Chapter 6

A COMPACT IN THE FORM OF A SIMPLE AGREEMENT OR CONTRACT

Nature of the proposal

6.1 An alternative legal device by which a compact between the Commonwealth and representatives of the Aboriginal people could be given effect is for the parties to put the principles and terms of the compact within a simple agreement or contract. Such a device has been proposed as a means of placing the agreement within the realm of the statutory and common law of contract. In so far as it was desired to enter into an agreement stating certain principles and objections and agreeing to the expenditure of money to undertake them, this could be done without constitutional difficulty. Following the decision in Victoria v. Commonwealth (AAP Case) (1975) 134 CLR 338, s.81 of the Constitution enables the Parliament to appropriate monies for 'the purposes of the Commonwealth' as these are determined by the Parliament and without any necessity to derive support from a head of power under s.51 of the Constitution.

6.2 However, if it is desired to create legally enforceable rights and obligations in relation to a contract or agreement, then there are suggestions by the High Court that the capacity to enter into the agreement is limited to what might be achieved under the heads of legislative power under the Constitution. That is, while there is no necessity for statutory authorisation of such a legally enforceable contract, the potential must exist for such statutory backing. As the Committee has concluded in

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

6.3 The Committee's attention was drawn to the treaties concluded by the British Government with the United States Indians and the Canadian Indians (see paragraphs 3.51-3.65 above) as examples of such an arrangement.[1] As discussed at paragraphs 3.67-3.69 above, it is clear that the contemporary colonial attitude and subsequent judicial interpretations have regarded these agreements not as international law treaties but as agreements which have been enforced at law with varying degrees of success by the parties to them.

Advantages of the contract form

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

Disadvantages of the contract form

6.5 Against these advantages must be considered several disadvantages brought to the Committee's attention which, in the opinion of witnesses appearing before the Committee, weigh heavily against using the contract form.[3] These include the fact that the Commonwealth Government would be one of the parties to the proposed contract and it cannot bind its own and successive governments' policy-making function by any means, including a contract.[4] A contract, moreover, is suited more to a strictly defined commercial agreement; it is inappropriate as a means of implementing a general and policy-oriented agreement.

6.6 A further disadvantage which has been suggested is that the enforcement of such a contract, despite the nomination of an adjudicator, would prove contentious and difficult. Establishment of the breach itself would be problematic. Finally, in the event that a breach was proved, finding an appropriate remedy, whether specific performance or damages (how would they be assessed?) would also prove very difficult.

6.7 There are precedents in Australian history for contracts between European settlers or explorers and Aborigines. In 1835 John Batman concluded an agreement with the Aboriginal tribes of the Port Phillip area. He made gifts to the Aborigines in return for obtaining land for his pastoral enterprises and for 'recognising' land rights of the tribes in the area. This 'treaty' was subsequently officially repudiated by Governor Bourke. More recently commercial contracts have been made between Aborigines and mining companies for the development of natural resources and the establishment of mining facilities on Aboriginal land. Examples of these contracts are the Ranger and Jabiluka uranium agreements.

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

6.9 The nature of these difficulties is such as to make a simple agreement an unsatisfactory method of implementing a compact. More importantly, however, a simple agreement would not have the necessary legal security which ought to attach to a national compact between the Aboriginal peoples and the Commonwealth of Australia.

Endnotes

1. Evidence, p. 775.

2. See, for example, P. Bayne, 'The Makarrata: A treaty with Black Australia', Legal Service Bulletin, October 1981, p. 232, incorporated in Evidence, p. 561.

3. National Aboriginal Conference Submission, incorporated in Evidence, p. 630; Professor G. Nettheim, Submission on behalf of International Commission of Jurists (Aust. Section), incorporated in Evidence, p. 905; P. Bayne, ibid

4. Ansett Transport Industries (Operations) Pty. Ltd. v. Commonwealth of Australia and Others (1977-78) 17 ALR 513, South Australia v. Commonwealth (1962-63) 108 CLR 130.

5. Ranger Uranium Project, Agreement Under Section 44 of the Aboriginal Land Rights (Northern Territory) Act 1976, between the Commonwealth of Australia and the Northern Land Council, 3 November 1978.

6. Felix, 'From Glass Beads to Gold Pens', 3 Legal Service Bulletin 225, December 1978.

B.4 Having considered the various legal options available for the implementation of a compact, the Committee is of the view that the preferable course is the insertion within the Constitution of an enabling power similar to s.105A. This option, which was also preferred by a significant number of witnesses,[1] has a twofold advantage.

B.5 First - and by no means insignificant - is the symbolic value of the necessary referendum process to insert the provision in the Constitution, whereby the non-Aboriginal community would be given the opportunity to recognise the failings of the past 200 years and to acknowledge their commitment to a new beginning in relations between themselves and the descendants of the nation's original inhabitants. The necessary educative process preceding such a referendum would be an important part of the longer process of reconciliation symbolised by the passage of the referendum.

B.6 The second advantage is the flexibility it provides to carry out legislative and executive action pursuant to the enabling power, which would be lacking in the other option for constitutional amendment: insertion of a final and complete agreement within the Constitution. Under the preferred option there is created a specified head of power within certain broad parameters to be followed by detailed legislation.

B.7 We have discussed in detail earlier in this Part the advantages and disadvantages or - in the case of the international treaty option, the unreality - of the other suggested options. Certainly it seems to the Committee that there is much to be said for the possibility of enacting legislation pursuant to the Commonwealth's existing constitutional authority, subject only to the danger of

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

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

RECOMMENDATION:

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

Endnote

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

PART C

FURTHER ISSUES INVOLVED IN ANY IMPLEMENTATION DECISION