Australia's Seventh State

Edited by Peter Loveday and Peter McNab
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NOTES ON CONTRIBUTORS

Mr Peter Bayne is Senior Lecturer in Law at the Australian National University

Hon Lionel Bowen MP is the Deputy Prime Minister and Attorney-General of the Commonwealth of Australia

Sir Maurice Byers QC is a former Solicitor-General of the Commonwealth of Australia

Senator the Hon Peter Durack QC is a Liberal Senator for Western Australia and former Attorney-General of the Commonwealth of Australia

Dr Rolf Gerritsen is Senior Lecturer in Public Policy at the Australian National University

Mr Peter Hanks is Associate Professor of Law at Monash University

Hon Steve Hatton MLA is the Chief Minister of the Northern Territory of Australia

Professor Colin Howard is the Hearn Professor of Law at the University of Melbourne

Dr Dean Jaensch is Reader in Politics at Flinders University

Mr Bernie Kilgariff is a former CLP Senator for the Northern Territory of Australia

Dr Peter Loveday is Field Director of the North Australia Research Unit in the Australian National University

Professor Daryl Lumb is Reader in Law at the University of Queensland

Mr Justice Michael Maurice is a Judge of the Supreme Court of the Northern Territory of Australia and an Aboriginal Land Commissioner

Mr Graham Nicholson is an advisor in the Department of Law, Darwin
Mr Justice Kevin O'Leary is a former Chief Justice of the Supreme Court of the Northern Territory of Australia

Emeritus Professor Geoffrey Sawer is Emeritus Professor in Law at the Australian National University

Mr James Strong is the General Manager of Australian Airlines

Justice John Toohey is a Justice of the High Court of Australia; formerly a Judge of the Supreme Court of the Northern Territory of Australia and an Aboriginal Land Commissioner

Professor Douglas Whalan is Professor of Law at the Australian National University
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PREFACE

The coming of statehood for the Northern Territory will be a major event not only for the people of the Territory but also in the constitutional history of Australia. We have had new State movements in the past, but no new States. And it is hard to think of any other Territories which could aspire to statehood in the Federation in the foreseeable future.

This book is a compendium of material relating to statehood, material of interest to constitutional lawyers and historians, politicians, political scientists and citizens in general, especially those in the Territory whose interests will be affected by statehood.

We used the word 'coming' in the opening sentence and that has a double significance. First, that is not the term used in the Constitution which speaks of a new State being 'established or admitted' to the Commonwealth. Those seemingly simple words admit different interpretations in the context of constitutional analysis and this book includes papers by people who have given leading arguments about those interpretations: Toohey, Lumb, Byers and Sawyer. Although the focus is necessarily legal and constitutional, there are papers on a number of other aspects of statehood, especially the political, financial and developmental questions which it raises.

This brings us to the other significance of 'coming'. Statehood will not be achieved overnight and it has to be achieved as a political decision. This, as the new States experiences of Canada and America show, is one of the most difficult political decisions a federation can attempt. It is a major test of a democracy.

The conference of the Northern Territory Law Society, from which this book emerged, took place at a time when there had been some months of public discussion of statehood for the Territory and much more was still to come. Twelve months earlier the Territory Government had commissioned an Australia-wide survey to give guidance in the political struggle ahead. The results appear to have been somewhat disheartening because although the Northern Territory had a 'positive image' with Australians, and over half disapproved of continuing Federal power over Territory legislation and believed that it would be a 'good thing' for the Territory to become a State, the report noted that

non-Territorians are cautious about giving the Northern Territory Government full control over
such things as development of off-shore resources, uranium mining and Aboriginal land rights.

And among Territorians themselves

where opinion was divided 38 per cent to 35 per cent in favour of statehood, the question of statehood was somewhat less an issue of general principle than an issue of very real and practical concern... few Territorians (19 per cent) felt the Northern Territory would be financially better off if it became a State, 44 per cent thought statehood would financially disadvantage the Northern Territory and the remaining 37 per cent thought it would make little difference or couldn't say (Roy Morgan, 1985, 5).

The figures suggest that there was a long political haul ahead for the Territory Government, both to convince Australian citizens in general and to win strong support from Territory citizens in particular.

The Law Society Conference was held at a time when it was becoming apparent that the Territory would probably have an early election for its Legislative Assembly and when speculation was beginning that the Federal Government might call an early national election. Both were called early: the Territory's for 7 March 1987, and the national election for 11 July 1987, but in neither of them was statehood made an issue.

Nonetheless the ruling Country Liberal Party and the Territory branch of the ALP each commissioned surveys in the run-up to the Territory election which included questions about statehood. The North Australia Research Unit also asked questions about statehood in its election weekend survey in March. These surveys all confirmed, in more or less detail, that the political push for statehood would have to be long and hard before the strong bipartisan support of Territory citizens for statehood could be proclaimed in Canberra.

The CLP's survey of just over 400 voters, taken in November-December 1986 by Morgan Gallup, did not directly ask people if they were in favour of statehood for the Territory and the answers to other questions suggested that opinion might be deeply divided. Seventy one per cent of voters thought that the Federal Government should not be able to override the laws of the Territory, but 49 per cent (up 5 per cent from 1985) thought that the Territory would be financially worse off if it became a State while only 18 per cent thought it would be better off. The Labor Party's
survey showed that only 30 per cent of a sample of 400 electors in the six Darwin northern suburbs thought it was now time for statehood; 65 per cent said 'wait'. This survey was carried out by the team which carried out the 1985 study.

