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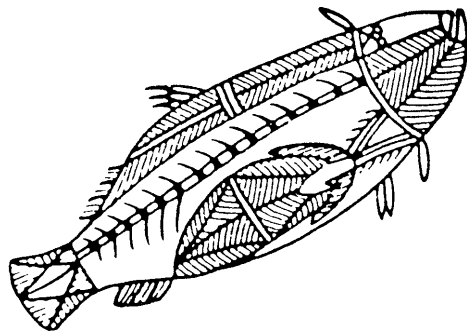
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**ABORIGINAL LAW NOTES**

**87/5**

**AUGUST 1987**

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**CONSTITUTIONALIZING ABORIGINAL RIGHTS**

This was the theme of the second day of the recent Seminar "Recognizing Aboriginal Rights: Yesterday, Today and Tomorrow".

The keynote speaker, Brad Morse, spoke of Canada's experience. But the major focus was Australia. Two Advisory Committees of the Constitutional Commission have addressed Aboriginal issues. ALN 87/4 included a briefing paper from the report of the Advisory Committee on Individual and Democratic Rights. In this issue, ALN 87/5, we include a briefing paper from the report of the Advisory Committee on Distribution of Powers.

(cont.)

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## Constitutionalizing Aboriginal Rights (Cont.)

At the Seminar on 16 August Graeme Neate, Principal Legal Officer to the Constitutional Commission, presented a 23 page paper "Aboriginals and Constitutional Reform". Copies of this paper, and copies of the Advisory Committee reports, can be obtained from the Constitutional Commission, PO Box E2, St James NSW 2000; tel. (02) 298505, or toll-free (008) 02 3103.

Graeme Neate's paper concluded with these remarks:

Matters of direct relevance to Aboriginals and Torres Strait Islanders are among the many issues being considered by the Constitutional Commission. Other issues have a greater meaning for the community at large, and will attract more interest. The issues outlined in this paper are important, however, not only for Aboriginal and Islander Australians but for all Australians.

Much has divided one part of the community from another. Much remains to be done in many ways to achieve a level of reconciliation. Constitutional change may be one means of getting all Australians to face up to the issues and play some part in resolving them. But it can only be a small part of an ongoing process.

The Constitutional Commission needs informed and constructive comments on what proposals, if any, it should present to the Federal Government. The proposals must be of real benefit either in symbolic or practical terms, and must have some likelihood of passing through the Parliament and the referendum process. High minded idealism alone will not suffice. But practical reforms may find sufficient support so that Australia can move towards a greater maturity as a nation. The Commission looks to people such as you to offer suggestions, so that Aboriginal and Islander Australians are adequately involved in both the process and proposals of constitutional review.

Now is the time for comments and submissions to be made, before the Constitutional Commission itself writes its report, which it must do by mid-1988. The two Advisory Committees mentioned may have been persuaded of the need for some improvement in the Constitution on Aboriginal rights. This does not mean that the Constitutional Commission itself will be persuaded. Nor does it mean that the Government will be persuaded. And even if the Government is persuaded, it is necessary to persuade the other major parties, if desired changes are to survive the referendum process.

Within the limits of its resources, the ALC will be happy to assist in the preparation of comments and submissions.

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## ALC Briefing Paper

### Distribution of Powers

#### Report of the Advisory Committee to the Constitutional Commission (6 June 1987)

## CHAPTER 6

## ABORIGINAL AFFAIRS

### The "Races" power

#### Recommendations

1. The Constitution should be altered to confer upon the Commonwealth Parliament a new head of power to legislate with respect to Australian Aboriginals and Torres Strait Islanders but the present power contained in section 51(xxvi) of the Constitution should be retained.<sup>1</sup>
2. The Constitution should be altered to ensure that the Commonwealth is not required by the Constitution to compensate State governments in respect of the acquisition of crown land for aboriginal purposes, where that land has at anytime since Federation been designated as land reserved for Aboriginals under the laws of any State.

#### Background

6.1 In its Issues Paper the Committee divided its consideration of matters concerning aboriginal affairs into two parts.

- The scope of the "races" power.
- The creation of constitutional machinery to entrench a "Makarrata".<sup>2</sup>

The provisions of section 51(xxvi) of the Constitution (the "races" power) previously empowered the Commonwealth Parliament to make laws with respect to

The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws.

In 1967 those provisions were amended to remove the phrase, "other than the aboriginal race in any State" as a result of the referendum held in that year (see

<sup>1</sup> Hereafter any reference to Aboriginal people is intended to be read as including a reference to Torres Strait Islanders

<sup>2</sup> See *Advisory Committee on the Distribution of Powers Issues Paper* at pp 46-47 and 48-49 respectively. The Committee proposes to follow the same format in this Report

*Constitution Alteration (Aboriginals) Act 1967 (Commonwealth)*). The purpose of the amendment was stated as to:

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.<sup>3</sup>

6.2 There are a number of factors which make it both desirable and necessary for the Commonwealth Parliament to have the power to make laws with respect to Australian aborigines even though that view has not always been accepted.<sup>4</sup>

6.3 At the national level it has been argued strongly by some that the nation as a whole has a responsibility to care for and provide for the well being of its aboriginal population.<sup>5</sup> Moreover it has also been suggested that one of the criteria which supports the assignment of a function to the national level of government is where

equality of opportunity or access to a government service is especially important or where it is necessary to protect the interests of minorities.<sup>6</sup>

6.4 There are of course strong links in this area with the power of the Commonwealth to provide for a whole range of social service benefits (for example sections 51(xxiii) and 51(xxiiiA)) and this seems especially appropriate given the Commonwealth's financial resources.<sup>7</sup> The Commonwealth has long recognized its special responsibilities for the care and well-being of aborigines in its territories, for example the Northern Territory and Jervis Bay, under section 122 of the Constitution.

6.5 At the international level it has been urged for some time that the reputation of Australia may be greatly affected by the treatment it accords to aborigines.<sup>8</sup> International bodies are beginning to play an important role in the recognition and development of the rights of indigenous peoples throughout the world.<sup>9</sup> Moreover it appears that the sovereignty of indigenous peoples in their tribal lands has been recognized by the International Court of Justice in the *Western Sahara Advisory Opinion Case*.<sup>10</sup> The latter developments raise the possibility that the external affairs power may perhaps become available as an additional head of legislative power in this area. All this helps to underline the connection between the external affairs power and the "races" power.

<sup>3</sup> See *Arguments for and against the Proposed Alterations together with a statement showing the Proposed Alterations* at p 13

<sup>4</sup> See for example, the failure of the majority to recommend in favour of a Commonwealth power in the *Report of the Royal Commission on the Constitution 1929* at p 270 and the power was not in fact assigned to the Commonwealth until 1967

<sup>5</sup> See the views of three of the seven commissioners in the *Report of the Royal Commission on the Constitution 1929* at p 303.

<sup>6</sup> K. Wiltshire, "Administrative criteria for the allocation of functions between levels of government in a federation" *ACIR Information Paper No 9. Towards Adaptive Federalism*, (1981), at p 78

<sup>7</sup> See minority recommendations made in the *Report of the Royal Commission on the Constitution 1929*, p 303. The point was made that it is unfair that the burden in caring for aborigines should rest upon the States which have small populations but in which the bulk of aborigines may reside, while the States with greater populations bear little or no financial responsibility in the matter.

