the matter on behalf of the Government. Because of the significance of the compact, the Committee believes that the appropriate person to sign it on behalf of the Commonwealth is the Prime Minister. This could be done after the Executive Council authorised the terms of the compact and also gave the necessary authority for the Prime Minister to sign it on Commonwealth's behalf.

- 8.14 In Part B above, the Committee discussed and endorsed the option of a constitutional amendment providing the Commonwealth with a broad enabling power to enter agreements with Aboriginal people and Torres Strait Islanders (similar to section 105A of the Constitution) as a legal means of implementing a compact. The enactment under this power of any proposed legislation for matters likely to be the subject of a compact would amount to parliamentary ratification of those elements of the compact.
- 8.15 Dr Coombs in his evidence before the Committee also considered the matter of parliamentary ratification of a compact between the Commonwealth and Aboriginal people. In viewing the compact as a matter governing the long-term relations between the parties, Dr Coombs suggested that the compact could be removed from a political association with a particular executive by having it ratified by the Commonwealth Parliament. The Committee considers that such a ratification would provide a

valuable indication of the Commonwealth's good faith towards the compact. It would provide an opportunity for the political will of the nation as a whole to express its endorsement of the compact. In addition, the compact would not be identified with any particular executive, thereby averting the possibility that a subsequent executive may not wish to uphold the Commonwealth's obligations arising from the compact.

# Aboriginal representation

At present, the Aboriginal community in Australia lacks a universally accepted representative political institution. It would appear that the adoption of Western political representative methods and institutions by the Aboriginal people is in a formative stage, and it would be a Eurocentric error, reminiscent of those outlined in Chapter 3, to treat one elected body as the sole representative voice of the Aboriginal and Torres Strait Islander communities. The National Aboriginal Consultative Committee, established only in 1973, was the first body formed for the purpose of representing Aborigines politically on an Australia-wide basis with elected members. This body evolved into the National Aboriginal Conference (NAC) which is intended to represent Aboriginal people in their dealings with the Commonwealth Government.

8.17 The structure, composition, responsibilities and funding of the NAC may in turn be further refined in the future in accordance with evolving Aboriginal opinion as to what is an appropriate representative body for Aboriginal Australians. Because of this, and in the interests of representing and reaching the widest possible range of Aboriginal society, the Committee sees much merit in evidence it heard that the various Aboriginal agencies such as the land councils, legal, health and housing services all have a part to play in collecting and representing the views of Aboriginal Australians during the negotiation of the terms of the compact. Take, for example, the evidence given by Mr Paul Coe:

CHAIRMAN - How do you see the negotiations (for a compact) going on then? Do you see some other organisation needing to be formed?

Mr Coe - No. I see the NAC as being a body with a large say in negotiations; I see the combined legal services having a large say; I see the combined medical services having a large say; and I see organisations which are not aligned and which are not a party to these, or even various communities which are not a party to these, having a say. 7

As we will indicate shortly, such a wide method of representation will also be essential in the process of disseminating the concept of a compact.

8.18 The NAC was emphatic in its view that it should represent Aboriginal Australia in any agreement executed with the Commonwealth and, further, that it was the most appropriate body to handle the necessary consultation and negotiation with the Aboriginal people. 8 In the words of Mr Rob Riley, Deputy Chairman of the NAC:

The representatives of the NAC who form the national body are probably in the best position to be able to provide some degree of emphasis as far as Makarrata is concerned. But because we are an elected body and because we assume the role of advising the Federal Minister of Aboriginal Affairs we think we would be probably the most likely people to be able to put forward a view in respect to Makarrata. Our obligation is then to diversify that and take it back out to the Aboriginal community so that we involve community-based organisations. They are the obligations we have upon us as NAC members and the Conference has upon it as a national body. There has to be that sort of starting point and that is the position I think - my own personal view - the Conference has to take upon itself. It establishes the initiative, then the initiative is developed and then incorporated through consulting

other groups. In that sense the NAC becomes the political lobby group and it facilitates the political needs of the Aboriginal community.  $^9$ 

In evidence before the Committee, the Makarrata Sub-committee of the NAC stressed the point that the NAC is a democratically elected body and that in the last election 38% of Aborigines and Torres Strait Islanders voted throughout Australia. 10 The Sub-committee was equally certain that other Aboriginal organisations would be quite unsuitable for the tasks associated with negotating and concluding a compact.

8.19 The Aboriginal community, however, is by no means unanomous in the view that the NAC is the most appropriate body. For example, the Aboriginal Legal Service (NSW) considered that the NAC should not be the sole negotiating body, nor should it have an exclusive right to consult with Aboriginal communities or to collate and disseminate relevant information concerning a compact. It considered that the NAC was merely one of negotiating bodies along with the combined land councils and the combined Aboriginal legal services as well as organisations and communities which are not aligned and which are not a party to these groups. 11 Although the Chairman of the NSW Aboriginal Legal Service, Mr Coe, acknowledged that the NAC was an elected body with a mandate to determine certain matters, he considered that this mandate was limited and did not extend negotiating of a compact. 12 However, the Legal Service was of the opinion that the NAC was the most appropriate Aboriginal co-ordinating body to set the process for negotiations motion<sup>13</sup> and requested that this Committee recommend to the Commonwealth Government that substantial funds be made available to the NAC to allow continuing research into the feasibility of a compact.14

8.20 The views of the Aboriginal Treaty Committee (ATC) on this question were not markedly different from those of the Aboriginal Legal Service. The ATC emphasised the need for appropriate administrative structures to be developed for the negotiating process. Professor Rowley, Deputy Chairman of the ATC, referred to the fact that there was, in a sense, a gap between the NAC and grass-roots Aboriginal communities and organisations, and that a Woodward-type organisation (referring to the land councils), which would be connected in some way to a national organisation, might generally be accepted by the Commonwealth as a middle administrative organisation to fill this gap.