And the NARU study three months later showed that 53 per cent of voters, from a sample of the electoral roll in all but the 5 rural electorates out of 25, were opposed to the Territory becoming a State, with 42 per cent in favour and 5 per cent 'don't knows'. Eighty per cent expected statehood to cost more in taxes and charges; about a quarter of the voters thought that the Commonwealth should retain control of National Parks, uranium mining and land rights; and 79 per cent of all voters thought there should be a referendum on statehood. The Government has accepted the need for a referendum and one is likely to be held in 1988.

As editors we hope that this book will contribute to the debate which will then occur. It contains the essential materials for that debate.

But before we turn it over to the readers, we wish to thank those people who have helped in its production, especially Janet Sincock, NARU, for the preparation of the text, and Bronwyn Ash, in the Library of the Commonwealth Attorney-General's Department in Darwin, for preparation of the table of cases.

We also wish to thank Professor Sawer, Graham Nicholson, Professor Lumb, Professor Whalan and former-Senator Kilgariff for permission to republish articles they have written and to thank Professor Howard, Sir Maurice Byers and Senator Durack for permission to publish opinions they had given. We acknowledge with thanks the permission of the Law Book Company for republication of articles by Lumb and Nicholson, and the permission of the Commonwealth Attorney-General's Department and the Territory Government for publication of legal opinions they had commissioned.

P Loveday
P McNab

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EDITORIAL NOTE

The editors have made minor alterations, not affecting the substance, to the text of chapters, quotations and appendices, except appendices 1 and 10, to secure, as far as practicable, uniformity and consistency in the citation of legislation and legal cases; to correct typographical errors in originals and to secure as much consistency as possible in capitalisation, spelling and related stylistic matters.

All legal cases have been cited uniformly throughout by reference to authorised law reports where available. Statutes and delegated legislation have been cited according to the citation clause found in the relevant statute or according to the practice applicable in the jurisdiction of the enacting legislature.

Side headings have been inserted in some items. In the appendices the original pagination is shown only on the first page of each appendix where the source of the item is given. Where substantive footnotes appeared in any original work to be found in the appendix those footnotes have remained and have not been made over into the Harvard system of referencing. An asterisk appearing in the bibliography indicates that the relevant article may be found in the appendices. In chapters where authors refer to works that also appear in this volume as appendices the pagination used by them refers to the journal or book in which the article was originally published.

Towards Statehood, the Ministerial statement of 26 August 1986 was initially distributed in typescript with Spirax binding. It was later typeset and printed by the Government Printer. Paragraphing was changed in the typeset version and pagination is substantially different. Referencing to the statement throughout this volume is to the earlier version, the only one available at the time of the conference. Appendices 11 and 12 were based on the earlier version but checked against the later version.

At the time of going to press the Select Committee on Constitutional Development (see Appendix 10) had reported to the Assembly. The Chief Minister tabled two volumes entitled Information Paper, Options for a Grant of Statehood, [Darwin, nd, (1987)] and Discussion Paper on a Proposed Constitution for the Northern Territory, [Darwin] October 1987.

P. Loveday
P. McNab

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INTRODUCTION

Michael Maurice

The Statehood Conference in October 1986 brought together a collection of distinguished speakers whose contributions to this important debate will be of lasting value. Their papers are reproduced in this volume, now required reading for anyone concerned with the statehood question. The Law Society’s organisers, Peter McNab, John Reeves, Kim Graves, as well as Dr Peter Loveday of the North Australia Research Unit deserve great credit for organising the conference and putting this collection together. The following partisan remarks are offered merely to provide a setting; the important discussion lies in the papers themselves.

Since 1974 the Northern Territory has had a fully elected legislature with plenary powers (except for labour disputes) to make laws for one-sixth of the Australian land mass – subject always to Federal veto. Most of the vast landholdings, minerals and other assets accumulated by the Commonwealth are now owned by the Territory in its own right. It has executive responsibility for all of the important areas of State administration including health, education and the courts. Its population now approximates that of Tasmania and Western Australia when those colonies were negotiating participation in the Australian Federation (although population numbers, relative or absolute, can hardly be the determinant for admission to statehood). The special funding arrangements which have existed between the Territory and the Commonwealth will end next year; from then on the Territory will be funded on the same basis as the States.

White Territorians have begun to evolve their own sense of identity, shucking-off the Mick Dundee image of the past. A cohesive vision for the future of this part of Australia is emerging. Less than a few hundred miles to the north lies the fifth most populous nation in the world. By contrast, the nearest Australian city to Darwin with a population in excess of 100,000 lies at the other end of the continent: Adelaide and almost a world away. The increasing trend to forge ties with the immediate south-east Asian region and participate in its economic and cultural life is but one side of the growing distinctiveness of this part of tropical Australia. Canberra never had a vision for the Territory – or if it did the dream died generations ago. The Federal role consists of implementing specific policies in areas of special interest, not part of any comprehensive
plan for the Territory and its citizens but a piecemeal tinkering increasingly resented by a population becoming anxious to shape its own destiny.

Inevitably the Territory will become the seventh State in the Australian Federation. The country is too big, its geography, climate and resource distribution too diverse for a unitary system of government. These were the conditions that led to the establishment of six separate colonies and, later, to the adoption of a federal system. They have not changed in their fundamentals.

New South Welshmen, Victorians and residents of other States see themselves as having a stake in what happens to the Territory as, indeed, do the Federal politicians and Canberra bureaucrats whose self-importance and power is as much in as anything else. Some of these outsiders have strong ideological interests: conservationists, the anti-nuclear lobby and those concerned about Aboriginal issues. Of course these are issues that concern Territorians, but when you actually live in a place you are affected by other considerations as well. Do not assume that all the issues that jostle for attention and must be considered by the Territory Government in determining its policies and priorities are given quite the same attention by the Federal political parties, by senior Commonwealth public servants or by special interest groups outside the Territory. A few of their number seem quite unconcerned about promoting divisions within the Territory community if it suits their own purposes. There are those who, for one reason or another, would like to dismantle the Federal system, beginning with the Territory. For some of them, it might be said, democracy is a happenchance of relative proportions wherein the value of a vote on all of life's great concerns is determined by a line fortuitously drawn so as to bring all within to a single political embrace, theirs.