<sup>8</sup> See the *Report of the Royal Commission on the Constitution 1929* at pp 219-220 and also p 118

<sup>9</sup> See e.g. work of Working Group on Indigenous Populations, a working group of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, mentioned in the submission provided by the Northern Lands Council at pp 4-5

<sup>10</sup> ICJ Reports (1975) at p 12: See Submission No.561 — Northern Land Council, p 4.

### Judicial Interpretation of the "Races" Power

6.6 The first test of the scope of the power contained in section 51(xxvi) occurred in *Koowarta v Bjelke-Petersen*<sup>11</sup> where it was held by a majority that a law which prohibited racial discrimination against persons of all races would not be supported by the power. The majority comprising Gibbs CJ, Stephen, Aickin, Wilson and Brennan JJ held that sections 9 and 12 of the *Racial Discrimination Act 1975* (Commonwealth) were not valid as an exercise of the races power. Murphy J was of the contrary opinion. As indicated elsewhere in this report the relevant provisions were held valid as an exercise of the external affairs power.

6.7 Gibbs CJ (with whose reasons for judgment Aickin and Wilson JJ agreed) seemed to base his conclusion on the ground that the application of the law to all racial discrimination prevented the law being described as a special law with respect to the people of a particular race.<sup>12</sup> The ground relied on by Stephen J is consistent with that relied on by Gibbs CJ but he seemed to attach additional significance to the need to make "special laws". According to him:

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(xxvi) speaks of.<sup>13</sup>

The significance of the approach taken by Stephen J. will be referred to in more detail later.

6.8 Gibbs CJ did, however, accept that in its present form the races power empowered the Parliament to make laws prohibiting discrimination against people of the Aboriginal race by reason of race<sup>14</sup> and Stephen J did not dissent from that proposition. The *Koowarta* decision may have had the effect of requiring the enactment of separate but parallel legislation to deal with problems which affect people of a number of races thus producing the somewhat odd result that what may be capable of enactment in several laws, each dealing with separate races, might not be capable of enactment in one law.<sup>15</sup>

6.9 In the *The Tasmanian Dam Case*<sup>16</sup> a majority of the High Court held that the Commonwealth Parliament could under the "races" power prohibit damage or destruction to caves and sites (and also to artefacts and relics on those sites, as well as their removal) where those caves and sites had a particular significance to the people of the Aboriginal race. Mason, Murphy and Brennan JJ would have upheld the validity of provisions in the *World Heritage Conservation Act 1983* (Commonwealth) which had this effect with Gibbs CJ, Wilson and Dawson JJ taking a contrary view. The remaining judge, Deane J, agreed with the former judges but held the provisions invalid because they constituted "a compulsory acquisition of property" . . . otherwise . . . on "just terms" contrary to section 51(xxxi). This does not affect the view taken by Mason, Murphy, Brennan and Deane JJ regarding the scope of the "races" power.

<sup>11</sup> (1982) 153 CLR 168.

<sup>12</sup> *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at p 187.

<sup>13</sup> At p 210.

<sup>14</sup> At p 186.

<sup>15</sup> See G J Lindell, "The Corporations and Races Powers" (1984) *Federal Law Review*, 219 at pp 243-5.

<sup>16</sup> (1983) 158 CLR 1.

6.10 In essence, the majority accepted that the relevant provisions were valid because they applied to protect and preserve things which had a special significance to the people of a particular race as members of that race. Such things could include matters relevant to the history, culture or religion of a race. After pointing out that membership of a race imported a biological history or origin which was common to other members of the race Brennan J observed:

Though the biological element is, as Kerr LJ pointed out<sup>17</sup>, an essential element of membership of a race, it does not ordinarily exhaust the characteristics of a racial group. Physical similarities, and a common history, a common religion or spiritual beliefs and a common culture are factors that tend to create a sense of identity among members of a race and to which others have regard in identifying people as members of a race. As the people of a group identify themselves and are identified by others as a race by reference to their common history, religion spiritual beliefs or culture as well as by reference to their biological origins and physical similarities, an indication is given of the scope and purpose of the power granted by para (xxvi). The kinds of benefits that laws might properly confer upon people as members of a race are benefits which tend to protect or foster their common intangible heritage or their common sense of identity. Their genetic inheritance is fixed at birth; 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.<sup>18</sup>

In similar fashion Deane J said.

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.<sup>19</sup>

6.11 As the Committee indicated in its Issues Paper, in the light of the judicial interpretation placed upon the "races" power, it would seem that it may be used by the Parliament to pass laws for the advancement and benefit of the people of the Aboriginal race. This could include the protection of Aboriginal sacred sites and artefacts, the language and culture of Aboriginal communities and also the recognition of and giving effect to Aboriginal law. This could also include the prohibition of discrimination against people of the Aboriginal race by reason of race, at least if the law is confined to discrimination against people of that race.

6.12 Some of the examples noted above were referred to by the Senate Committee on Constitutional and Legal Affairs in the Report entitled, "*Two Hundred Years Later* . . ." where it had occasion to observe that even on the "narrowest view" of section 51(xxvi) which emerges from the judgments mentioned above "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."<sup>20</sup> The Committee sees no reason to dissent from that view and accepts that the Commonwealth appears to have quite substantial powers to pursue wide ranging policies for the protection and welfare of Australian

<sup>17</sup> In *Mandla v Dowell Lee* [1983] 1 Q.B. 1 at p 19.

<sup>18</sup> *The Tasmanian Dam Case* (1983) 158 CLR 1 at p 244.

<sup>19</sup> At p 276.

<sup>20</sup> Report of the Senate Committee on Constitutional and Legal Affairs, *Two Hundred Years Later* 1983, p92.

aborigines providing of course the Commonwealth is prepared to observe such express constitutional guarantees as that contained in section 51(xxxi).<sup>21</sup>

6.13 Possibly the power may also be available to support laws which discriminate against persons of the aboriginal race especially having regard to the origins and history of the power before it was amended in 1967.<sup>22</sup> In fact in the *Koowarta Case* a majority of the Court envisaged that the power could be used in this way although one judge rejected this view of the power.<sup>23</sup>

6.14 Despite the width of the power a potential source of limitation may flow from the approach taken by Stephen J in the *Koowarta Case*, adverted to earlier. Under that approach and because of the need to show that the law is a "special law", it is possible that the scope of the power will be confined to the enactment of measures which are designed to deal with matters which have a special connection with the people of the Aboriginal race (at least in its application to people of that race). In other words it will be necessary to show that the law deals with the "special needs" of or a "special threat" or "problem" posed by the people of the particular race. It can be argued that this approach to the power could help to undermine quite considerably the extent to which the Parliament's opinion, as to the necessity of the law enacted as an exercise of the races power, is conclusive. The opinion of the Parliament as to the existence of the special need or the special threat would not suffice in order to show that the law was "special" in character.

6.15 The Committee understands that the need to deal with the correctness of Stephen J's view did not arise in the *Tasmanian Dam Case*. There are references to his approach in a number of the judgments without there being any suggestion that his approach would not be followed in the future. Whilst the position cannot be regarded as settled, if the approach is followed in the future it would mean that the power would not support the making of a law on any matter regardless of its context or subject matter merely because it was confined in its application to conduct or affairs involving people of the Aboriginal race.