Administratively we are in an unco-ordinated mess in Aboriginal affairs, partly because of differences between Commonwealth and State, and this chaotic mess is just the reverse of what we need to get some sort of logical process of continuing negotiation between Aborigines and other Australians. I think we could benefit by extending the principles and institutions of the Woodward report - the report of the Aboriginal Land Rights report of the Aboriginal Land Rights Commission - to all Australia. There should be a series of institutions which provide then for continuous negotiation as between corporate bodies. It does seem strange that the central Aboriginal organisation, the NAC, is not a corporate body, for instance, with the kind of legal advice and at least powers existing in the case of the land councils. structures Agreement institutional on involves the land councils, Aboriginal corporations etcetera.15

In commenting on Professor Rowley's evidence, Dr Coombs, Chairman of the ATC, made it quite clear that there was no implied criticism of the NAC, and that any gap that existed between the NAC and grass-roots organisations was not necessarily through any fault of the NAC:

Professor Rowley was emphasising the fact that he believed that there was, in a sense, a gap between the NAC and the grass roots Aboriginal communities and organisations. This was not necessarily through any fault of the NAC. He thought that if there were to be any negotiations it should not be only the NAC which should be involved but certainly some other Aboriginal organisations. In particular the land councils should in some way be involved. 16

- Despite these differences, there appears to have been 8.21 some common ground between the ATC and the NAC on this issue. On 22 September 1980. Dr Coombs wrote to the Chairman of the NAC suggesting a procedure by which negotiation could take place. In Coombs envisaged the essence. Dr Commonwealth Government authorising the NAC to call convention of а Aboriginal representatives chosen by communities, political organisations and corporate bodies. This convention would choose who were to negotiate on behalf of the Aboriginal people, prepare instructions for their negotiators about content, and choose professional advisers to assist the negotiators. Provisional decisions would then be referred back to the constituent communities and organisations for explanation, discussion and, if necessary, amendment before a final decision was made. 17 The opportunity would also exist for the convention's role to be further enhanced by making it the body which formally accepted and executed a draft compact on behalf of the Aboriginal people, assuming that agreement was reached and that the Aborigines did in fact approve. The substance of this letter, including other matters dealing with the initial consultative process, was in a position paper and put forward for incorporated consideration by the NAC to the World Council of Indigenous Peoples in 1981.18
- 8.22 This paper listed six possible negotiating steps, including the calling of a convention, with the NAC acting as the co-ordinating body.  $^{19}$  These steps are based upon the

assumption that the NAC is the only national Aboriginal organisation which is likely to have the organising capacity and necessary resources to set the process of negotiation in motion. Both the ATC and the Aboriginal Legal Service (NSW) agree with this view, but both acknowledge that with its present pattern of resources the NAC would be quite unable to effectively carry out this program. In addition, the ATC has doubts as to whether the Aboriginal communities of which it was aware would be wholly satisfied with having the NAC serving alone as representatives in the negotiating process. Dr Coombs expressed his personal opinion that the land councils were closer to the traditional sources of Aboriginal authority, and closer to Aboriginal people in the communities and groups where they live than the NAC. For this reason he considered that the NAC should establish some kind of consultative agency to advise it, which would incorporate at least both the official unofficial land councils.

8.23 One of the options suggested by the ATC and partially adopted by the NAC in their position paper, that of creating a new national representative body for Aboriginal people, was also mentioned by Mr Rumble in his submission. He suggested the formation of a body or number of bodies independent of control by the Commonwealth Executive. This could be achieved either by independent Aboriginal action or preferably, in his opinion, with specifically designed legislation so as to give the body corporate status. His submission put forward two models for consideration:

First, a national body composed representatives elected by Aboriginal people, probably on a regional basis (proportional to the number of Aboriginal people or voters in Secondly, regional the region). representatives of elected composed Aboriginal people. These regional would consider Makarrata proposals, take them to the Aboriginal people of their region and send delegates, with authority to bind their region's Aboriginal people to a national body

Under either model the authority of the elected representatives could be authorised to negotiate and enter a Makarrata or their authority could be limited to the negotiation of the terms of the compact with the final acceptance of the compact being left to a referendum of Aboriginal people.<sup>20</sup>

Mr Rumble concluded bv stating that he also thought appropriate for this representative Aboriginal body to continue in existence after the execution of a compact so as to enable the Commonwealth's obligations thereunder to be enforced by way of court action or public pressure or both. This point was also raised by Dr Coombs and the Committee agrees that there is a clear need for the Aboriginal people to develop and maintain a representative structure which will enable them to bind future Australian governments to a compact.

- 8.24 The preceding discussion on this issue has been premised on the basis that there would be only a single agreement with one body representing the whole of Aboriginal and Torres Strait Island Australia. Such an arrangement, while desirable from the Commonwealth's point of view, is by no means assured. Certainly, the NAC Makarrata Sub-committee has left this issue open and, despite its preferences, envisaged that agreement could be achieved in at least three possible ways.<sup>21</sup> The various options available include:
  - (i) A single detailed agreement between one national organisation or body, representing all Aboriginal people and Torres Strait Islanders and the Commonwealth.
  - (ii) Two separate detailed agreements between the Commonwealth and:

- (a) Aboriginal Australia;
- (b) Torres Strait Islanders.
- (iii) A number of detailed agreements between the Commonwealth and:
  - (a) individual clans or tribal communities;
  - (b) regional groupings of Aboriginal and Torres Strait Island communities (irrespective of State or Territory boundaries);
  - (c) Aborigines and Torres Strait Islanders on a state-wide basis; or
  - (d) a combination of any of the above.

At present, the matter is largely unresolved and must be left in the hands of the various Aboriginal organisations and, ultimately, to Aboriginal and Torres Strait Island communities.