And then, of course, there is the political numbers game played by actors on the Federal stage. Equal Senate representation might disturb the balance of power, although it offers the tantalising prospect of increasing the size of the House of Representatives because the Constitution requires that House to have twice the number of members as the Senate. The new seats would go mostly to south-eastern Australia. A cynic might infer that considerations of this nature rather than a disinterested analysis of the requirements of federalism in modern Australia led the Government and Opposition Coalition members of the Joint Select Committee on Electoral Reform to recommend, in November
1985, that new States' Senate representation be based on population. That same cynic would hardly be surprised to find the Australian Democrat's representative on the Committee dissented on this point.

For these reasons, the how and when of statehood may be significantly influenced by the way outsiders see their interests as being affected. These and other political realities are incisively discussed in Dr Dean Jaensch's illuminating paper.

What is a State? Perhaps of all the legal issues discussed at the conference this will prove to be the most important. The constitutional background to the question is taken up in the paper by Justice John Toohey. The orthodox view is propounded in the Commonwealth Attorney-General's paper: a State in the Australian Federal system, at least a new State, is exactly what the Commonwealth wills it to be. So the new State's legislative competence may be limited to specific enumerated powers (ie precisely the reverse of the position between the Commonwealth and the existing States) or the new State may be denied legislative competence over particular matters.

But, ever the Iconoclast, Professor Colin Howard challenges all this in his landmark paper. He suggests that the power to limit new State representation had unworthy origins (anti-Maori sentiment) and that it would be unthinkable to exercise it today because to do so would tend to destabilise the Federation with its population so heavily committed to the virtues of political and social equality. Still, there are those who deny the Senate has a role as a States' House; no determinative force in the organisation and conduct of Australian political affairs is accorded the structural premise of equal representation. Jim Strong's examination of the extent of direct Commonwealth interference in what have been traditionally regarded as State matters suggests otherwise.

Jim Strong, lawyer, former Territory resident and now boss of Australian Airlines, argues that any extent to which the new State is limited in its powers will detract from its commercial status. Impediments to growth and a discouraging legal landscape will, he says, disadvantage the Territory and Australia, permanently.

The quest for statehood calls for the development by Territorians of positive policies towards our Aboriginal people, policies which must be worked out with them and their leaders. For many white Territorians this will
require a new set of attitudes, not pegged-back to the level of 'generosity' afforded black Australians in other parts of the country but which recognises their special place here in the Territory. Aboriginal leaders are understandably concerned about the push to statehood; unquestionably there are some white people who see this development as an opportunity to roll back the gains of the last 10 years. Lorraine Liddle, the Territory's first Aboriginal female lawyer, made a powerful and moving plea for her people at the conference - regrettably it has not been possible to obtain a copy for publication. Aboriginal leaders seek guarantees, assurances to which they are plainly entitled as the price for their support. Associate Professor Peter Hanks has canvassed in his paper the legal mechanisms available for entrenching minority rights. Peter Bayne talks about consultative procedures and offers the benefit of his experiences in Papua New Guinea.

More important, perhaps, than simple guarantees is the need for political leaders to sit down with Aboriginal leaders and work out a common vision of where the Territory is going - it must be going somewhere. Aboriginal people cannot afford to be complacent; Canberra has no coherent plan for this part of the world, its vision seems not to extend beyond a continuing Aboriginal dependency. Conversely, Territory leaders are developing such plans but have not so far fitted Aboriginal people into them. For a decade there has been next to no discussion about Aboriginal policy in the Territory, as though the Land Rights Act were the panacea for all the problems they face. Older generations may have to accept, many already do, that their children and grandchildren increasingly belong to and will wish to stake a claim in the modern world. This does not mean they must abandon respect for their culture, or the old people. There is no clear prescription for the future save that change will come. One fact to ensure this is that all Territory children are required to go to school; another, communications technology. The clock cannot be turned back. Transition cannot be made entirely painless. The Territory will not make a better fist of it than the other States unless plans are made and progress monitored. The pace of change should not be dictated but agreed upon. I envisage a partnership between people of two cultures with Aboriginal leaders becoming more and more involved in Territory public affairs, thus realising their considerable political potential in the new State.

Despite these remarks, a recurring theme at the conference was: Why all the fuss about statehood? Dr Jaensch's research suggests the public either has not
grasped the issues or sees them as no big deal. Recent surveys indicate that many people believe they will be materially better off while the Territory remains a Federal Territory. That the financial implications are not clear cut can be seen from the paper by Dr Rolf Gerritsen, a political economist who has lived and worked in the Territory.

Over the past few years the statehood debate has tended to be confined to members of political parties, notably the CLP, and much attention has focused on the question of Senate representation. To some observers this has seemed to be putting the cart before the horse: increased Senate representation may come with statehood but is not itself sufficient justification for becoming a State. Increasing the number of politicians whose life's expenses they must meet has always been an anathema to Australians; little wonder some have been turned off by this prospect.

Chief Minister Hatton has attempted to put the debate back on the rails by identifying specific goals. These may be summed up as the fruits of equal-partner status with the existing States in the vital areas of legislative and executive power. Three particular areas are singled out: legislation giving Aboriginal people the right to claim and preserve traditional lands; control of major flora and fauna reserves (Kakadu, Uluru and, possibly, Katherine Gorge); and ownership of uranium.

