

National Aboriginal Conference

Briefing of Draft Recommendations and considerations

Re-Options for constitutional reform and a Land Rights package

Prepared by Michael Anderson (March, 1984)

NAC Research Director for a Treaty Framework between the Commonwealth Government of Australia and the NAC for and on behalf of First Nations Peoples of Australia

Introduction

Having had a series of discussions with Brian Keon-Cohen (Legal adviser to the NAC sub-committee on the Treaty (Makarrata); Land Rights matters) and, Professor Peter Bain of the ANU law faculty on possible options for constitutional reform, the following proposals were recommended on each of these matters.

Summary

The matters that were proposed on land are attached in schedule 1.

The recommendations for constitutional change focused on what already exist within the current Australian constitution with a few adjustments and/or inclusions.

It was generally agreed that the least we have to do in terms of alterations the better, especially section 51 ss. 26; The Race power.

However, it maybe that we will need to have a more definite proposal which may include the need to create a package like that of section 105A.

Recommendation:

In short, the NAC should consider putting to the government as its first option, alteration to section 51 sub-section 26 with words such as that which follows:

“to pass laws for the benefit of the Aboriginal race”

This will replace the existing sub-section 26 which states:

"the people of any race for whom it is deemed necessary to make special laws"

The selling point for this is the fact that it only deals with First Nations Peoples. It will also serve to remove the racist element of section 51 sub-section 26 which permits the parliament to pass detrimental laws for any race it deems necessary. In this regard it is recommended that we take a very strong look at what Hitler did in Germany having such a power as head of state.

I believe that all Human Rights bodies operating within and without Australia will be very happy to see this change.

The second option is to introduce a similar section to 105A of the Australian constitution, that is:

SECT 105A.

Agreements with respect to State debts.

(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.

- (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.

This section was used as a model for the Commonwealth to assume the responsibilities for Aboriginal and Torres Strait Islanders. The arrangement between the Commonwealth and the States (1975) divided among themselves certain responsibilities in respect of Aboriginal and Torres Strait Islanders affairs such as funding of programs like “housing for Aborigines” through the State Housing Commission and other development projects to improve the status of Aboriginal and Torres Strait Islanders within the States like special funding to the State Health Departments.

These arrangements with the States were achieved by the Commonwealth using both section 51 ss 26 and section 105A (105A as a model only) to have it formally arranged for the Commonwealth to deal with matters that were formally the sole responsibilities of the States.

To provide an example of what these arrangements and powers achieved.

Land remained the responsibility of the States (See NSW and South Australian Land Rights) did take action to make Land Rights a reality within their jurisdiction but admittedly they were very reserved.

- The NSW Government introduced legislation for Land Rights which empowered the State Land Council as legislated for to claim all unclaimed and unused Crown lands within the State., Along with a funding arrangement that would provide for a sustainable self-funding investment program.
- In the case of the Northern Territory, the Commonwealth had the powers to pass laws as this was a territory over which the Commonwealth retained residual constitutional powers. Thus, the Commonwealth Northern Territory Land Rights Act 1975.
- The Commonwealth funded a specialised housing program for Aborigines from 1976 within each respective States jurisdiction. All of which was administered by the States Housing Commissions

- Specialised Educational strategies, eg paying Aboriginal and Torres Strait Islander children \$3 per week to attend school
- State health programs fro Aboriginal and Torres Strait Islanders.
- Etc etc

While it was agreed that the Commonwealth shall fund:

- The development of specialised Education and Training programs through the Commonwealth department of Employment and Industry
- Community Development and Employment Programs (CDEP) by creating an employment strategy where the people worked for their Dole.
- Community based Medical Services
- Funding for the development of early childhood programs throughout Australia
- Legal services and
- Independent Housing Companies at the community level thereby enabling the people to at community level to house their own and be responsible for those houses.
- Etc etc.

In the case of Section 105A it served as a model that permitted the States to cede certain powers (in this case Aboriginal and Torres Strait Islanders) to the Federal Government for their administrative arrangements.