8.25 The lack of consensus among Aboriginal people as to which body should represent them stems, at least partly, from the very nature of the contending Aboriginal organisations, including their political and legal status. The only national representative Aboriginal organisation is the NAC and it has attracted considerable criticism from Aboriginal people on a number of grounds. As noted earlier it had its origin in the National Aboriginal Consultative Committee, which was formed by the Labor Government in 1973 as a result of the Aboriginal Tent Embassy set up in front of Parliament House. Although it was composed of elected representatives of Aboriginal people from

all parts of Australia, it proved something of a disappointment both to the government and Aboriginal people, urban, rural and traditional.

8.26 Dr Coombs describes the inadequacies of the National Aboriginal Consultative Committee in his book 'Kulinma' in the following terms:

In operation it seemed both isolated from local influences of those whom its members were supposed to represent and ineffective and powerless in its dealings with government. There were not surprisingly, weaknesses in the structure and composition of the National Aboriginal Consultative Committee, but the fundamental deficiency was the failure of the Government to entrust it with real authority or to provide it with resources which would have enabled it to develop its own capacities. 22

The Committee encountered many comments in a similar vein from Aboriginal people concerning this body's successor, the NAC. The criticism is not surprising, as in some respects the inherent deficiencies in the National Aboriginal Consultative Committee are even more pronounced in the NAC. For instance, although the National Aboriginal Consultative Committee was limited to 41 persons, thereby ensuring that each member had a large geographic area to cover, this meagre representation was reduced to 36 persons in the case of the NAC.

8.27 Evidence received by the Committee in outlying areas indicated that the NAC is unable, as presently structured, to adequately represent tribal Aboriginal people because the area which one single representative is asked to cover is often vast and may involve different cultural and language groups to which he or she has little or no access, and among whom he or she has no standing. This situation has been exacerbated by the fact that funding for the NAC has been limited, reaching \$3.7 million

in 1982-83, thereby placing even further difficulty in the path of each member's ability to adequately consult with and represent his or her constituency.

8.28 Comment on the deficiencies in the present structure of the NAC has not been limited to Aboriginal people outside that organisation. The NAC position paper presented to the World Council of Indigenous Peoples reveals an underlying uncertainty within the NAC itself as to its capacity to adequately conduct negotiations for a compact as presently constituted. The paper suggested that before any negotiations commence, the Australian Government should legislate to give the NAC corporate standing and statutory functions, so as to enable it to negotiate on behalf of Aboriginal people throughout Australia. It further suggested that legislation should be enacted to ensure a secure source of funds which would not be subject to political limitation.<sup>23</sup>

8.29 As the Committee has already noted, for any compact to be of lasting benefit, it will of necessity have to be the negotiation and agreement between independent representative bodies. The independence of the Aboriginal party the Commonwealth must be clearly perceived. Yet Committee was advised by Mr Rumble that, in many crucial respects, the NAC is, according to its Charter, subject to control by the Commonwealth Minister for Aboriginal Affairs. 24 For instance, the Minister has sole authority concerning the number of members in the NAC and the boundaries of the areas which members shall represent. He also has power to declare, after consultation with the National Executive, that a member is no longer fit to hold office on the grounds of conviction for a criminal offence, gross neglect of duties, or of ill health. Rules for the conduct of elections and any amendments to those rules are subject to the approval of the Minister for Aboriginal Affairs in consultation with the Minister for Administrative

Services. Most importantly, finance for the NAC is totally within government control and specifically subject to budgetary requirements within the context of overall government policy. Even the provision of support staff for the NAC is subject not only to the availability of funds, but also to the approval of the Minister following advice from the Public Service Board. These controls, and the lack of any guaranteed financial security, seriously erode the ability of the NAC to maintain its independence from government.

- 8.30 In addition, aspects of the <u>Aboriginal Councils and Associations Act</u> 1976, under which the NAC is set up, adversely affect it's capacity to politically represent the Aboriginal people. The legislation was not designed to support a body with a representative role like the NAC. Rather, it appears primarily directed towards the formation of locally-based Aboriginal Councils.<sup>25</sup>
- 8.31 Whatever role the NAC is eventually to play in the negotiation of a compact, and this is a matter which ultimately must be resolved by Aboriginal people by processes indicated in Chapter 9, it is clear that it or a similar body must be given independent legal and financial status. If the main, or one of the main, Aboriginal negotiating bodies is perceived to be under government control it would not only jeopardise the conduct of the negotiations itself, but could cast doubt in the minds of future Aboriginal generations on the validity of any compact agreed to between the parties.
- 8.32 In this context, the Committee notes recent statements by the Minister for Aboriginal Affairs in the newly-elected Government about the role of the NAC. In a speech to an NAC Workshop on 12 July 1983 the Minister spoke of

the Government's determination and resolve to ensure that the voice of the NAC will be heard ... as a representative and national voice of Aboriginal people and as a body which accepts ultimate responsibility for the formulation of policy. 26

He also referred to the Government's determination that the NAC should be 'the structure, which by its very strength and cohesion unifies Aboriginal people throughout the nation'.27

8.33 In a speech a few days earlier the Minister said:

We've indicated that it is to a restructured National Aboriginal Conference that we are placing our hopes as a structure which will be recognised not merely by the Federal Government, but by the State Governments and more importantly by the broader white community [as the] authoritative voice, the unified voice of Aboriginal people right throughout Australia. 28

At the NAC Workshop the Minister referred to the need for the NAC to look at its Charter to see whether it should be amended, raising the possibility that the NAC should be set up by an Act of the Parliament. He also suggested that the NAC should decide whether its electorates are the right size and whether the boundaries are correct.