However, despite bipartisan support (now, predictably, wilting), the new drive for statehood has so far failed to galvanise the community as the politicians no doubt hoped it would. The rational arguments are there but something is missing, a factor 'X'. One possibility is a lack of widespread conviction that statehood would bring about a relinquishment of Commonwealth control over the three main areas targeted in the Chief Minister's campaign. And most lawyers would probably concede that one way or another the Commonwealth could retain those controls.

No, factor 'X' is, I think, a more elusive thing. It has to do not with the material advantages of statehood but the social, cultural and spiritual or psychological aspects of that condition. To spark a groundswell of support the idea must trigger an emotional reaction in the community at large. It has not so far done this. Why not? We are still learning to live in the Territory, particularly the Top End. Many people do not cope well with the climate, with the isolation from family and old friends, with the adjustments necessary for a good and satisfying life in these parts.

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The inappropriate hours for work and leisure, and the dress and accommodation styles attest to this. Particularly, the adjustments have not been made in those quarters of the community which might be expected to provide leadership in building a new society: the teachers, lawyers, managers, accountants, union leaders, doctors, public administrators, journalists and the like. Nor have our academic institutions developed to the point where they generate ideas and contribute significantly to debates about public affairs, although the establishment of the University College may be a significant step in this direction.

Being still so close to a paternalistic Commonwealth administration in the recent past, some people may fear that final severance statehood will bring. Arguably it is the colonial mentality within the Territory rather than that without which holds it back. Surprisingly, apart from Senator Kilgariff, the community leaders who fought for and won Self-Government are all gone from the political scene; at times our new politicians appear to be painfully green. Many Territory residents are here principally for the work opportunities, few have thoughts of retiring and dying on this soil. They cannot claim to have developed a sense of belonging here the way the Aborigines can.

The Territory's greatest resource is not uranium or Ayers Rock or endless tracts of pastoral land, it is people. The quality of their commitment to building not just an economy but a new society in the Territory is of seminal importance to what happens here. At times Territory leaders appear not to appreciate this, perhaps because they have deeply concealed doubts about the strength of their own commitment.

The Territory will be ready for statehood when the broad community sees significant social, cultural and psychological advantages in the transition. They will have put down real roots, a sense of commitment will burn deep in them, they will feel they are helping to build a community for their children, the country will hold them, they will not think of retiring and dying in some other place. They will have hope for the future and confidence in the Territory and its leaders and some sort of dream about where it is all going. Absent these things and there is no magic in the politicians' campaign. When they will come who is to say - they may be just around the corner. But, for the time being, two-fifths of the more enduring population, the Aboriginals, appear to have no great desire for statehood.

Judges' Chambers,
Darwin.
Chapter 1

NEW STATES AND THE CONSTITUTION: AN OVERVIEW

John Toohey

The topic which has been allotted to me diverts attention from the particular issues facing the Territory in its quest for statehood. It requires a more general survey of what the Constitution has to say about new States - an 'overview' is the approach selected - though some reference to the Territory is both inevitable and desirable. The paper may be seen perhaps as providing a context for more specialised contributions.

Constitutional Background

Clause 6 of the Commonwealth of Australia Constitution Act of 1900, an imperial statute, defines 'The Commonwealth' to mean 'the Commonwealth of Australia as established under this Act'. It defines 'The States' to mean

...such of the colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia, including the northern territory of South Australia, as for the time being are parts of the Commonwealth, and such colonies or territories as may be admitted into or established by the Commonwealth as States; and each of such parts of the Commonwealth shall be called 'a State'.

What colonies or territories did cl.6 have in contemplation when it was introduced? The colonies commonly known as the Australasian colonies included New Zealand. There were other colonies reasonably adjacent to Australia such as British New Guinea, annexed in 1901, and Fiji (Quick and Garran 1901, 968). But there is nothing in the language of cl.6, or for that matter in the language of s.121 of the Constitution itself, that precludes the admission of foreign States wishing to become States of the Commonwealth (Lumb and Ryan 1981, 390).

In passing it may be noted that, by reason of s.1 of the Australia Act 1986,

No Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to the Commonwealth, to a State or to a Territory as part of the law of the Commonwealth, of the State or of the Territory.
Presumably this means that the Commonwealth of Australia Constitution Act can no longer be amended by the Parliament of the United Kingdom. Does it follow that the Act, as opposed to the Constitution, is immutable? Or is s.128 of the Constitution wide enough to include the Act? Fortunately an answer to these questions is not necessary for the purpose of this paper and I pass them by.

The Constitution itself deals with new States in four deceptively simple sections that together comprise Chapter VI. Because they are the key to the matters arising under this paper and because they are short, I shall set them out in full.

121. The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit.

122. The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

123. The Parliament of the Commonwealth may, with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, increase, diminish, or otherwise alter the limits of the State, upon such terms and conditions as may be agreed on, and may, with the like consent, make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation to any State affected.

124. A new State may be formed by separation of territory from a State, but only with the consent of the Parliament thereof, and a new State may be formed by the union of two or more States or parts of States, but only with the consent of the Parliaments of the States affected.

Admission and Establishment

Section 121 in terms draws a distinction between admitting a new State to the Commonwealth and establishing a new State.
Quick and Garran express the view that the admission of new States 'can only refer to the entry into the Commonwealth of political communities which, prior to their entry, were duly constituted colonies'. They are of the further opinion that the establishment of new States 'evidently includes the formation of States whether out of Federal territory or out of States already in existence, by sub-division or otherwise' (968-969).

The circumstances in which the words 'establish' and 'admit' came to be included in s.121 are mentioned by Professor Lumb in 'The Northern Territory and Statehood', when discussing the Melbourne session of the Federal Constitutional Convention in 1898. Opinions differ as to whether there is in truth any real distinction between admission and establishment. The distinction is not one made by the American Constitution. Professor Sawer is of opinion that 'colonies outside Australia, that is British colonies, are to be "admitted", while territories, i.e. Commonwealth Territories are to be "established"' (Sawer 1981, 95).