6.16 An aspect of the power which may give rise to practical difficulty concerns the meaning of the word "race" and whether for example it will be found to include persons of mixed race. In the *Tasmanian Dam Case* Murphy J did say that whatever technical meaning the term may have in other contexts in the Australian Constitution it includes the "Aborigines and Torres Strait Islanders and every subdivision of those peoples".<sup>24</sup> Deane J. in the same case said:

It is unnecessary, for the purposes of the present case, to consider the meaning to be given to the phrase 'people of any race' in s 51(xxvi). Plainly, the words have a wide and non-technical meaning. See, e.g. *King-Ansell v Police* [1979] 2 NZLR 531, *Mandla v Dowell Lee* [1983] 1 QB 1 620. The phrase is, in my view, apposite to refer to all Australian Aborigines collectively. Any doubt, which might otherwise exist in that regard, is removed by reference to the wording of para (xxvi) in its original form. The phrase is also apposite to refer to any identifiable racial sub-group among Australian Aborigines. By 'Australian Aboriginal' I mean, in accordance with what I understand to be the conventional meaning of that term, a person of Aboriginal descent, albeit mixed, who identifies himself as such and who is recognized by the Aboriginal community as an Aboriginal.<sup>25</sup>

<sup>21</sup> See also the article by G J Lindell (above note 15) at p 248.

<sup>22</sup> See Quick and Garran, *The Annotated Constitution of the Australian Constitution* (1901) at pp 622-3.

<sup>23</sup> See (1982) 153 CLR 168 at p 186 per Gibbs CJ, 209 per Stephen J, 244 per Wilson J, contra Murphy J at p 242; see also the discussion in the *Tasmanian Dam Case*, which however adds little to that in *Koowarta* (1983) 158 CLR 1 at pp 110, 180, 242 and 273.

<sup>24</sup> (1983) 158 CLR 1 at p 180.

<sup>25</sup> At pp 273-4 and see also Brennan J. at p 245.

6.17 In a non-constitutional setting the view has been taken that for the purpose of interpreting a will, the words "Aborigine" and "Aboriginal" when used to describe a general body of persons, are not confined to persons of "full blood".<sup>26</sup>

6.18 Since 1967, successive Australian Governments have adopted the following working definition —

An Aborigine or Torres Strait Islander is a person of Aboriginal or Torres Strait Islander descent who identifies as an Aborigine or Torres Strait Islander and is accepted as such by the community in which he or she lives.<sup>27</sup>

The Department of Aboriginal Affairs in its submission observed that the majority of the judgments in the *Tasmanian Dam Case* contain obiter in favour of the Commonwealth administrative definition of "an Aboriginal person". In contrast the *Aboriginal Land Rights (Northern Territory) Act 1976* (Commonwealth) defines 'Aboriginal' to mean 'a person who is a member of the Aboriginal race of Australia'. Nevertheless, particularly in view of narrower opinions being taken in the past, the issue cannot be regarded as fully settled at the moment.<sup>28</sup>

6.19 The provisions contained in section 51(xxxi) are commonly thought to qualify the other provisions of section 51 of the Constitution.<sup>29</sup> This has a direct bearing on the use of federal powers to provide for the acquisition of land from State Governments and private owners for the purpose of transferring ownership in the land to groups of Aboriginal persons. As indicated in the Issues Paper it is likely that any such acquisition would attract the constitutional obligation to compensate the original owners of the land.

6.20 As also indicated in the Committee's Issues Paper a question does arise as to whether that obligation should operate in cases where the owner of the acquired land is a State Government.<sup>30</sup> It is sometimes suggested that the "just terms" requirement:

- (a) operates as a practical constraint on the exercise of the federal Parliament's powers with respect to aborigines, and
- (b) in a sense rewards States who have not been active in providing for aboriginal land rights

There are also unresolved questions concerning the basis for calculating any compensation payable to a State Government. In *Grace Bros v The Commonwealth* Dixon J. had occasion to observe:<sup>31</sup>

... what is just as between the Commonwealth and a State, two Governments, may depend on special considerations not applicable to an individual.

## Issues

6.21 In its Issues Paper the Committee identified the following issues as calling for its advice:

- (a) Is the present power adequate to deal with matters affecting people of the Aboriginal race?

<sup>26</sup> See *Re Brynning dec'd* [1976] VR 100.

<sup>27</sup> Submission No. 578 — Department of Aboriginal Affairs (Federal).

<sup>28</sup> See Attorney-General's Department opinions adverted to by Mr G Neale in his private submission to the Commission at p 1 and Attachment C.

<sup>29</sup> See paras 1 43 onwards of this report dealing with the relationship of Commonwealth powers to each other.

<sup>30</sup> See *Advisory Committee on the Distribution of Powers Issues Paper* at p 47.

<sup>31</sup> (1946) 72 CLR 269 at p 290.

- (b) Should the power be amended to make it clear that the Parliament can conclusively determine what "special" laws are needed in this area?
- (c) Is there a need to clarify the availability of the power with regard to persons of mixed race? and
- (d) Should the Commonwealth be obliged to compensate State Governments in respect of land acquired for people of the Aboriginal race?

#### Submissions

##### (a) Level of Response

6.22 The Committee did not consider it received a sufficient and adequate response from the public, and in particular bodies representing aboriginal interests as regards this part of its inquiry. This is understandable given the special difficulties attendant upon any proper consultation with the many aboriginal groups in Australia.

6.23 Further consideration needs to be given as to whether, and the means by which, the various and diverse elements of the Aboriginal community are adequately consulted on all aspects of constitutional change which affects their interests.

6.24 The Committee received submissions from the following Aboriginal groups:

- The Central Land Council (CLC) of the Northern Territory
- The Northern Land Council (NLC) of the Northern Territory
- The N.S.W. Aboriginal Lands Council (NSWAL Council)
- The Aboriginal Land Council Victoria

6.25 The importance of devising special methods of consultation with aboriginal groups and tribes and the difficulty of doing so was stressed by Associate Professor Chisholm of the Aboriginal Law Centre at the Sydney public hearing.<sup>32</sup> The time set for the completion of the Committee's report and also the limited resources available, made it impossible for the Committee to institute the kind of consultation procedures which are obviously needed to gauge the wishes of the aboriginal people. The importance of wide ranging discussions in this area cannot be over-emphasized since solutions devised in the past have so often been accused of failing to reflect the wishes of aboriginal people themselves. The Commission may need to bear this factor in mind when it evaluates the recommendations made by the Committee.

##### (b) Guarantee of rights

6.26 There was considerable support in the evidence and the submissions received by the Committee for a proposal to provide for the constitutional guarantee of the rights of the aboriginal people of Australia. This proposal was sometimes accompanied by a call for the recognition of the prior sovereignty enjoyed by Australian aborigines before the country was settled by Europeans.<sup>33</sup>

6.27 The essential purpose of this proposal is to seek a reversal of the so-called "terra nullius" doctrine (that is, the doctrine that Australia did not belong to anyone before white settlement took place) and the failure of the common law in Australia to recognize communal native title.<sup>34</sup>

<sup>32</sup> Aboriginal Law Centre of University of NSW (ALC) Transcript, p 585-587

<sup>33</sup> See Submission No 446 — Central Land Council; Submission No 561 — Northern Land Council, Submission No 737 — Aboriginal Law Centre; Submission 139 — Professor G Nettheim; NSW Aboriginal Land Council, Transcript, pp 604-609, Mr M Barker, Transcript, pp 272-274.

