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, the matter of entrenchment in this way requires careful 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.[3]

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 condition the obligatory force of the 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.

4.13 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 requiring special legislative concurrence by recognised 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.

2. P. Bayne, 'The Makarrata: A Treaty with Black Australia', Legal Service Bulletin, October 1981, incorporated in Evidence, p. 61.

3. Evidence, p. 781.

4. R.D. Lumb and K.W. Ryan, The Constitution of the Commonwealth of Australia Annotated, Second Edition, 1977, p. 341.

5. NSW v. Commonwealth (1932) 46 CLR 155 at 177 (emphasis supplied).

6. G. Shaw, 'Makarrata, Problems and Possibilities of Implementation', tabled as Committee Document, 28 June 1982, p. 23.

7. ibid.