Professor Lumb regards the distinction as important for these reasons:

The importance of the distinction is ... reflected in the wording of s.106 of the Constitution which contains an implication that a political community with a Constitution already formed (that is a Territory which has attained a degree of autonomy) is admitted with that Constitution which continues as at the admission. The formation of the Constitution therefore predates the admission of the Territory as a State. Thus a constitutional structure of autonomy is already imprinted on the territory of the political entity which is admitted. The function of the Parliament is to ratify such a Constitution (which could include a right to request amendments if the Parliament is not satisfied with the content of the Constitution) and to approve admission on terms and conditions. It is not the function of the Parliament to establish or create a State Constitution. If this view is correct the word 'establishment' would in practice be limited to the formation under s.124 of new States out of existing States. In such a case the entities concerned, that is, the partitioned areas, would not have their own Constitutions and therefore it would be necessary for the Parliament to establish a Constitution (Lumb 1978, 559).

Section 5 of the Northern Territory (Self-Government) Act 1978 established the Northern Territory of Australia 'as
a body politic under the Crown by the name of the Northern Territory of Australia'. Whether there is a real distinction between 'admit' and 'establish', admission seems the appropriate description in the case of the Northern Territory, a political entity with a large measure of autonomy. It is outside the scope of this paper to consider the present constitutional status of the Territory. The matter is discussed in depth by Mr G R Nicholson in 'The Constitutional Status of the Self-Governing Northern Territory' and is the subject of the Ministerial statement Towards Statehood issued by the Chief Minister of the Northern Territory on 28 August 1986 (Hatton 1986).

Terms and Conditions

Whether a new State is admitted or established, its admission or establishment is subject to such terms and conditions as the Parliament may impose, including the extent of representation in either House of the Parliament.

The principle of equal representation in the Senate and the guarantee of a minimum number of senators for each State, produced by s.7 of the Constitution, must yield to any different principle of representation that the Parliament may impose in admitting a new State. In the words of Quick and Garran, 'the Federal Parliament may assign to such States the number of senators which it thinks fit' (1981, 970). Equally, the principle of proportionality between senators and members of the House of Representatives and the guaranteed minimum number of House of Representative members for each State expressed in s.24 must yield to any different principle which the Parliament may impose on the admission of a new State.

In Western Australia v Commonwealth (1975) 134 CLR 201 at 281-282 Murphy J said this about the Constitution:

The general scheme in Ch 1 of the Constitution is a Senate of States with equal numbers of senators (s.7) and a House of Representatives with the number of members as nearly as practicable twice the number of the senators and the number of members chosen in the states being in proportion to their population (s.24). The symmetry of this scheme was imperfect. It was marred by the provision that at least five members of the House of Representatives shall be chosen in each original State. Thus, the number of members chosen from the States was not, and is not now, strictly proportional to their population. Therefore, though an increase in the number of senators for each original State would mean a
proportionate increase in the House of Representatives, it would not necessarily result in a proportionate increase in each State.

Again it appears from s.7 and s.121 that the constitutional guarantee of equal representation of States in the Senate and the minimum number of six senators for each State is applicable only to original States and not to new States.

That the Parliament is not bound by the terms of ss.7 and 24 in the exercise of its power under s.121 to impose terms and conditions as to the extent of representation of the new State is clear from the language of those sections. They confine the application of the principle they express to 'Original States' (defined in cl.6 of the Constitution Act as 'such States as are parts of the Commonwealth at its establishment'). However, while the Parliament may depart from established constitutional principles in determining the number of parliamentary representatives to be assigned to a new State, it is another question whether it can confer rights or impose obligations on those representatives except in accordance with the Constitution. The process of selection of those representatives, at least so far as the Senate is concerned, must be in accordance with laws that are uniform with the equivalent laws of the existing States (s.9).

This is not to say that ss.7 and 24 have no application to a new State. Those sections 'will operate with respect to the new State when admitted' (Barwick CJ in Western Australia v Commonwealth at 228-229); but s.121 empowers the Parliament to determine the extent of representation. Incidentally the actual decision in Western Australia v Commonwealth, which was concerned with s.122 of the Constitution, was followed in Queensland v Commonwealth (1977) 139 CLR 585 notwithstanding opinions that it had been wrongly decided.

The Parliament may admit or establish a new State but there is no legal compulsion on it to do so. At the same time, the Constitution of a new State is, by force of s.106 of the Constitution and subject to the Constitution, continued until altered in accordance with the Constitution of the State.

Section 122, although part of Chapter VI, is not concerned with new States. It relates to any territory surrendered by a State to and accepted by the Commonwealth or any territory otherwise acquired by the Commonwealth. 'Territory' is used in a different sense to 'territories' in cl.6 of the Constitution Act. It bears its ordinary meaning of land which is under the jurisdiction of some political
entity. But it is the area of land that is accepted by the Commonwealth, not the political entity.

The power conferred by s.122 is a plenary power capable of exercise in relation to Territories of varying size and importance which are at different stages of political and economic development. It is sufficiently wide to enable the passing of laws providing for the direct administration of a Territory by the Australian Government without separate territorial administrative institutions or a separate fiscus; yet on the other hand it is wide enough to endow a Territory with separate political, representative and administrative institutions, having control of its own fiscus (Mason J in Berwick Ltd v Deputy Commissioner of Taxation (1976) 133 CLR 603 at 607).

For a list of the Territories accepted or otherwise acquired by the Commonwealth, see the Australian Constitution Annotated, (437).