- 8.34 As to finance, in the Budget of 23 August 1983 the NAC's appropriation was increased from \$3.7 million in 1982-83 to \$7.3 million for 1983-84. Clearly this is consistent with the enhanced role which the current government wishes the NAC to play.
- 8.35 The Committee recognises that the decision as to who should co-ordinate Aboriginal viewpoints and represent them to the Commonwealth must rest with the Aboriginal people. Nevertheless, the clear desire by the Government to enhance the

status and role of the NAC as the nationally elected body representing Aboriginal people in its dealings with the Federal Government suggests that it is likely to be the most appropriate body to take a pre-eminent role in this process. The increased funding given to the NAC is an important step in enabling it to carry out its enhanced function. In our view there is good sense in increasing the number of members of the NAC, thereby reducing the size of electorates and enabling each member to better represent his or her constituents. We would also urge the NAC to take up the Minister's offer to establish it on an independent statutory basis. In this way the NAC's independence - both in policy and funding - will be enhanced.

8.36 It appears to the Committee that a re-structured, more independent NAC is best equipped to act as the conduit of Aboriginal viewpoints between the communities and government and ultimately to conclude a compact on behalf of the Aboriginal people. At the same time, as will be seen in Chapter 9, the Committee believes that the fullest and widest consultation with the various Aboriginal groups will need to be undertaken during the negotiation process. In this regard the established land councils - such as those in the Northern Territory, the Kimberley and North Queensland - and other community service groups such as health, legal and housing services have a valuable role to play in educating their local communities and conveying their views to the NAC.

#### RECOMMENDATIONS

8.37 (a) The National Aboriginal Conference should take the opportunity offered it by the Government to seek re-establishment on an independent statutory basis and with an increase in membership, so as to allow for more effective representation of the Aboriginal people.

- (b) The Government should ensure that the increased funding granted to the National Aboriginal Conference in the 1983-84 Budget is maintained so as to enable the National Aboriginal Conference to adequately fulfil its enhanced role as the representative and national voice of Aboriginal people.
- (c) If the compact proposal is pursued, the National Aboriginal Conference should be considered as the most suitable organisation to co-ordinate Aboriginal opinion during the negotiation process and, once negotiations are completed, to conclude the compact on behalf of the Aboriginal people.

#### Endnotes

- 1. Evidence, p. 452.
- 2. Evidence, pp. 650, 674, 1123.
- 4. Evidence, pp. 696, 698.
- Harris, S, <u>'It's Coming Yet' 'An Aboriginal Treaty Within Australia Between Australians</u>, Canberra 1979, p. 85.
- 5. There was also an Agreement, signed between the Commonwealth and the mining companies, Peko-Wallsend Operations Ltd., and the Electrolytic Zinc Company of Australia Limited.
- 6. Evidence, pp. 1110, 1111.
- 7. Evidence, p. 937.
- 8. Evidence, p. 674.
- 9. Evidence, pp. 1140, 1141.
- 10. Evidence, p. 656.
- 11. Evidence, pp. 937-8.
- 12. Evidence, p. 938.
- 13. Evidence, p. 938.
- 14. Evidence, p. 924.
- 15. Evidence, pp. 580-1 and pp. 617 ff.
- 16. Evidence, pp. 1086-7.
- 17. See also <u>Aboriginal News</u>, Vol. 3, No. 8, 1980, reporting a statement made by Dr H.C. Coombs on the progress of the Aboriginal Treaty Concept.
- 18. 'The Makarrata: Some Ways Forward', incorporated in the evidence of Dr H.C. Coombs, pp. 1088-1091.
- 19. Evidence, p. 1091.
- 20. Evidence, p. 453.
- 21. Evidence, pp. 650-51.
- 22. Dr H.C. Coombs, <u>Kulinma</u>, <u>Listening to Aboriginal</u>
  <u>Australians</u>, ANU Press, Canberra, 1978, p. 241.

- 23. Evidence, p. 1090.
- 24. Evidence, p. 452.
- 25. Evidence, p. 452.
- 26. Speech to NAC Workshop, 12 July 1983.
- 27. ibid.
- 28. Speech at the Aboriginal Hostels Ltd. 10th Anniversary Lunch, 8 July 1983.

#### Chapter 9

### DISSEMINATION OF THE IDEA OF A COMPACT

9.1 In the course of its inquiry, the Committee found there was widespread lack of information and understanding among Aboriginal communities of the idea of a compact between Aboriginal people and the Commonwealth. For example, Mr Les Collins, a witness appearing before the Committee in a private capacity, speaking of the Makarrata concept, advised the Committee:

I think at the grass roots level people do not understand what it means. They have heard some interpretation that it means "all is well after the fight" or something. Then we come to people who have a little more awareness. They are very confused as to what are going to be the consequences of such an agreement; what is going to go in it; should we even go into it at this stage. I think the general feeling is that it should be deferred until there has been a hell of a lot more consultation; a hell of a lot explanation so that Aboriginal people can be in a position to hire the people they feel are adept and who will explain to them exactly what they want to know. A lot of people at this stage are quite ignorant of what this Makarrata is all about. We never hear anything about it. All we hear is Makarrata being negotiated.<sup>2</sup>

The Committee also found, in some instances, that there was only a limited understanding of the concept even among informed non-Aboriginal witnesses, from which it could be inferred that the wider non-Aboriginal community also lacks an understanding of the idea. The Committee is concerned to point out that this lack of understanding of the compact should not be confused with

hostility to the idea. Rather it indicates that the concept is only a relatively recent one, still very much in its formative stages. Accordingly, a more effective way of disseminating understanding of the idea of a compact is required.