<sup>34</sup> Submission No.561 — NLC, pp 3-7

6.28 Taking the proposal put forward by the Northern Land Council as an example, what is sought is that the Constitution should:

- (a) grant recognition and affirmation of the indigenous rights of Australian Aborigines and Torres Strait Islands by inserting a provision along the lines of section 35 of the Canadian Constitution, and also
- (b) provisions spelling out fundamental principles underlying those rights including:
  - the right of self determination;
  - rights to land;
  - the protection of social and cultural heritage; and
  - the right to secure economic bases.

The provisions of section 35 of the Canadian Constitution "recognize and affirm ... (t)he existing aboriginal land treaty of the aboriginal peoples of Canada". Support for a provision of this kind was expressed even though it was recognized that the rights of the kind referred to in section 35 had already received a greater recognition in Canada than was the case in Australia.<sup>35</sup>

6.29 On the other hand, the Country Shire Councils' Association of Western Australia expressed its opposition to the grant of aboriginal land rights.<sup>36</sup>

#### Adequacy of existing Power and need for a new power.

6.30 The Northern Land Council advocated the inclusion of a new and full power expressed in general terms to enable the Commonwealth Parliament to legislate for the benefit of Australian Aborigines.<sup>37</sup> The formulation of the proposed new power was intended to dispense with the need to comply with the "special law" requirement contained in the "races" power. The proposal was also seen as a means of putting the present power on a clearer and firmer basis — an objective shared and supported by the ALC.<sup>38</sup> Support for ensuring that the power to legislate for Aborigines should be confined to laws for their benefit was also expressed by citizens for Democracy.<sup>39</sup>

6.31 The reasons advanced by the NLC for seeking a new power are

- (a) the need for a full power to legislate with respect to Australian aborigines,<sup>40</sup>
- (b) the uncertainty which surrounds the present power;<sup>41</sup>
- (c) the need to eliminate the "special laws" requirement which is seen as unnecessary;<sup>42</sup>
- (d) the need to ensure the valid and continued operation of laws passed for the benefit of aborigines in the Northern Territory (in the exercise inter alia of the territories power under section 122) if and when the Territory becomes a State;<sup>43</sup>
- (e) the need to avoid the use of the word "race" in defining Federal legislative power because of its unsuitable and undesirable character as a concept.<sup>44</sup>

<sup>35</sup> See comments of Mr M Barker, Transcript, pp 272-273 and A/Professor Chisholm Transcript, pp 585-587

<sup>36</sup> Submission No 365 — Country Shire Councils' Association of WA

<sup>37</sup> Submission No.561 — NLC pp 42

<sup>38</sup> Submission No 737 — ALC

<sup>39</sup> Submission No.165 — Citizens for Democracy

<sup>40</sup> Submission No.561 — NLC, p.8

<sup>41</sup> At p.18.

<sup>42</sup> At pp.16-22.

<sup>43</sup> At pp.40-41.

<sup>44</sup> At pp.8-12.

The NLC also made a similar point at the Darwin hearings where it asserted that the "races" power was inadequate and uncertain and failed to recognize the special and unique position of Australian aborigines.<sup>45</sup>

6.32 The suggestion that the existing power is inadequate was rejected in submissions provided by the Department of Aboriginal Affairs and Mr G Neate (a legal officer with the Constitutional Commission who provided a submission in his private capacity). According to their views the present power is adequate and is likely to continue to be so in the future. Two organizations rejected the need for any change for a somewhat different reason and that was that they were opposed to any expansion of federal power in this area.<sup>46</sup>

6.33 The existence of possible problems with regard to the application of the present power to persons of mixed race was conceded in some of the submissions received by the Committee. However, general optimism was expressed at the likelihood of the power being interpreted to cover such persons.<sup>47</sup>

6.34 Some advantage was seen in principle in favor of making conclusive the Parliament's power to "deem the necessity for a special law" in the exercise of the present power but doubt was expressed as to how such an alteration could be made.<sup>48</sup> It was even suggested by the NLC that such an alteration could well involve a "transgression of the fundamental principles which underlie the relationship between the legislature and the judiciary".<sup>49</sup> In the view of the NLC the better solution was to abolish the special law requirement altogether at least as regards the power to make laws with respect to aborigines.

#### Compensation

6.34 There was some support for the proposal that the Commonwealth should not be obliged by the Constitution to compensate State Governments for the compulsory acquisition of property owned by them where the property is acquired for aboriginal purposes. In some cases support was expressed for this proposal without qualification while in others the support was only forthcoming in relation to the acquisition of non-urban and unalienated Crown land.<sup>50</sup>

The main reasons advanced for restricting the operation of the just terms requirement in this way were:

- (a) the requirement at present operates as a practical restraint on the ability of the Commonwealth to make just provision in favour of aborigines e.g. in the way of recognizing aboriginal land rights;
- (b) the requirement "rewards" in a sense the States which fail to make provision for the grant of ownership rights to aboriginal communities;
- (c) the transfer of ownership rights in land to aboriginal communities is seen by some as a restriction of their rights since ownership of land was taken away from the aboriginal population as a result of European settlement.

<sup>45</sup> Transcript, pp 521

<sup>46</sup> Submission No 365 — Country Shire Councils' Association of WA and Submission No 393 — Country Womens' Association of Australia

<sup>47</sup> See submissions provided by Department of Aboriginal Affairs, Mr G Neate, cf. NLC submission which cites these problems as a further reason for not using the concept of race for the purpose of describing the Commonwealth's powers in this area. The NLC seems to assume that this would be achieved by its formulation of the new power. See at pp 12-15

<sup>48</sup> See comments of Ms McEvoy, Transcript, pp 237 and Submission No 578 — Department of Aboriginal Affairs (Federal)

<sup>49</sup> Submission No 561 — NLC, p 17

<sup>50</sup> See Submission No 561 — NLC, pp.23-24; Mr M Barker, Transcript, pp.272-274, Ms McEvoy, Transcript, pp 237

6.35 As against this, however, the proposal did encounter some opposition from the Country Shire Councils' Association of WA which was opposed to special provision being made for aboriginal rights generally. Similarly, Citizens for Democracy believed the Commonwealth should be obliged to compensate State Governments in respect of State land acquired for aboriginal purposes, notwithstanding, that it was in favour of ensuring that the present power could only be used for the benefit of aboriginal people.

#### Implications for other races

6.36 The Department of Aboriginal Affairs highlighted the fact that any changes made to the existing races power for the benefit of aborigines necessarily raises the question whether similar changes should be made for people of other races. To some extent this problem could be avoided if provision was made for a separate and new head of power to legislate with respect to Australian aboriginals while leaving the present power intact.