In its opening words, s.122 is the counterpart of s.111 which enables the Parliament of a State to surrender any part to the Commonwealth. There is no Constitution for s.106 to preserve nor does the territory accepted by the Commonwealth become a new State. It is the Parliament of a State which may surrender a part to the Commonwealth. The electors cannot, at least directly, surrender a part of a State to the Commonwealth and many of the proposals associated with new States movements have sought to substitute a referendum procedure for the decision of Parliament (see 'New States for Australia', The Australian Institute of Political Science Spring Forum 1955 Proceedings).

In 1959 the Commonwealth Parliament's Joint Committee on Constitutional Review recommended that there should be an alternative to the existing procedure, in particular that the Commonwealth should have the power to establish a new State if a proposal to that effect is approved at a referendum by a majority of the electors residing in the proposed new State, and by a majority of electors in the existing State.

Section 123 is not concerned with the admission or establishment of a new State. It is concerned with 'the limits of the State', that is with the boundaries of a State. Quick and Garran comment, (975):

A limit is, strictly speaking, a boundary line; and a line cannot be 'increased or diminished' except in length. But the word is also used in a secondary sense, to connote 'the space or thing
defined by limits' (Webster, International Dictionary). In this sense, increasing or diminishing the limits of a State means altering the boundaries of the State so as to increase or diminish its territory.

The Parliament of the Commonwealth may not act unilaterally. The limits of a State may not be diminished without the consent of the Parliament of that State. And, of course, any increase in the limits of one State involving a diminution in the limits of another requires the consent of the Parliament of each State and the approval of the majority of the electors of each State.

Quick and Garran, (975) note this as 'an extraordinary limitation on the power of the State Parliaments'. For a referendum in each State is required together with the approval of the Parliament of the Commonwealth.

In the Nicholson River (Waanyi/Garawa) Land Claim under the Aboriginal Land Rights (Northern Territory) Act 1976, an issue arose as to the precise position of the border between the Northern Territory and Queensland. If in such a case two States decided upon a realignment of their boundary, it might be accomplished in such a way as neither to increase nor diminish the limits of either State. There might be a mutual rectification of the boundary or an exchange of equal areas. But even then, it is hard to see that the limits of each State would not be otherwise altered within the meaning of s.123, thereby requiring the approval of the majority of electors in each State.

Sections 111 and 123 of the Constitution are not related. Part of a State may be surrendered to the Commonwealth under s.111 without the approval of electors under s.123. And acceptance by the Commonwealth of a surrender under s.111 can be effected by an executive act of the Commonwealth; it does not have to be by an Act of the Parliament, Paterson v O'Brien (1978) 138 CLR 276.

Section 124 contemplates the formation of a new State by separation of territory (again the reference is to an area of land and not to a political entity) from a State, but only with the consent of the Parliament of that State. Likewise, a new State may be formed by the union of two or more States or parts of States, but only with the consent of the Parliaments of those States. Section 124 is by way of elaboration of s.121. Any new State thus formed may be admitted to the Commonwealth pursuant to s.121 and its admission is upon such terms and conditions as the Parliament may impose.
The formation of a new State pursuant to s.124 may conceivably 'increase, diminish, or otherwise alter the limits of the State' in terms of s.123. The question thus arises whether the consent of a majority of the electors of the State as required by s.123 is an additional precondition to the admission to statehood of an area formed in accordance with s.124. The prevailing view, that the requirements in s.123 should not be imported into s.124, is put this way by Professor Lumb:

It is submitted that an appropriate answer is that s.123 confers an additional substantive power on the Commonwealth, the conditions for the exercise of which are not to be automatically read into the other sections which empower the creation of Federal Territories or new States. The requirement of a referendum of electors is not provided for in either s.111 or s.124 and the onerous condition of a referendum ought not therefore to be applied to these sections. Therefore, it would seem that s.123 has reference to the less important problem of the alteration of the boundaries between the States and not to the major problem of the creation of Federal Territories or new States out of existing State territory (Lumb 1963, 173).

Limitations on S.121 Power

The position of the States within the Commonwealth and the relationship between the States and the Commonwealth is regulated to a significant extent by the Constitution. Whether a new State admitted pursuant to s.121 would occupy a position within the Commonwealth equal to that of the existing States and bear a relationship to the Commonwealth equivalent to that of the existing States largely depends upon the nature of the terms and conditions which the Commonwealth may impose in the exercise of its power under s.121. The ambit of the Commonwealth's power in this regard is therefore of considerable importance.

It is unlikely that the High Court would permit the imposition of any term or condition which derogated from the rights in relation to States as enshrined in the following provisions of the Constitution:

1. s.51(ii) – no discrimination in Commonwealth taxation laws between States or parts of States
2. s.51(xxxi) – Commonwealth laws for the acquisition of property in a State to be on just terms
3. s.55 - Commonwealth laws imposing taxation to deal only with the imposition of taxation and, other than customs and excise, with only one subject of taxation

4. s.80 - trial on indictment for an offence against a law of the Commonwealth to be by jury

5. s.92 - trade, commerce and intercourse among the States to be absolutely free

6. s.99 - Commonwealth is not by any law or regulation of trade, commerce or revenue to give any preference to one State or part thereof over another State or part thereof

7. s.116 - Commonwealth not to legislate in respect of religion

8. s.117 - residents in any State not to be subject in any other State to any disability or discrimination

9. s.118 - full faith and credit to be given to the laws, Acts, records and judicial proceedings of the States

10. s.119 - protection of States against invasion and violence

11. s.123 - no alteration of State boundaries without consent of State Parliament.

