A compact or "makarrata" examined

"Two Hundred Years Later" the report of the Senate Standing Committee on Constitutional and Legal Affairs, tabled in Parliament on September 13, 1983.

Senator Michael Tate, Chairman of the Committee, told the Senate, "The report is a result of a resolution of the Senate that the Committee should conduct 'an examination of the feasibility, whether by way of constitutional amendment or other legal means, of securing a compact or 'Makarrata' between the Commonwealth Government and Aboriginal Australians.'

"Proposals for some form of treaty or compact or, to use the word favoured by the National Aboriginal Conference, for a 'Makarrata', have had currency for several years. The idea behind such proposals is that at this stage of Australia's history there is a need for a reappraisal of traditional perceptions of the historical relationship between Aboriginal and non-Aboriginal people from the time of European ssssettlement in this country. Proponents of the concept have argued that the best means of effecting a reconciliation between the Aboriginal and non-Aboriginal communities is the negotiation of a comprehensive agreement setting to rights, insofar as that is possible some two hundred years later, the dispossession and ill-treatment suffered by the original inhabitants of this continent and their descendants at the time of European settlement and subsequently.

"It is important to emphasise that the Committee's terms of reference did not require it to come to a conclusion as to the desirability or usefulness of the Makarrata concept. That central issue must be decided elsewhere and by other persons, the appropriate representatives of the Aboriginal and non-Aboriginal communities. Clearly such an agreement would only succeed if it were understood and supported throughout the whole Australian community. As regards the Aboriginal community there must be a comprehensive consultative process throughout Australia, an understanding and systematic consideration of the legal issues involved and of the various legal options for implementation. As well, there must be clear accord as to the objectives which are sought to be procured by the agreement, the establishment of proper representational processes and of a timetale for implementation. The relevance to the narrower question of legal feasibility of these issues, which must be dealt with if a decision is made to pursue a compact, became apparent during the course of the inquiry and the Committee's report attempts to assist in consideration of them . . . .

SITTING, left to right, Senators Austin Lewis, Michael Tate (chairman), Nick Bolkus, Alan Missen. STANDING, left to right, Mary Louise Willheim (research officer), Christopher Fogarty (secretary), Cleaver Elliott (research officer).

"The claim made by some Aboriginals to sovereignty is given serious and detailed consideration in the report. The Committee looked closely at the rules of international law regarding sovereignty and at the consistent application by the courts in Australia of the 'settled colony' principle which in turn was based on the *'terra nullius'* doctrine, by which it was held that at the time of European settlement Australia was land belonging to no one. The effect of the application of this principle was that the Aboriginal inhabitants of the colony of Australia became immediately subject to the laws of the colonising nation, which refused to acknowledge that they had a recognisable system of law and disregarded their relationship to their land.

However regrettable and ill-founded the views which led to the application of the settled colony principle, with its historical consequences for the Aboriginal people, the Committee has concluded that sovereignty does not now inhere in the Aboriginal people. The Committee's conclusion is expressed in the following terms:

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

Following its consideration of the legal options available to implement a compact, the Committee concludes that the option to be preferred is the insertion within the Constitution of a provision similar to existing section 105A of the Constitution and recommends that the Government, in consultation with the Aboriginal people, should give consideration to this option if a compact is pursued. Under this option, a new provision in the Constitution woulf confer a broad power on the Commonwealth enabling it to enter into a compact with representatives of the Aboriginal people. The 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.

An important aspect of this approach is the symbolically important opportunity it would provide for the Australian people, by way of the necessary referendum to amend the Constitution, to show their commitment to the concept of a compact as a means of reconciliation between the Aboriginal and non-Aboriginal communities and as a means whereby the history of injustice and deprivation against Aboriginal people can in come measure be redressed. Inclusion of a special enabling power within the Constitution would also enhance the status of the ultimate agreement.

Although the Committee's preference is for a constitutional amendment, our consideration of sections 51 (xxvi) (the power to make laws for the people of any race for whom it is deemed necessary to make special laws) and 51 (xxix) (the external affairs power) have led us to conclude that there already exists sufficient power to enable the Parliament to enact the sort of legislative measures which would be likely to flow from the conclusion of a compact. These powers, recently given detailed consideration by the High Court in Koowarta's Case and the Tasmanian Dam decision, would cer-

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MEMBERS OF THE COMMITTEE

Senator Michael Tate (Tasmania) Chairman
Senator Robert Hill (South Australia) Deputy Chairman
Senator Nick Bolkus (South Australia)
Senator Peter Cook (Western Australia)
Senator Austin Lewis (Victoria)
Senator Alan Missen (Victoria)
Former members of the Committee (membership ceased on 4 February 1983)
Senator Noel Crichton-Browne (Western Australia)
Senator Gareth Evans (Victoria)
Senator Susan Ryan (Australian Capital Territory)
Secretary
Christopher Fogarty

Representation for Aborigines to decide

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tainly provide a useful 'fall-back' position should it be decided not to pursue a constitutional amendment.