- 9.2 Before commencing negotiations on the content of a compact, the Committee believes that considerable thought must be given to the question of how to inform the Australian community, both non-Aboriginals and Aboriginals, about the concept, purpose and effect of the compact. Active and informed discussion about it must be promoted among both parties to provide an environment from which the actual terms of the compact may evolve.
- 9.3 Such a wide community discussion as is proposed should also include a consideration of the desirability or otherwise of a compact, its benefits and disadvantages for the present and the future and a consideration of alternative means of achieving the same ends. (For example, it has been suggested to us that to ask an Aboriginal community what it seeks to include in the terms of a compact is to pre-empt that community's right to decide first whether or not it wants a compact at all).<sup>3</sup>
- 9.4 Apart from its innovative nature, the idea of a compact is very complex, involving, among other things, difficult legal and political issues. Witnesses advised the Committee that the process of thoroughly explaining and discussing the concept to Aboriginal communities would be time consuming. But the Committee considers such a process is necessary, if the compact is to be effective, and if a cry from future generations that the compact had been forced upon the Aboriginal people is to be avoided. Suggestions as to the time needed to fully explain the concept to Aboriginal communities ranged from two or three to five or even ten years. 4

- 9.5 Another significant factor affecting the speed with which this educational process could be concluded difficulty created by the significant diversity of Aboriginal linguistic and tribal groups. As an illustration of this, the Committee encountered serious misunderstandings about the meaning of the term 'Makarrata'. This key word for an agreement between the Aboriginal and non-Aboriginal communities, proposed by the National Aboriginal Conference, gave rise in certain Aboriginal communities to serious misconceptions and a lack of understanding as to the intent and purpose of such an agreement. Unlike, for example, the situation in the United States where separate treaties were negotiated with each individual tribe, here in Australia it is usually proposed to conclude a single compact between the Commonwealth and all Aboriginals. 5 This will involve during the negotiation process such matters as provision of interpreters, translation of documents into local languages and production of explanatory tapes in local languages.
- Mr Paul Coe, Chairman of the Aboriginal Legal Service proposed to the Committee a technique for establishing effective educational process about the compact. 6 (This distinct from any proposed models for political representation for the Aboriginal people). In his view the idea of a single team, or existing National Aboriginal Conference representatives with greater resources, well versed in both the idea of a compact and of negotiating with the Commonwealth, travelling from community to community, might not be successful because such a team may not be trusted by all communities and would not be able to remain long enough in any one community to fully explain the concept. 7 Mr Coe considered that each Aboriginal community requires a leader who fully understands the concept, whom the community trusts, and who can remain in the community to lead discussions and respond to questions on the concept. He suggested that such leaders should be selected by and from each community to undertake, say, a three month seminar, established

purely to explain the issues of a compact. Such a seminar would seek to create among the leaders an understanding of the constitutional, political and social ramifications of a compact for present and future generations of Aboriginal people. The seminar could be financed and co-ordinated by the Commonwealth Department of Aboriginal Affairs. At the conclusion of the seminar, these people would return to their communities where they would lead discussions about compact. The leaders would be selected from the Aboriginal communities and from special interest groups such as the National Aboriginal Conference, land councils, Aboriginal medical and legal services and Aboriginal housing and hostel agencies. The Committee sees much merit in the Commonwealth Government taking steps to ensure that a consultative progress of this nature, drawing on the widest possible range of Aboriginal leadership, takes place.

9.7 Miss Margaret Valadian and Mrs Natascha McNamara, Directors of the Aboriginal Training and Cultural Institute in New South Wales, both considered that such a scheme had merit. 10 They reinforced the Committee's belief in the requirement for an extensive program of education among the Aboriginal community, but noted that this would require adequate facilities and extensive travelling allowances, as well as considerable time. Mrs McNamara noted that such a program was preferable to a community information program which may not educate or may not be understood by the people. 11 Miss Valadian emphasised, however, that the education of the leaders could only be a preliminary stage:

... it is not enough to educate leaders. The ordinary people in the community are the ones who need to be fully informed, because it is they who will either be the beneficiaries or bear the brunt of what is going to come out of an agreement. 12

In particular, Miss Valadian was concerned that in a program to educate leaders, minority clans and those Aborigines who might not necessarily be covered by participation in an Aboriginal organisation should not be overlooked.

9.8 Certainly the Committee accepts the need for extensive information about, and discussion of, the compact proposal and all the issues which touch upon it at the basic Aboriginal community level. Our visits to Aboriginal communities made us aware of the vital role played in these communities by such bodies as legal aid, health and welfare services, housing associations and land councils. They have direct links with the communities they serve and generally appear to have their confidence and support. Accordingly we see great advantage in their involvement in the educative and consultative processes preceding a compact. We would urge the Aboriginal community to use these existing means of ascertaining community views and ultimately to pass them on to their negotiators.

#### RECOMMENDATION

- 9.9 In order to ensure that the negotiation process towards a compact is conducted on a basis of understanding and acceptance of the concept by all Aboriginal communities, the Commonwealth should ensure that the widest range of Aboriginal community leadership is involved in that preliminary task.
- 9.10 An explanation of the idea of a compact would also need to be undertaken among the non-Aboriginal community. The promotion and discussion of an understanding of the concept was a task which the Aboriginal Treaty Committee set for itself at its establishment. The ATC sponsored a series of 12 academic seminars and conferences to examine different aspects (ncluding legal and constitutional matters) of Aboriginal and non-Aboriginal relationships in Australia and the possible relevance of a compact to those relationships. The discussion

and variety of papers which these seminars provoked greatly increased the awareness of issues relating to a compact among certain sections of Australia's non-Aboriginal society. The ATC was dissolved in June 1983 as, having stimulated an awareness of the compact idea, it believed its task was completed.