There is nothing in the Constitution which supports a confinement of these provisions to original States; on the contrary, the Constitution evinces a clear intention that a reference to 'States' is a reference to both original and new States. In the first place, the definition of 'States' in cl.6 of the Constitution Act includes 'such colonies or territories as may be admitted into or established by the Commonwealth as States'. Furthermore, the scheme of the Constitution is to make express reference to 'Original States' where it is intended that a provision be restricted in that regard eg ss.7 and 24.

An additional qualification upon the ambit of the Commonwealth's power to impose terms and conditions under s.121 may arise from a principle of constitutional construction recently endorsed by certain members of the High Court (Koowarta v Bjelke-Petersen (1982) 153 CLR 168 - Gibbs CJ at 191-192, Mason J at 225, Murphy J at 240; R v Coldham; Ex parte Australian Social Welfare Union (1983) 153 CLR 297 at 312; Commonwealth v Tasmania (1983) 158 CLR 1 - the Franklin Dam case); Re Lee; Ex parte Harper (1986) 60 ALJR 441 at 444, 449.
The principle is based upon implications drawn from the federal nature of the Constitution and operates to prevent the Commonwealth from discriminating against the States or any of them or from taking any action which interferes with their functioning or threatens their existence. The operation of the principle has thus far been in the context of Commonwealth legislative powers and considerable uncertainty still surrounds its degree of relevance in constitutional interpretation (see Douglas 1985, 105; Zines 1984, 277). If accepted as a legitimate and relevant principle of construction, it may be possible to call it in aid in delineating the extent of the Commonwealth's power under s.121.

North American Precedent

The power to admit new States in s.121 has yet to be exercised by the Commonwealth. Any future determination of the nature of the terms and conditions referred to in that section will therefore necessarily occur in the absence of and without the benefit of relevant Australian judicial precedent. A similar power has, however, been exercised in the United States; an examination of judicial pronouncements on the subject by the Supreme Court of the United States may therefore be instructive.

The power of the Congress of the United States to admit new States is in terms:

Section 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, without the Consent of the Legislature of the States concerned as well as of the Congress.

This provision has been held to carry with it the power to impose terms and conditions upon the State seeking admission. However, the Supreme Court of the United States has consistently maintained the right of new States to admission upon an equal footing with original States and has therefore refused to uphold any term which undermines the constitutional equality of the States. For example, in Coyle v Smith (1910) 221 US 559 a provision in an Act of Congress requiring the then new State of Oklahoma to locate its capital in a named city was held to be invalid on the basis that it deprived the new State of the power enjoyed by the existing States of establishing its capital city in the area of its choice. According to the Supreme Court:

There is to be found no sanction for the contention that any State may be deprived of any of the
power constitutionally possessed by other States, as States, by reason of the terms in which the acts admitting them to the Union have been framed.

Whether the High Court of Australia would impose a similar restriction on the Commonwealth's power under s.121 is doubted by Professor Sawyer who distinguishes the American position in this way. First, the power to impose terms and conditions in the United States legislation is implied rather than express. Second, the constitutional assumptions which underlie the American constitutional system differ from those upon which the Australian system is based; specifically, the basis of the American system is sovereignty of the people whereas the Australian system is founded upon sovereignty of the Parliament (Sawyer 1981, 96-97).

The terms upon which new American States have been admitted to the Union to date have taken the form of a requirement that their Constitutions contain guarantees, for example as to a republican form of government, racial equality and religious freedom (Park 1959, 406).

In Reference Re s.17 of The Alberta Act [1927] SCR 367 the Supreme Court of Canada rejected an argument that the Province of Alberta could not be incorporated into the Union upon terms and conditions different from those applying to Ontario, Quebec, Nova Scotia and New Brunswick. The provisions of the British North America Act, 1871 have no precise counterpart to s.121 but the conclusion of Newcombe J at 372 was that

...there was no limit, operating within the Territories, to the legislative power which the Dominion might exercise for their administration, peace, order and good government, while they continued to be Territories, or, at the time of the establishment of new Provinces therein, for the constitution and administration of any such Province...

Does s.121 Have a Limited Scope?

It has been suggested (Sawyer 1981, 98) that the power in s.121 to impose terms and conditions may be qualified by the words 'upon such admission or establishment' in the sense that the power is restricted to the imposition of those terms and conditions necessary to facilitate, or which flow from the actual admission or establishment of a new State; for example, terms as to liability for existing debts and employment of transferred officials. In other words, Professor Sawyer suggests a temporal relationship between the terms and conditions and the act of admitting or establish-
ing. However, he concedes that 'this very restricted interpretation is inconsistent with the one specific example the section gives of a permissible term - extent of representation in the Parliament, a constitutional matter of indefinite duration in its effects' (98-99).

Certainly s.121 is expressed in broad terms and it is not easy to support the restricted interpretation to which Professor Sawer refers. At the same time the validity of terms and conditions imposed on a new State will, I think, be measured against those provisions of the Constitution which I have described as enshrining rights in relation to the States and also perhaps against the principle of constitutional interpretation mentioned earlier in this paper.

Section 128 of the Constitution includes this paragraph:

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approved the proposed law.

It is conceivable that the terms and conditions upon which a State is admitted may be thought to diminish or otherwise alter the proportionate representation of an existing State. It is also conceivable that the term 'State' is subject to the defining terms of s.41 of the Constitution. If so, the consent of a majority of electors in the State or States affected may be required to those terms and conditions.

Financial Arrangements

One should not lose sight too of s.105A of the Constitution, inserted in 1929 following its approval at a referendum in the previous year. The section empowers the Commonwealth to make agreements with the States with respect to their public debts and empowers the Parliament to make laws for the carrying out of any such agreement. Sub-section (5) reads:

Every such agreement... 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.
Of sub-s. (5) Rich and Dixon JJ said in New South Wales v Commonwealth (No. 1) (1932) 46 CLR 155 at 177:

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.