One of the more significant issues which came to the Committee's attention during public hearings was that of representation. The question of who should represent the non-Aboriginal party in negotiations has never seriously been in issue and the Committee's reasons for supporting the Commonwealth Government in this role are set out in the report so I need not discuss them in this statement.

However, the question of who should represent the Aboriginal community is not so straightforward and has been the subject of much deliberation by the Committee. The National Aboriginal Conference has been the major proponent of a compact on behalf of Aborigines and has generally been seen as the body most suited to negotiate on their account. In our travels among Aboriginal communities we heard a good deal of comment about the NAC's inadequate funding and structure. For example, many witnesses spoke of the inability of the NAC to adequately represent Aboriginal viewpoints because of the smallness of its membership and the consequently large electorates to be served by each member. Concern was also expressed in some quarters about what was perceived as a lack of independence from government on the NAC's part.

The Committee has noted that the new Minister for Aboriginal Affairs (Mr Clyde Holding) has made it clear that the present government wishes to strengthen the NAC and enhance its role as the nationally elected body representing Aboriginal people in their dealings with the Commonwealth Government. As part of this new role, the Minister has suggested that the NAC give consideration to a new structure for itself and that it consider its re-establishment under its own Act, thereby giving it the statutory autonomy it lacks at present. As well the recent Budget doubled the NAC's appropriation.

In view of these developments the Committee, while recognising that the decision ultimately rests with Aborigines themselves concludes that the NAC should be considered the most suitable organisation to co-ordinate Aboriginal opinion during the negotiation process and, once negotiations are completed, to conclude the compact on behalf of the Aboriginal people. To this end, the Committee urges the NAC to take the opportunity which the government has offered it to seek re-establishment on an independent statutory basis and with an increase in membership, so as to allow it to represent the Aboriginal people more effectively. We also urge the government, following its Budget initiative, to maintain funding of the NAC at a level which will enable it to fulfil adequately its enhanced role.

At the same time we emphasise that we see the NAC's role as one of *co-ordination* of Aboriginal opinion. There is a valuable role to be played by the many community-based Aboriginal organisations such as land councils and health, legal and housing services in educating, seeking views and relaying them to the negotiators if the compact proposal goes forward.

Another vital issue which the Committee has found it necessary to address in its report is that of education — among both the Aboriginal and non-Aboriginal communities — about the compact proposal. Before any compact could be concluded considerable thought would need to be devoted to the question of how to inform both communities about the concept, its purpose and effect.

The evidence available to the Committee indicated a widespread lack of information and understanding among Aboriginal communities of the idea of a compact. We also found that in some instances there was only a limited understanding even among informed non-Aboriginal witnesses, from which it could be inferred that the wider non-Aboriginal community also lacks an understanding of the idea.

We wish to emphasise, however, that this lack of understanding should not be confused with hostility to the idea. Rather it indicates that the concept is a relatively recent one which requires explanation and discussion. Such discussion should include consideration of the desirability of a compact, its benefits and disadvantages, both present and future, and a consideration of alternative means to the same ends.

The Committee heard valuable suggestions from witnesses as to the most effective means of promoting education and discussion among Aboriginal communities, and these are considered in Chapter 9 of our report. Although likely to be time consuming, the Committee believes that such a process is crucial if a compact is to be negotiated. Accordingly, we recommend that, in order to ensure that the negotiation process is conducted on a basis of understanding and acceptance of the concept by all Aboriginal communities, the Commonwealth should ensure that the widest range of Aboriginal community leadership is involved in that preliminary task.

The Committee also discusses the need for the development of programs under Commonwealth sponsorship to raise the consciousness of the non-Aboriginal community to a level where the compact proposal can be discussed in an informed way. The Committee recognises the political nature of this task, especially if the Committee's preferred option of a constitutional amendment is pursued. This would require widespread discussion and subsequent acceptance of the issues involved, if the necessary majorities to amend the Constitution were to be attained.

In conclusion, I emphasise again that this report is not concerned to determine whether the concept of a Makarrata should be pursued. What the report seeks to do is to address in detail a number of subsidiary issues which will need to be faced if the necessary political decision to negotiate a compact is made by Aboriginal people and the Commonwealth. It is the Committee's hope that, if that decision is made, the report will be of assistance in coming to grips with the various processes which will need to be pursued if a worthwhile compact is to come to fruition.

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