#### Conclusions

6.37 The Committee has already indicated its uneasiness about the lack of an adequate public response especially from persons representing the wide and diverse groups of Australian aborigines. Subject to that reservation the Committee has decided to make the following recommendations:

#### Recommendations

1. The Constitution should be altered to confer upon the Commonwealth Parliament a new head of power to legislate with respect to Australian aboriginals but the present power contained in section 51(xxvi) of the Constitution should be retained.
2. The Constitution should be altered to ensure that the Commonwealth is not required by the Constitution to compensate State governments in respect of the acquisition of Crown land for aboriginal purposes, where that land has, at anytime since Federation, been designated as land reserved for Aborigines under the laws of any State.

#### Basis for Recommendation

##### (i) A new power

6.38 The Committee's recommendation in favour of the inclusion of a new power is designed to deal with the first three issues identified by the Committee as calling for its advice at paragraph 6.21

6.39 Essentially the Committee has decided to make this recommendation for the following reasons:

- it is desirable to have such a power for symbolic reasons;
- a new power could avoid some of the uncertainty which surrounds the present races power.

The Committee wishes to emphasise that neither of those two reasons would have been sufficient by themselves to warrant a constitutional amendment.

6.40 From a symbolic point of view it does not seem fitting to link the future of people who can rightly claim to be the "first Australians" with those of "alien" races. It may be correct to assert, as was done in one of the submissions, that the

"races" power "betrays a fundamental fear of persons of non-European descent". To that extent and very much as a matter of form the amendment to section 51(xxvi) carried in 1967 may have failed to give adequate expression to the intention of the voters to empower the Australian Parliament to legislate with respect to Australian aborigines.<sup>51</sup>

6.41 In other words a separate power would help, even if only in a small way, to recognize the special and unique position of Australian aborigines — and thus overcome the failure of the Constitution to make any reference to those persons at all.

6.42 Reference has already been made to the desire of some bodies to remove any reference to the concept of "race" in the description of the federal power over aborigines. The formulation put forward by the NLC has at least the merit of avoiding any explicit mention of the term but the Committee has doubts as to whether it would be possible to frame a new power which does not implicitly rely on the concept of race.

6.43 The other main reason for seeking a new power relates to the uncertainty created by the special law requirement, especially as interpreted by Stephen J. in the *Koorwaa* Case. It will be recalled that according to the approach favoured by Stephen J. merely because a law applies to the people of a particular race will not be sufficient to bring it within power — it is also necessary to show that the law deals with their special needs or a special threat posed by them. Parliament's judgment about the need for such special measures will not be treated as conclusive. It is true that in the *Tasmanian Dam* Case a majority of the Court accepted the ability to pass a law

- (a) applicable to everyone,
- (b) to protect things or objects which had a special significance to persons of the aboriginal race, at the same time as having significance for the rest of the community as well e.g. archeological caves.

However, this does not preclude a majority of the Court following the Stephen J. test in the future.

6.44 One way of avoiding the problem is to trust the judgment of the Parliament as to what, if any, special or other measures are needed to provide for the welfare and well-being of Australia's aboriginal population. This can best be done by abolishing the special law requirement altogether.

6.45 It is true that some doubt still remains as to whether powers to make laws with respect to persons or bodies (as distinct from activities) will always sustain laws merely because they apply to those persons or bodies regardless of the content or subject matter of those laws — a doubt which remains with the corporations power at present.<sup>52</sup> Nevertheless, even if the doubt is well founded the creation of a new power to make laws with respect to Australian aborigines when one already exists can be expected to suggest to the High Court that a change was intended to the power of the Parliament to make laws with respect to those persons. If the new power dispenses with the need to establish the "special" character of the laws passed in the exercise of the new power it can be expected that the Court will assume that the change was intended to widen the powers of the Parliament.

<sup>51</sup> Submission No 561 — Northern Land Council, p 10.

<sup>52</sup> See G J Lindell in the article referred (above at note 15) pp 219-220, 229-231.

6.46 Notwithstanding those considerations, it may perhaps be thought that the creation of a new power would not by itself be effective to sustain the validity of any law merely because it applied to persons who are Australian aborigines. If this is so, then specialist drafting advice may be needed in order to ascertain what, if any, wording can be used to achieve this objective.

6.47 A further reason for supporting the creation of a new power is that this would obviate the necessity to consider the alteration of the "races" power in its application to persons of other races since, under the Committee's proposal, that power would be retained.

6.48 The Committee has not been persuaded that the new power should be qualified to ensure that it is only used to sustain laws which benefit Australian aborigines, as was suggested by the NLC and Citizens for Democracy. In its view such a qualification is not desirable because:

- (a) the concept of benefit may prove difficult to interpret since there can be frequent disagreement on whether legislation benefits or adversely affects the interests of particular groups in a community;
- (b) heads of legislative power should be broadly worded,
- (c) the introduction of the benefit concept would have the effect of partially retaining the Stephen J. approach to the "races" power in its application to laws with respect to Australian aborigines,
- (d) the question whether a law benefits or adversely affects the interests of people of the aboriginal race is a matter which should be seen as more properly reflecting on the way the power should be exercised rather than its existence i.e. a political matter which should be left to the judgment of the electors;
- (e) whether the power should be limited because of its potential use in interfering with or overriding important rights of aboriginal people should be more properly considered as part of the debate concerning the entrenchment of individual rights — a matter which generally lies outside of this Committee's terms of reference. Such a course, however, even if it was followed, would concentrate on the entrenchment of the desired rights rather than limiting the scope of the power.

#### (ii) Compensation

6.49 The Committee begins by adverting to the general arguments in favour of removing the obligation to compensate State Governments where property is acquired for purposes related to aboriginal affairs, for example the provision of land rights. The arguments in favour of dispensing with the obligation to compensate State Governments are:

- the requirement at present operates as a practical restraint on the ability of the Commonwealth to make just provision in favour of aborigines e.g. in the way of recognizing aboriginal land rights;
- the requirement "rewards" in a sense the States which fail to make provision for the grant of ownership rights to aboriginal communities;
- the transfer of ownership rights in land to aboriginal communities is seen by some as a "restitution" of their rights since ownership of land was taken away from the aboriginal population as a result of European settlement;
- the ability of the Commonwealth Parliament to provide financial assistance to the States under section 96 is seen as a more flexible and realistic way of providing compensation as between governments.



6.50 The arguments in favour of retaining the present position are as follows

- the obligation operates as an important constitutional guarantee which was always intended to operate in favour of State Government as well as ordinary individuals;
- it would be both unfair and contrary to the federal character of the Australian system of government to discriminate against State governments in this way;
- the Commonwealth has adequate financial resources to ensure compliance with the present constitutional requirement;
- the power to grant financial assistance under section 96 is discretionary and does not guarantee a State a legal right to compensation.