- 9.11 The Committee considers that there now exists sufficiently informed and committed sector among non-Aboriginal Australians to provide a resource from which a future nationwide community education program about the compact proposal can be based. In our view there still remains, however, a significant lack of understanding of the concept among the non-Aboriginal community. If the compact is to find acceptance broader community, it will be necessary for Commonwealth to sponsor the provision of programs which will raise the community's consciousness about Aboriginal matters to a level where the compact can be discussed in an informed fashion.
- 9.12 The Committee sees this as an essentially political task, in the sense that for the Committee's preferred method of legal implementation to be available to the Commonwealth (that of a section 105A-type amendment to the Constitution), a referendum would be necessary. Clearly there would be no point in putting a question of such significance to the Australian electors, and expecting the necessary majorities to assent, unless a widespread discussion of the issues had occurred in the years preceding such a referendum. It will be seen, therefore, that in relation to both the Aboriginal and non-Aboriginal communities a long process of discussion of the idea of a compact would be required as a sound base for the actions of the elected representatives of both parties to the compact.

#### Endnotes

4.

- Evidence, pp. 26, 31, 43, 71, 87, 1020, 1094. 1.
- 2. Evidence, p. 195.
- 3. Evidence, pp. 1028, 1029.
- Evidence, pp. 935, 1031.
- Evidence, p. 1039. 5.
- Evidence, p. 936. 6.
- 7. Evidence, p. 939.
- Evidence, p. 937. 8.
- Evidence, p. 940. 9.
- Evidence, p. 1021. 10.
- 11. Evidence, p. 1019.
- Evidence, p. 1021. 12.

## Chapter 10

#### TIMETABLE

10.1 Another significant matter which remains to considered is whether it is possible for a target date to be set for the conclusion of a compact. The 1988 bicentennial year has been consistently suggested by many groups as a target date. It is seen by some as an ideal date, imbued with the necessary symbolic significance, providing a national occasion on which to acknowledge the effects of European occupation and settlement on the original inhabitants of the continent, and on which to beginning in the relationship a new between descendants of the original occupiers and the European settlers. However, others - not least some sections of the Aboriginal community - have suggested that the date is peculiarly inappropriate. It has been put to the Committee that, as 1988 is regarded as the anniversary of the European invasion, the adoption of this date would be demeaning to Aborigines, as the compact could be portrayed in paternalistic terms as a 'birthday present' from the invaders.1

10.2 At the time of its first appearance before the Committee in June 1982, the National Aboriginal Conference (NAC) did not appear to be concerned by any offensive implications of the bicentennial date; nor did it envisage consultation difficulties but proposed an ambitious Makarrata settlement program. This program was set out in Attachment B of the Conference's submission, where it proposed that an amendment in the nature of s.105A of the Constitution should be devised and implemented by way of referendum by 1984. It was also envisaged that, in parallel with the development and entrenchment of a s.105A-type clause, an agreement in principle should be

developed and executed between the Commonwealth and the NAC (representing the Aboriginal people) by 1984. This agreement, which is seen as a general statement of fundamental principles and guidelines upon which a further full detailed agreement or agreements may be entered into, is to be executed shortly after the s.105A-type amendment is approved. The NAC envisaged that the final agreements should be ready for execution in 1988, although it expected, that a continuing process would be developed setting out procedures for the appropriate implementation into law of the agreement or agreements, together with their administration, oversight, periodical review and possible amendment.

10.3 When the NAC appeared before the Committee a second time in May 1983, however, evidence indicated that no consultation about the Makarrata had taken place since August 1982, due to lack of funds, and the Makarrata Sub-Committee, which carried out earlier consultations, no longer existed. In the words of Mr Riley, Deputy Chairman of the NAC:

... at times we have thought that because of the lack of resources, the lack of information and the lack of being able to research information in relation to the Makarrata, it was an impossible task ... 2

In fact it appears then that by force of circumstances, work on the Makarrata within the NAC has lost priority over the last twelve months.  $^{3}$ 

10.4 Mr Paul Coe of the Aboriginal Legal Service (N.S.W.) suggested that 'negotiations and consultations could go on for a matter of two to three or even five years until those communities are aware of exactly what they are getting themselves into'.4 On the other hand, two of the Directors of the Aboriginal Training and Cultural Institute, Miss Margaret Valadian and Mrs Natascha McNamara, considered that such a

process could take much longer. Miss Valadian commented that she could see it taking ten years although this would depend on the particular goals and objectives of the Aboriginal people. However, she thought the real time constraint in any such exercise was the speed with which the Aboriginal communities throughout Australia could obtain a full understanding of what was involved.

- 10.5 In Miss Valadian's opinion each individual has the right to be fully informed and to understand the implications of the settlement process. This desire for full consultation was frequently made in the remote communities and, indeed, is the subject of a recommendation in Chapter 9.5 In the first place there would need to be extensive, careful and planned discussion before the Aboriginal people could get to the stage of saying that they wanted to proceed. Then, if they did decide proceed, a further program would have to be undertaken to enable Aboriginal people to understand the legal technicalities and their implications, as well as the goals and final content of such a settlement. The speed with which this education and consultative program could be established, and its effectiveness, would depend to a large extent on the amount of funds provided by the Commonwealth Government.
- 10.6 Dr Coombs considered that the consultative process would take many years. He noted that traditionally the Aboriginal peoples' decision-making processes are very slow and that it was important that they should be allowed to reach consensus on this matter by means of their own choosing. Under these circumstances, he though it might be realistic to expect a statement of principles by 1988, but it was unlikely that a final agreement could be negotiated within that time span.
- 10.7 While work towards reaching agreement should proceed expeditiously, time consuming processes such as the education of Aboriginal and Torres Strait Island communities on the nature of the concept and its

possible form and contents should be undertaken before the equally time-consuming matter of negotiations begins. At the same time there will need to be a continuing and extended education program occurring in the non-Aboriginal community so that, by the time a compact is ready to be concluded, a valuable process of healing and understanding between both communities will have taken place. Perhaps the fundamental task in this process will be to create an attitudinal change, generated by discussion, consultation and negotiation. The attitudes held by non-Aboriginal Australians towards Aboriginal and Torres Strait Island people and vice-versa lie at the heart of the situation and, until they can be properly oriented, a compact, no matter what its form and content, will at best only create superficial improvement.