It is therefore recommended that the NAC Treaty sub-committee propose to the NAC National assembly body the following:

It is recommended that the NAC propose as an alternative to an amendment of section 51 ss 26 (Race power) that it considers drafting a new section as follows:

105B

Legislating for the Rights of Aboriginal and Torres Strait Islander Peoples.

The proposed wording be as follows:

The Commonwealth assume all responsibilities for legislating for the benefit of all Aborigines and Torres Strait Islanders within all State and Territories with respect to:

1. Cultural Heritage
2. Social and Cultural wellbeing
3. Economic development
4. Independent sovereign jurisdictional governance within defined territories
5. Establishment of traditional customary Local Law Courts within Independent the Jurisdictions
6. Establishment of a National First Nations Land Registry Office
7. Establishment of a joint National First Nations and Commonwealth managed Environmental Protection Agency
8. The total separation of jurisdictional powers between the States and Territories and the defined self-governing First Nations lands and waters.
9. Establishing local Policing authorities within the defined self-governing First Nations Territories.
10. The establishment of First Nations Independent School.

Schedule 1

Land Rights

The following are the key objectives that have been coming out of the community-based consultations that we have been holding around this country.

The precedent that underpins these recommendations come from the British “*Landcaster*” agreement between the British Government and Zimbabwe after the success of their civil war against the occupying British power for their right to be a self-determining People and to be self-governing. (de-colonisation).

1. That all houses currently occupied by Aboriginal people in Australia be purchased as a Reparations/Compensation package.
 - a) The ownership of these house be transfer to the head of the family in occupation of these houses at the time of purchase on the condition that the Head of the household provide a will which identifies the name of the person to whom the house shall be transferred in the event of death.
 - b) In the event of separation of the parents, the ownership of the house will go to the eldest child of the family]
2. That the State housing Authorities who have been funded by the Commonwealth to provide Housing for Aborigines transfer ownership of each of the houses in the same manner and on the same conditions as is identified in clause 1 above.
3. That a housing fund in the amount of \$5 Billion be established. That \$2 billion be placed in an investment account in perpetuity and that only the interest of these funds shall be accessed for future housing strategies only. The remaining \$3billion shall be used to acquire the houses as described in clause 1 above.
4. That a land Fund be established in the amount of \$20billion to purchase lands from landowners on the bases of a ‘willing seller, willing buyer’ arrangement throughout Australia. \$10billion shall be used in the immediate period to acquire lands. \$10billion shall be invested in perpetuity and that the interest shall be drawn for the purpose of continuing land acquisitions into the future’ generations. These lands are to be transferred to the traditional owners.

- i) (noting that each clan group of a Nation shall have the right to have all lands so purchased transferred to them in their clans' names of that clan group and not centralise ownership in the name of that Nation)
5. That an Economic Development fund be established in the amount of \$6billion for the purposes of establishing and/or purchasing businesses for Aboriginal people who wish to establish businesses.
 - i) The central focus and functions of this Economic development fund is to assist in establishing primary and agricultural industries throughout Australia subject to the will of the people. All funds so provided are to be regarded as seed funding. These funds are NOT to be classified as loans. (The only condition will be that a support fund be established in the amount of \$500 hundred thousand to be provided independently of the Economic Development fund and that this fund shall be used ONLY for the purposes of working with the proponents to establish a business and viability plan prior to approval being given)
6. That all National Parks and Marine Parks be transferred to the Traditional Owners of those lands and waters and that these Parks be owned and governed and managed by the people whose lands and water they are on.
7. That the space above these lands and waters shall be the property of the Traditional Owners and that the use of this space will require formal agreements with the Traditional Owners if they are needed by airline companies for their routes across these lands and waters.
8. That all waters both surface and ground water shall become the property of the Traditional Owners.
 - i) Should these waters be required by Sate and Territory Government for industrial purposes and continued grazing purposes then formal agreements will be required to be entered into between the State and Territory governments with the Traditional Owners