#### Conclusions

6.51 The Committee does not believe that an adequate case has been made which would move it to recommend a repeal of the requirement that land even for aboriginal purposes should be acquired on "just terms". It does believe however that it would be appropriate to exempt from this requirement the acquisition of land for aboriginal purposes which has been a proclaimed aboriginal reserve by any State

6.52 Land rights for aborigines do not have the purpose of providing them a 'living area' on which they may pursue agricultural and horticultural or pastoral activities in order to earn income. Basically they are to guarantee the Aboriginal groups the perpetual use of land which is of totemic significance to them. Aboriginal relationships with the land have a totally different significance in their culture from the European relationship known as the common law

6.53 There are still many Aborigines in Australia who retain some vestige of tribal grouping and who have no rights in law to any use of land which is of totemic significance to their group, and to which they fairly have a claim

6.54 Some of these lands are occupied or specially reserved Crown Lands. Others are the subject of European settlement and investment for generations. As to the latter, the Committee was of the view until the process relating to the proposed "Makarata" has been gone through, there is no purpose in making a proposal for constitutional change. As to the former, in the Committee's view they fall into two categories:

- (a) lands on which for some generations aborigines have had little or no physical presence, and
- (b) lands which at some time have been reserved under the Laws of the States or the Territories for the use of aborigines

As to (a), the Committee found it difficult to define satisfactorily lands which could in all cases have a compelling argument made in respect of them that the Commonwealth should be able to acquire them for Aboriginal purposes without compensation to the States. It believes that the question of 'just terms' in those cases must be left to the courts. As to (b) the history of the lands reserved for aborigines is important. Until land rights legislation commenced (beginning with South Australia in 1965) Aboriginal Reserve Lands were provided, usually under the various Crown Lands Acts, as Crown Lands reserved for aborigines. The aboriginal people occupying those lands had no title in law to them. The States did, by executive order, alter the boundaries, excise portions and remove them from reservation without compensation to the occupants.<sup>53</sup>

<sup>53</sup> For example the South Australian Government in the case of Point Pearce Reserve in the 1950's, the Queensland Government in the case of Aurukun and Mornington Island Reserves in 1979

6.55 The majority of the Committee is of the view that in respect of lands which, at some time since Federation, have been reserved for Aborigines under the laws of the States, there can be no reasonable claim by the States to compensation for their acquisition by the Commonwealth for Aboriginal purposes. Moreover, the States should not be in a position to put obstacles in the way of Commonwealth acquisition by removing a reservation of the land for Aborigines in order to affect the compensation payable.

6.56 The majority of the Committee therefore recommends that in respect of acquisition of such lands the Constitution should be altered to provide that no compensation is payable by the Commonwealth. One member of the Committee is however more persuaded by the arguments in favour of retaining the present position.

#### (iii) Indigenous Rights

6.57 The Committee has taken the view that the question of entrenching indigenous rights generally lies outside its terms of reference. The kind of rights proposed, could, it believes, be made the subject of valid Commonwealth legislation under the new power proposed to deal with Australian aborigines. Such legislation could override any inconsistent State legislation by virtue of section 109 and thereby provide a measure of full protection as against future inconsistent State legislation. However, it could not provide full entrenchment as against future inconsistent federal legislation.

6.58 The Committee has undertaken a consideration of what is accepted as one of the few guarantees of individual rights contained in the present Constitution, namely, the obligation to compensate persons whose property is compulsorily acquired by the Commonwealth. This, however, is because it is a matter which is seen as having a very close and inextricable connection with the practical operation of the present power to make laws for the benefit of Aboriginal people

### Constitutionally Entrenched "Makarata"

#### Recommendation

It is too early to seek an amendment of the Constitution for the purpose of enabling constitutional backing to be given to a "Makarata" or compact between the Commonwealth and representatives of the Aboriginal people.

#### Background

6.57 In recent times there have been suggestions that there should be an agreement between representatives of the Aboriginal people and the Commonwealth Government. Such an agreement is sometimes called a "Makarata". In 1983 the Senate Standing Committee on Constitutional and Legal Affairs reported on the feasibility, whether by way of constitutional amendment or other legal means, of securing such a compact or agreement.<sup>54</sup> The Senate Committee preferred to refer to the Makarata as a "compact" in view of the lack of agreement and confusion which surrounds the use of the term Makarata. "Treaty" was not used either because it was thought to carry some form of internationally recognized sovereignty residing in an "Aboriginal nation"<sup>55</sup>

<sup>54</sup> Report of Senate Committee on Constitutional and Legal Affairs, *Two Hundred Years Later 1983 (Hereafter Senate Committee Report)*

<sup>55</sup> At pp.20-23

6.58 The Senate Committee recommended that the Federal 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.<sup>56</sup>

6.59 The kind of matters envisaged as being the subject of the Makarrata have included

- (a) the protection of Aboriginal identity, languages, law and culture;
- (b) the recognition and restoration of rights to land;
- (c) the conditions governing mining and exploitation of other natural resources on Aboriginal land,
- (d) compensation to Aboriginal Australians for the loss of traditional lands and for damage to those lands and to their traditional way of life;
- (e) the right of aborigines to control their own affairs and to establish their own associations for this purpose,
- (f) the provision of extensive welfare service such as Aboriginal medical services, legal aid, schools,
- (g) the provision of reserved seats for Aboriginal people in the Commonwealth and State parliaments and local government bodies; and
- (h) compulsory employment of a fixed proportion of Aboriginal people in governmental bodies.

6.60 The Senate Committee considered the following legal solutions put forward as potential means of implementing any compact which may emerge from negotiation between Aboriginal and non-Aboriginal Australians:

- (a) agreement with constitutional backing;
- (b) agreement in the form of a treaty,
- (c) agreement with legislative backing, and
- (d) simple agreement.<sup>57</sup>

6.61 The principal advantages of providing for the kind of agreement with constitutional backing recommended by the Senate Committee were

- the symbolic value of the necessary referendum process to insert the provision in the Constitution (as a means of helping the non-Aboriginal community to recognise "the failings of the past 200 years" and also to acknowledge a "new commitment in relations between themselves and the descendants of the nation's original inhabitants.");
- the flexibility to carry out legislative and executive action (which would be lacking in the other option for constitutional amendment, namely incorporating the full text of the compact as part of the Constitution); and
- the inability of subsequent Parliaments to amend or repeal the terms of the compact (thus giving it protection from what was described as "damage due to short-term political or social expediency").

<sup>56</sup> Senate Committee Report para 1 at p xii, see generally paras B4-B9 at pp 114-5.

<sup>57</sup> See generally Senate Committee Report, Chapter 4, pp.67ff

6.62 Under the terms of the Senate Committee's preferred recommendation a constitutional amendment would not be required to amend the terms of the compact or agreement but at the same time such a document would, like the Financial Agreement between the Commonwealth and the States, enjoy a certain measure of overriding constitutional force and would be binding on both the Commonwealth and the States (in the sense described below.) Under the other option for constitutional amendment the terms of the compact or agreement would become a new section of the Constitution thus requiring an amendment of the Constitution whenever it was desired to amend any of the terms of the compact or agreement.

6.63 The nature of the constitutional backing which the Senate Committee recommended can be better understood by setting out the kind of possible constitutional amendment which the Senate Committee envisaged could be used to give effect to its recommendation:

- (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 past 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).<sup>58</sup>

6.64 The Senate Committee noted that sub-section (5) of the draft provision is in similar terms to sub-section (5) of section 105A of the Constitution.<sup>59</sup> Sub-section

<sup>58</sup> Senate Committee Report, para 4.13 at pp 73-4.

<sup>59</sup> Senate Committee Report, para 4.14, p.74

(6) of the draft provision is designed to provide for special modes of alteration or repeal of the enabling power created by the draft provision either providing the easier or more difficult methods of referendum presently provided for by section 128 of the Constitution.<sup>60</sup>

6.65 The aim of the draft amendment is to utilize to some extent the model provided by the constitutional recognition accorded to the Financial Agreement. The Agreement was entered into in 1927 between the Commonwealth and the States to make further provision for the taking over the payment of State debts and also to regulate the borrowing of money by the Commonwealth and State Governments. Subsequently the Constitution was amended to include section 105A which reads 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.