10.8 It seems, therefore, that there is little point in setting a date merely for its own sake. Rather, once a commitment has been made to proceed with the compact proposal, it will be necessary to give detailed consideration to the time required for proper completion of each stage of the education and negotiation processes. Once these processes are under way and the complexities involved become more apparent, it should be possible ultimately to establish a concluding date.

The Senate Parliament House Canberra

September 1983

Michael Tate Chairman

### Endnotes

- 1. Evidence, pp. 297-8, 3114-5.
- 2. Evidence, p. 1125.
- 3. Evidence, p. 1151.
- 4. Evidence, p. 935.
- 5. Evidence, p. 343 ff.

#### APPENDIXES



## Appendix 1

# Individuals and organisations who made written submissions to the Committee

	i	Submission no.
ABORIGINAL AFFAIRS, DEPARTMENT OF	Canberra, A.C.T.	16
ABORIGINAL LEGAL SERVICE (N.S.W.) LTD	Redfern, N.S.W.	19
ATTORNEY-GENERAL'S DEPARTMENT	Canberra, A.C.T.	18
BAYNE, Mr P.	Canberra, A.C.T.	24
CASH, Mr B.T.	Northcote, Vic.	14
CENTRAL AUSTRALIAN ABORIGINAL ORGANISATIONS	Alice Springs, N.T.	26
CLUNE, Mr J.	Palmyia, W.A.	1
DANDENONG & DISTRICT ABORIGINES CO-OPERATIVE SOCIETY LTD	Dandenong, Vic.	11
DEVES, Mr J.R.	Gosford, N.S.W.	4
ECKERSLEY, Mr P.P.	Wembley, W.A.	13
FOREIGN AFFAIRS DEPARTMENT OF	Canberra, A.C.T.	33
FOX, Dr J.E.D.	Perth, W.A.	10
FREEMAN, Mr D.	Sandy Bay, Tas.	5
GOVERNMENT OF TASMANIA	Hobart, Tas.	17
GOVERNMENT OF WESTERN AUSTRALIA	Perth, W.A.	20
HOCKING, Mrs B.	Melbourne, Vic.	12 & 28
INTERNATIONAL COMMISSION OF JURISTS (AUSTRALIAN SECTION)	Sydney, N.S.W.	21

	:	Submission no.
JOHNSON, Professor D.H.N.	Sydney, N.S.W.	9 & 32
KEON-COHEN, Mr B.A.	Melbourne, Vic.	27
KITTO, Mr K.M.S.	Buderim, Qld.	2
LANE, Professor P.H.	Sydney, N.S.W.	3
LITTLE, Mr J.	Melbourne, Vic.	6
MINISTER FOR ABORIGINAL AFFAIRS (N.S.W.)	Sydney, N.S.W.	31
MORRIS, Mrs H.	Belmont, Vic.	8
NATIONAL ABORIGINAL CONFERENCE	Woden, A.C.T.	23 & 30
NORTHERN LAND COUNCIL	Darwin, N.T.	25
RUMBLE, Mr G.A.	Canberra, A.C.T.	22, 29, 34
SAWER, Professor G.	Canberra, A.C.T.	7
TATZ, Professor C.	North Ryde, N.S.W.	35
TURNER, Mr N.	Brisbane, Qld.	15

#### Appendix 2

#### Witnesses

- ABEDNEGA, Mr K., Deputy Chairman, Tamwoy Community Council, Thursday Island, Qld.
- ALBERT, Mr S., Chairman, Bilgungurr Aboriginal Corporation, Broome, W.A.
- ANDERSON, Mr M., Research Officer, National Aboriginal Conference, Woden, A.C.T.
- ANGUS, Mr P., Chairman, Lombodina Community, Broome, W.A.
- BANI, Mr E., Thursday Island, Qld.
- BARNEY, Mr V., Councillor, Mornington Island, Qld.
- BARTLETT, Mr P., Aboriginal Development Commission, Derby, W.A.
- BARWICK, Dr D.E., Member, Aboriginal Treaty Committee, Canberra, A.C.T.
- BAYNE, Mr P.J., Member and Legal Adviser, Aboriginal Treaty Committee, Canberra, A.C.T.
- BELLEAR, Mr R., Aboriginal Legal Service Ltd, Redfern, N.S.W.
- BIEUNDURRY, Mr J., Fitzroy Crossing, W.A.
- BLITNER, Mr G., Chairman of the Northern Land Council, Darwin, N.T.
- BOTTRILL, Mr G., Aboriginal Legal Service, Broome, W.A.
- BOXER, Mr A., Fitzroy Crossing, W.A.
- BURGESS, Ms H., Area Representative, National Aboriginal Conference, Mirrima Aboriginal Reserve, W.A.
- BUSH, Ms L., Councillor, Mornington Island, Qld.
- CARTER, Ms B., Central Australian Aboriginal Legal Aid Service, Alice Springs, N.T.
- CHARGER, Ms J., Weipa, Qld.
- CHOHAN, Mr, National Aboriginal Conference Member for QEF, Cairns, Qld.

