

24/3/2/2/5



CONSTITUTIONAL ASSEMBLY

**MEMORANDUM**

**TO :** Theme Committee 3

**FROM :** Sandra Haydon

**DATE :** 4 May 1995

**SUBJECT :** SUMMARY: AREAS OF AGREEMENT & CONTENTION

Members are asked to read the document '*Summary: Areas of Agreement & Contention*', which relates to the report on Block 2 Phase 1, in preparation for discussion at the Theme Committee meeting on Monday 8 May 1995.

*Please bring this document with you.*

***IMPORTANT***

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# **CONSTITUTIONAL ASSEMBLY**

## **THEME COMMITTEE 3**

### **SUMMARY**

#### **AREAS OF AGREEMENT & CONTENTION:**

#### **NATIONAL & PROVINCIAL LEGISLATIVE & EXECUTIVE COMPETENCIES**

**2 May 1995**

*Embargoed until 14h00 8/5/95*

**REPORT THEME COMMITTEE 3**  
**SUMMARY: AREAS OF AGREEMENT & CONTENTION:**  
**NATIONAL & PROVINCIAL LEGISLATIVE & EXECUTIVE COMPETENCIES**

Constitutional issues	Agreement	Contention	Further clarity
<p><b>1. The existence of exclusive &amp; concurrent powers</b></p>	<p>There is agreement amongst all parties that there should be powers allocated to both national &amp; provincial governments.</p>	<p>1. Whether the powers of the provinces or national parliament should be listed.            2. Where the residual powers of government lie. In other words for the ANC, NP &amp; PAC residual power lies with the national entity, for the IFP, DP (ACDP?) residual power lies with the provinces.            3. Following from whether the national government should have powers extended beyond those specified in the 'further clarity column.'</p>	<p>Only the IFP &amp; DP submissions mention specific functions that should be allocated exclusively to the national level namely, foreign affairs, defence against foreign threats, national citizenship, immigration, emigration, extradition &amp; asylum, currency, money &amp; coinage, weights &amp; measures, customs, excise, tariffs &amp; foreign trade, admiralty &amp; maritime law &amp; regulations, railways across provincial borders, national public service, industrial &amp; intellectual property rights, monetary policy, national public finance (incl taxation), banking, credit, insurance &amp;</p>

			<p>financial services across provincial boundaries, national statistics, civil aviation, policing within the ambit of national legislative competence, international police liaison, special task forces</p> <p>for high risk security operations in support of provincial police, technical regulation of equipment of telecommunication &amp; broadcasting &amp; post &amp; inter-provincial telecommunication.</p> <p>The views of other parties on this matter are not clear in that they do not list any functions.</p> <p>Whether both national &amp; provincial powers should be listed explicitly in the Constitution.</p>
<p><b>2. Role of framework legislation</b></p>	<p>There is agreement that national government should be empowered to pass framework legislation within which the provinces are then entitled to implement detail within the context of the framework provided by the said legislation.</p>	<p>1. There is a dispute as to how the subject matter should be dealt with by framework legislation.</p>	<p>What the parties' perceptions are regarding the nature of framework legislation.</p>

<p><b>3. Prevalence of legislation.</b></p>	<p>1. The principle of the prevalence of the laws of the national parliament under specific circumstances or conditions is accepted.</p>	<p>1. There is dispute as to the extent &amp; ambit of the override. The IFP suggested the override only takes place in the event that a province fails to deliver the essential services so as to jeopardise the health &amp; safety &amp; welfare of the citizens of the province. It further states that such overrides shall be valid &amp; effective only for so long and insofar as the province concerned has not adopted its own adequate legislative measures.</p> <p>The ACDP suggests that there is an override of legislation whether of national or provincial nature where a law does not comply with biblical principles. The DP &amp; NP have proposed overrides which constitute variations of section 126(3) of the present constitution. The PAC recommends that the override take place in accordance with CPXXI. The ANC proposes an override on grounds also not dissimilar from section 126.</p> <p>2. Other than the content of the override there is also dispute as to whether an Act of Parliament shall prevail over a law passed by provincial legislature if</p>	<p>Certain parties, in particular the IFP, have not made clear as to whether the Bill of Rights overrides legislation which is in conflict therewith.</p>
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		certain grounds are met or whether the reverse should apply namely that a law passed by a provincial legislature shall prevail over an Act of Parliament unless certain grounds are met.	
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<p>4. Should the competencies of the provinces be fixed by the Constitution or should the Constitution allow for an evolutionary process?</p>	<p>None</p>	<p>1. The ANC contends that the Constitution should have the basic feature that practical executive functions in the administration may increasingly be assigned to elected &amp; accountable provincial governments as administrative capacity grows while the weight of legislative activity at the national level of government should be concerned especially with setting of norms, standards and framework.</p> <p>The NP submit as constitutional certainty as to the powers at each level of government are needed. Thus the powers of the provinces should be set out &amp; entrenched in the Constitution with, however, enough flexibility to allow for future developments &amp; for differences amongst the provinces. This will create the opportunity of encouraging asymmetry in the provincial system.</p> <p>2. IFP proposals appear to recommend a Constitution which determines the power relations definitively.</p>	<p>1. As the specific question was not addressed by either the DP or the ACDP &amp; it only appears to have been considered by implication by the PAC &amp; IFP, clarity is required.</p>
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<p><b>5. Executive competence of the provinces.</b></p>	<p>Provinces should be granted executive competency where they have legislative competence.</p>		<p>The detail of how &amp; where such competence should be specified remain to be canvassed. Whether in certain circumstances provinces might have executive competence where they do not have legislative competence.</p>
<p><b>6. Alternative mechanisms for safeguarding interests of provinces.</b></p>	<p>There is agreement between the ANC &amp; NP that the Senate constitutes a body capable of representing provincial interests in national lawmaking.</p>	<p>The views of the PAC &amp; IFP on the role of the Senate &amp; other inter-governmental institutions are unclear.</p>	<p>1. Liaison with TC2 which is also studying the Senate should be instituted with a matter of urgency to bring clarity to the role &amp; composition of the Senate. 2. More detail is required on the role of other inter-governmental institutions which might be utilised in reconciling the powers of the provinces with the national government.</p>



<p>7. The manner in which the Constitution would deal with local a government. In particular the question arises as to the distribution of competencies between national &amp; provincial levels of government as far as local government is concerned.</p>	<p>The promotion of maximum participation in democratic &amp; accountable government at local level should be encouraged.</p>		<p>Although there is a difference in certain of the proposals which dealt with local government specifically, namely as to whether local government should be entirely regulated by means of provincial constitutions &amp; legislation, the matter was not canvassed by all the parties. The IFP &amp; DP have submitted that local government be dealt with primarily in provincial constitutions &amp; legislation. The NP suggests that local government should not withstanding that it is a fully fledged level of government still fall under the control of the other levels of government &amp; should be one of the functional areas over which provinces have jurisdiction. The NP submission however states that the national provincial levels will be able to make laws affecting local government but should not be allowed to compromise the fundamental states purpose &amp; character of local government.</p>
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			<p>The PAC submit that local government should be as independent as possible from the provincial government but that the provincial government must be given 'merely supervisory &amp; coordinating powers'. Neither the ANC nor ACDP addressed the matter. There does appear to be need for further clarity from all parties as to whether any national supervisory role can take place at this level before formulating the exacts points of contention.</p>
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