6.66 As the Senate Committee pointed out in its report the Commonwealth's power to legislate under section 105A was challenged in 1932 following the failure of the NSW Lang Government to meet interest payments due on overseas loans. The Commonwealth paid the State's debts under the Financial Agreements Act and pursuant to sub-section 3 of section 105A the Commonwealth Parliament then enacted the *Financial Agreement Enforcement Act 1932*. The Act provided for the "garnisheeing" of State revenues to recover the unpaid interest (which by then constituted a debt owing to the Commonwealth). The Act was unsuccessfully challenged in *New South Wales v The Commonwealth (The Garnishee Case*

No.1).<sup>61</sup> The Senate Committee drew attention to the following remarks of Rich and Dixon JJ in that case:

Subsection 5 of that section provides with respect to agreements of the description contained in subsection 2 that every such agreement and 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 condition the obligatory force of the Agreement.*<sup>62</sup>

6.67 The Senate Committee mentioned that the words emphasised indicate the overriding strength which could be built into a compact deriving its efficacy from a provision modelled on section 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 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

6.68 Reference will be made in paragraph 6.89 of this Report to the fact that while sub-section (5) of section 105A gives binding force to the agreement, sub-section (5) of the possible draft amendment purports to give binding force to the laws passed pursuant to the proposed powers of the Parliament to:

- (a) validate state agreements made before the commencement of the amendment (under sub-section (2)), and to
- (b) carry out the agreement (under sub-section (4)).

6.69 The Senate Committee also considered a number of other associated matters, for example:

- (a) the need to determine who would represent the Aboriginal people of Australia in negotiating the compact,
- (b) the need to take measures to disseminate the idea of the compact as well as the terms to be negotiated in the compact.<sup>63</sup>

#### Terms of Reference

6.70 As was pointed out in its Issues Paper, this Committee did not regard it as being within its terms of reference to consider whether it is desirable for the Commonwealth Government to enter into a compact with the representatives of the Aboriginal people. However the Committee is concerned with the question whether the Constitution should be amended to provide the framework within which such an agreement could operate if it is ever thought desirable for the agreement to be concluded in the future.<sup>64</sup> As will be clear from the above that framework envisages the creation of new heads of federal legislative power with respect to Australian aborigines.

<sup>61</sup> (1931) 46 CLR 155

<sup>62</sup> At p.177 — emphasis supplied by Senate Committee

<sup>63</sup> See *Senate Committee Report* Chapters 8 and 9 respectively

<sup>64</sup> *Advisory Committee on the Distribution of Powers. Issues Paper* at p.49 and see generally at pp.48-50

<sup>60</sup> At para 4.16, p.75

### Issues

6.71 The following issues were identified by the Committee as calling for its advice:

- (a) Should the Constitution be amended to give constitutional backing to a Makarrata negotiated between the Commonwealth and representatives of the Aboriginal people?
- (b) If so, what form of constitutional backing should be provided?
- (c) Are there any practical or other difficulties in the way of providing any such constitutional backing?

### Submissions

6.72 The desirability of amending the Constitution for the purpose of providing the framework within which a compact could be negotiated and made to operate, mainly along the lines suggested by the Senate Committee, was supported by most of the bodies and persons who supplied the Committee with submissions on this topic.<sup>65</sup> Some of the bodies and persons who supported the proposal dealt with the more detailed aspects of the proposal, for example, the NLC, Mr G Neale and Professor G Nettheim. The NLC was at pains to emphasize that it did not see the Makarrata or compact concept as the only mechanism by which Aboriginal rights could be accorded recognition and protection.<sup>66</sup>

6.73 In contrast the proposal was opposed by the Country Shire Councils' Association of WA principally because it regarded aboriginal matters as best dealt with at a State level and also by Mr M Barker who regarded the concept as too hazy to be the subject of a workable constitutional amendment.<sup>67</sup>

6.74 The Department of Aboriginal Affairs indicated that there was no agreement between the Commonwealth Government and the Australian aboriginal community at the present time either as to:

- (a) the desirability of the compact concept, or
- (b) the terms to be included in any such compact.

6.75 The Committee wishes to reiterate that although it derived considerable assistance from the information given to it by the bodies and persons who made submissions, it does not regard the response received from the public and aboriginal groups as adequate to gauge community or aboriginal attitudes on this matter.

### Recommendation

It is too early to seek an amendment of the Constitution for the purpose of enabling constitutional backing to be given to a "Makarrata" or a compact between the Commonwealth and representatives of the Aboriginal people.

### Basis for Recommendation

6.76 The Committee recognizes that a proposed amendment to provide the necessary framework for a compact provides an imaginative and attractive approach to the immensely difficult situation which exists between Australia's

<sup>65</sup> See Submission No 561 — NLC, pp 25, 39, Submission No 443 — Anglican Church Diocese of Sydney, Submission No 165 — Citizens for Democracy p 16, submission No 737 — Aboriginal Law Centre, NSW Aboriginal Land Council, Transcript, pp 604-609.

<sup>66</sup> Submission No 561 — NLC, p 25.

<sup>67</sup> Transcript, pp 272-274.

aboriginal and non-aboriginal population. Had the compact concept attracted greater recognizable support both within and outside Australia's aboriginal population, it might indeed have formed an appropriate amendment to be placed before the voters at a referendum to be held in the bi-centennial year of 1988.

6.77 Nevertheless, upon the information before it, the Committee does not believe that such agreement has emerged and it concludes with some reluctance that it is too early to seek such amendment of the Constitution. The reasons for reaching this conclusion are elaborated below.

6.78 Essentially those reasons are twofold:

- (a) the proposal includes a number of problems which, although possibly not insurmountable, will require careful attention;
- (b) it is premature to attempt to resolve those problems and to invoke the referendum procedure, until, and unless the concept of a compact attracts a greater measure of support amongst Australian aborigines and the rest of the public.

### Problems

#### (i) Aboriginal representation

6.79 One of the significant differences between the Financial Agreement and the kind of compact discussed here, is that the parties to the former agreement were legally recognisable bodies whose existence was and is constitutionally guaranteed. This is not the case with regard to the body or entity which will need to be created to negotiate the compact on behalf of the Australian aboriginal people.

6.80 In its report the Senate Committee itself suggested that the following criteria will need to be satisfied concerning the representation of the parties to the compact:

- each signatory's acceptance of the compact must be the legitimate and representative act of the community concerned,
- each signatory has the capacity and authority to bind its respective party to a lasting observance of the terms of the compact. It was said to be equally essential that each signatory be clearly perceived to be independent of the other party to the compact.<sup>68</sup>

6.81 The proposed constitutional amendment discussed by the Senate Committee would enable the Commonwealth to negotiate the compact "with persons or bodies recognized as representatives of Australian Aborigines and Torres Strait Islanders."

6.82 The Senate Committee indicated in its Report that there was no universally accepted representative political institution to represent Australian aborigines.<sup>69</sup> However the same Committee favoured a re-constituted National Aboriginal Conference to serve as the body to represent Australian aborigines in the negotiation of a compact.<sup>70</sup>

6.83 Apart from identifying the appropriate body to conclude a compact with the Commonwealth Government a further issue which will need to be dealt with is

<sup>68</sup> Senate Committee Report paras. 8.2-8.3 p 129.