- CHONG, Ms A., Councillor, Mornington Island, Old.
- CHULUNG, Mr F., National Aboriginal Representative for WAG, Derby, W.A.
- COE, Mr P.T., Chairman, Aboriginal Legal Service Ltd, Redfern, N.S.W.
- COLLESS, Ms R., Cairns, Qld.
- COLLINS, Mr L., Cairns, Qld.
- COOMBS, Dr H.C., Chairman, Aboriginal Treaty Committee, Canberra, A.C.T.
- COX, Mr K., Administrator, Broome Regional Aboriginal Medical Service, Broome, W.A.
- COX, Mr P., Chairman, Milliya Rumurra Alcohol Committee, Broome, W.A.
- CRAIGIE, Mr W., Field Officer, Aboriginal Legal Service, Redfern, N.S.W.
- CRAMBIL, Mr T., Bayulu Community, Fitzroy Crossing, W.A.
- DAYMBALIPU, Mr., Chairman, Garma Council, Yirrkala, N.T.
- DEAKIN, Mr A., Area Representative, National Aboriginal Conference, Mirrima Aboriginal Reserve, W.A.
- DJANGARU, Mr B., Kalumburu, W.A.
- DJERRKURA, Mr G., Nakara, N.T.
- DODSON, Father P., Alice Springs, N.T.
- DOWDING, Mr P., M.L.C. for North Province, Broome, W.A.
- DOWNING, Rev. J., Co-ordinator of Community Development, Aboriginal Advisory and Development Services, Darwin, N.T.
- DRUMMOND, Mr R., Chairman, Barula Action Group, Derby, W.A.
- DUGONG, Mr L., Chairman, Mornington Island Shire Council, Mornington Island, Qld.
- DUGONG, Mr N., Councillor, Mornington Island, Qld.

- EADE, Mr B., Deputy Director, Central Australian Aborigines Congress, Alice Springs, N.T.
- EDGAR, Mr T., Councillor, Broome Regional Aboriginal Medical Service, Broome, W.A.
- ELSGOOD, Ms, Co-ordinator, Aboriginal Women's Resource Centre, Darwin, N.T.
- FEATHERSTONE, Mr D., Shire Clerk, Aurukun, Qld.
- FELTON, Ms R., Mornington Island, Qld.
- FORRESTER, Mr V., National Aboriginal Conference Representative for NAG, Alice Springs, N.T.
- FOURMILE, Ms, Cairns, Qld.
- GAFFNEY, Ms E., Thursday Island, Qld.
- GAVENOR, Mr N., Councillor, Mornington Island, Qld.
- GEORGE, Ms J., Weipa, Qld.
- GOODIL, Mr J., Manager, Department of Aboriginal and Islanders Affairs, Weipa, Qld.
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#### Appendix 3

# Makarrata demands as proposed by the National Aboriginal Conference

- N.B. The items listed below are as contained in telexes to the Minister for Aboriginal Affairs dated 29 September 1981 and 1 October 1981.
- l. Land to be acquired by the Commonwealth for and on behalf of Aboriginal people and that all such land be vested in freehold title to the Aboriginal people and that such land be given in perpetuity and shall not be subject to mortgage and/or sale outside the Aboriginal community and/or communities.
- 2. The development of self-government in each respective tribal territory to take due respect for the culture of the Aborigines and to ensure their political, economic, social and educational advancement, and by virtue of this, that they have the right to freely determine their political status and freely pursue their economic social and cultural development.
- 3. The establishment of a national Aboriginal bank with branches in each state of the Commonwealth.
- 4. The payment of 5% of the gross national product per annum for a period of 195 years to come into effect upon the date of this section being given assent and/or upon the signing of the agreement.
- 5. The return of all national parks and forests to the Aboriginal communities whose territorial jurisdiction prevails.
- 6. The return of all artefacts, artworks and items located by archaelogical diggings from museums and other art centres.
- 7. The rights to hunting, fishing and gathering on all lands and waterways under the jurisdiction of the Commonwealth of Australia.
- 8. The rights over all minerals and other resources that may exist on all lands given in perpetuity to Aboriginal people and/or communities and that these rights which include all minerals from the earth's surface to the centre of the earth, and that we reserve the rights to all the air space from the earth's surface to the outer perimeters of the earth's atmosphere.
- 9. The recognition of Aboriginal customary law in those territories which deem it necessary.
- 10. The establishment of Aboriginal schools, that is pre-schools, infants, primary, secondary and colleges within those Aboriginal territories which deem it necessary.
- 11. Freehold title and full ownership of all houses currently occupied by Aboriginal people throughout Australia and that such title to be given in perpetuity.

- 12. The establishment of Aboriginal medical centres in the Aboriginal territories which deem it necessary.
- 13. The establishment of Aboriginal legal aid offices in all territories which deem it necessary.
- 14. The exemption from all forms of taxes on land vested in freehold title to Aboriginal people throughout Australia for a period of 195 years from the commencement of this section and/or agreement.
- 15. The exemption of all taxes being applied to monies derived from the Commonwealth as cash compensation from the gross national product for Aboriginals for a period of 195 years from the commencement of section and/or agreement.
- 16. The exemption of taxes being applied to any monies derived from Aboriginal business and/or commercial ventures within their respective territories for a period of 195 years from the commencement of section and/or agreement.
- 17. The Parliament may make laws for the carrying out by the parties thereto on any agreement.
- 18. Any laws established for Aborigines by the Federal and State Parliaments, prior to the commencement of this section shall become null and void upon the commencement of this section 129 or agreement, except for those pieces of legislation that refer to land.
- 19. Any such agreement may be varied or rescinded by the parties thereto. Every such agreement and any such variation thereof shall be binding upon the Commonwealth, should the Aborigines who are a party to such an agreement thereto, notwithstanding anything contained within this section and/or agreement.
- 20. The Parliament may make laws after validating any such agreement contained in this section and/or agreement.
- 21. The powers conferred by this section shall not be construed as being limited in any way by the provisions of section and/or agreement.
- 22. Timber rights to all forests and timbered areas within Aboriginal territories, including all waterways.
- 23. The right to move freely across all state borders without prejudice, due to the differences in state laws.
- 24. The right to have all laws and by-laws of Aboriginal self-governed territories applied equally across all state borders, where Aboriginal territories involve two or more states.