<sup>69</sup> At para. 8.16 at p 146.

<sup>70</sup> At para. 8.36 p 146.

whether it will be either necessary or desirable to give that same body a measure of constitutional protection to protect its continued existence.

(ii) Obligation to negotiate

6.84 The notion of a compact or indeed any agreement presupposes that the parties to that instrument have been prepared to negotiate and reach agreement with each other. Legal mechanisms can usually be created to enforce compliance with the agreement but it is quite another thing to create legal mechanisms to attempt to force parties to negotiate with each other. It was suggested in one submission that the relevant constitutional provisions should be worded in a way that "infers an obligation on the Commonwealth to take active steps towards reaching (such) agreement" and also "obliges the Commonwealth to take reasonable steps within a reasonable period to conclude an agreement".<sup>71</sup>

6.85 The Canadian Constitution may provide some guidance in this context by expressly requiring:

- (a) the holding of constitutional conferences to be convened within fixed periods of time, and
- (b) to include on the agenda "matters that directly affect the aboriginal peoples of Canada"; and at which
- (c) representatives of those peoples must be invited to attend.<sup>72</sup>

6.86 Nevertheless the concept of obliging a party to negotiate and reach agreement (as distinct from merely consulting) will be thought, at least by some, to be quite novel. Traditionally the courts have not been prepared for example to enforce "agreements to agree".<sup>73</sup> Perhaps it may prove impossible to go beyond the kind of consultative mechanism suggested by the Canadian example referred to above.

(iii) Obligation to legislate

6.87 To be fully effective the compact may need to give rise to a constitutional obligation to carry out the terms of the compact, even to the point of having to legislate with respect to certain matters e.g. the grant of aboriginal lands within a fixed or reasonable time. There is nothing unusual, at least in modern times, in making governments legally liable to perform contractual obligations of the kind normally undertaken by ordinary individuals. The problems begin to arise when what is sought to be enforced consists of agreements which give rise to "political and administrative arrangements" i.e. matters of a governmental or political character.<sup>74</sup> A constitutional amendment could doubtless overcome their non-enforcement as the law presently stands. However it needs to be recalled that an underlying factor behind their non-enforcement in the normal way may be due to a perception that such agreements are not appropriate to be enforced by the ordinary legal processes having regard to their peculiarly political character or perhaps the very general nature of the obligations contained in such agreements.

6.88 It is of course true that the Constitution was amended to facilitate the constitutional recognition and efficacy of the Financial Agreement. But the obligations created by the Agreement seem to fall within a narrower compass in that

<sup>71</sup> Submission No 2086 — Mr G Neale, pp 6-7

<sup>72</sup> See Canadian Constitution sections 35(1)(b) and 37(2)

<sup>73</sup> For a case involving intergovernmental agreements of that kind, see *Soeth Australia v The Commonwealth (The Railway Standardization Case)* (1962) 108 CLR 130.

<sup>74</sup> see *Australian Woollen Mills Pty Ltd v The Commonwealth* (1954) 92 CLR 424; (1955) 93 CLR 546 and the *Railway Standardization Case* mentioned above

they require the Executive Governments of the Commonwealth and the States to take certain measures in order to comply with the Agreement. The power to pass laws created by section 105A are designed to facilitate compliance by those governments in the taking of the required measures. They do not extend to the general regulation of the rights of other persons.<sup>75</sup> The essential difference here is that what needs to be created is an obligation placed upon the Commonwealth Parliament to make laws affecting the whole community, whereas the effect of Section 105A only places obligations on Governments.

(iv) The operation of other provisions in the Constitution

6.89 The provisions of sub-section (5) of the draft constitutional amendment would ensure that laws passed to give effect to the compact would be binding "notwithstanding anything contained in this Constitution". As has been pointed out in a submission received by the Committee<sup>76</sup>, consideration needs to be given to what, if any, constitutional provisions should operate or apply to laws passed to give effect to the compact, for example, section 51(xxxi) (the just terms of compensation requirement) and section 92 (freedom of interstate trade).

(v) The entrenchment of the compact

6.90 It was foreshadowed that the entrenchment involved in the draft constitutional amendment envisaged by the Senate Committee basically focusses on the laws that are passed to carry out the compact rather than the compact itself. It is likely that further thought will have to be given to the need for express provisions to prohibit:

- (a) the repeal or amendment of a law which was passed to carry out the compact, and
- (b) the making of any law in the exercise of other legislative powers vested in the Commonwealth,

where the laws to be prohibited are either inconsistent or otherwise contravene the terms of the compact. In other words, it may be necessary to explore further the need to make the compact binding (as distinct from the laws passed to carry out the compact) in order to make the proposal effective.

Support for the compact

6.91 The Committee does not wish to suggest that the above problems are insuperable even though they do give rise to some novel issues. Nevertheless, as already indicated, it does not seem advisable to attempt to resolve them or invoke the referendum procedure until and unless there is sufficient support for such a compact.

6.92 There were various indications contained in the Senate Committee Report that suggest that the concept of a compact was only in its formative stages and that necessary support for it did not exist when that report was prepared. The Senate Committee for example found it necessary to recommend the taking of steps to overcome the perceived widespread lack of information and understanding amongst aborigines (which was not however to be confused with hostility to the concept.) It quoted the evidence of a witness who appeared before it:

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.

<sup>75</sup> *The Garnishee Case* (1931) 46 CLR 155 at p.178 per Rich and Dixon JJ

<sup>76</sup> Submission No. 2086 — Mr G. Neale, p.7.

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 more 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>77</sup>

The Senate Committee also pointed to a lack of understanding in the rest of the community.

6.93 There was, furthermore, a recognition that the consultative process which should take place before further action could take place on the proposal could take many years, especially given the fact 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 the matter by means of their own choosing. The Senate Committee felt unable to set a timetable.<sup>78</sup>

6.94 Submissions received by this Committee have not contradicted these impressions or suggested any radical change in the situation having occurred since the Senate Committee presented its report in 1983. For example the NLC itself recognized that:

Neither concept of Makarrata or treaty enjoyed the full support of the Aboriginal and Islander peoples. It is however recognized by the Northern Lands Council, that at some time in the future it may be generally thought desirable by Aboriginal and Islander people to enter one or several Agreements with the Commonwealth.<sup>79</sup>

This suggests to the Committee that there may be division about the proposal amongst Aboriginal groups.

6.95 Moreover as indicated above no agreement apparently exists between the Commonwealth and the Australian aboriginal community on the desirability of the compact concept.

6.96 It needs to be recalled that the successful referendum in relation to the Financial Agreement was held after the Agreement was concluded between the Commonwealth and the States. In the opinion of the Committee a greater indication of support for the general concept of a compact needs to be evidenced (without necessarily requiring the negotiation of all its terms) before it becomes desirable to seek an amendment of the Constitution for this purpose.

<sup>77</sup> Senate Committee Report para 9.1 at p 151.

<sup>78</sup> See ch.10 of the Senate Committee Report and especially para 10.6 at p 161.

<sup>79</sup> Submission No.561 — Northern Land Council, p.26.