See also Sankey v Whitlam (1978) 142 CLR 1 at 27-31, 71-74, 88, 105.

The Financial Agreement of 1927 has been amended on a number of occasions, most recently in 1976 - see the Financial Agreement Act 1976. If a State is admitted pursuant to s.121 of the Constitution, what is the position of that State so far as the Financial Agreement, as revised from time to time, is concerned? Any agreement may be varied or rescinded by the parties (sub-s.105A(4)). What if the Commonwealth or a State is not agreeable to a variation to accommodate the new State? Does s.105A permit the Commonwealth to make a separate agreement with that State? Such an agreement, though limited in its terms, was made between the Commonwealth and Tasmania as appears in the Tasmania Sinking Fund Agreement Act 1928.

The nature of the terms and conditions which the Commonwealth may seek to impose in any given situation will of course depend upon the particular political and other considerations associated with the area being admitted. Against the background of this general discussion, therefore, the position of the Territory bears some examination as illustrative of the questions that may arise on admission.

Maintaining Commonwealth Controls

On 28 August 1986 the Northern Territory launched a campaign to become Australia's seventh State (Canberra Times 29 August 1986). The overriding objective of this campaign is stated to be the achievement of constitutional equality with the existing States. At the forefront of the demands which the Territory is making in pursuit of its objectives are:

- the 'patriation' of the Aboriginal Land Rights (Northern Territory) Act 1976
- transfer of ownership of uranium
- control over National Parks.
Whether the Commonwealth should or will accede to these demands is not within the scope of this paper. However, in the event that the Commonwealth wishes to maintain its control over those matters, it is relevant to consider whether as a matter of constitutional law it has power to do so.

Land Rights

The Land Rights Act is expressed to apply exclusively to the Northern Territory and is thus a valid exercise of the territories power under s.122 of the Constitution. Similarly, the power to regulate uranium mining in the Ranger region of the Northern Territory under the Atomic Energy Act 1953 and to exercise control over those areas of the Northern Territory within the scope of the Environment Protection (Alligator Rivers Region) Act 1978, the Environment Protection (Northern Territory Supreme Court) Act 1978 and the National Parks and Wildlife Conservation Act 1975, is located in s.122. Upon the admission of the Territory to statehood, however, the question will arise whether the validity of this legislation may be maintained by reference to other heads of power.

The Constitution, by s.51 (xxvi), empowers the Commonwealth to make laws with respect to 'The people of any race, for whom it is deemed necessary to make special laws'.

In its original form, the power specifically excluded the Aboriginal race from its operation. However, as a result of a referendum in 1967, the words 'other than the Aboriginal race in any State' were deleted, giving the Parliament power to legislate with respect to the people of any race including Aboriginals. It is clear from the amendment proposal put to the electorate at the referendum and the parliamentary debate on the amending Bill that the legislative intent behind the amendment was to provide the Commonwealth with power to legislate with respect to the Aboriginal race (Senate Standing Committee Report 1983, 81-82).

This has been recognised by the High Court, members of which have, on two recent occasions, adopted a wide view of the scope of the power (Koowarta v Bjelke-Petersen; Commonwealth v Tasmania). The Senate Committee on Constitutional and Legal Affairs observed that, even on the 'narrowest view of s.51(xxvi) which emerges from these judgments, it would appear that if the Parliament deems that the necessity exists and passes special laws for the benefit of people of the Aboriginal race, such laws will be valid' (Senate Standing Committee Report 1983, 92). The power of the Parliament to enact Aboriginal land rights legislation under this plactium, therefore, seems clear enough.
Sub-section 3A(2) of the Land Rights Act excludes any liability of the Commonwealth for payment of compensation to the Northern Territory 'by reason of the making of a grant to a Land Trust of Crown land that is vested in the Northern Territory'. The question to which this provision gives rise is whether Commonwealth land rights legislation, passed in the exercise of its power under s.51(xxvi), could validly exclude the requirement in s.51(33xi) that acquisition of State property by the Commonwealth be 'on just terms'. While there is no binding authority on the point, it was the view of the Senate Committee that 'the power to make laws with respect to the people of any race could not be exercised so as to acquire property free of the restrictions imposed by s.51(3xxi) of the Constitution' (83). Further, while there was disagreement between the members of the High Court in the Franklin Dam case as to whether a prohibition restricting the use of land amounted to an 'acquisition of property' in terms of s.51(3xxi), those justices who considered the point appeared to assume that the 'just terms' requirement did apply to property acquired for the purpose of a law under s.51(xxvi) (Mason J at 708-709, Murphy J at 738, Brennan J at 795-796, Deane J at 824-833).

Uranium

The Atomic Energy Act 1953 controls the mining of uranium at the Ranger Project Area and other areas in the Northern Territory. By virtue of sub-s.35(1) of that Act, ownership of uranium deposits in the Territory is vested in the Commonwealth. This is in contrast to the position of the States which retain the ownership of uranium deposits located within their respective boundaries. A detailed discussion of the possible legislative heads of power which may support this legislation is beyond the scope of this paper. However, it is Professor Lumb's view that the legislation may be supported by a combination of the defence, external affairs and trade and commerce powers (see Lumb 1979, 84).

National Parks

A contentious issue so far as the Territory is concerned is the acquisition by the Commonwealth, without compensation, of the Alligator Rivers region, including its mineral deposits. There is a discussion of the steps by which the Kakadu National Park was established in the Alligator Rivers Stage II Land Claim Report (paras 240-246). The relevant legislation, so far as it applied to the Territory, was supportable by reference to the territories power.

While the National Parks and Wildlife Conservation Act 1975 is in a general sense also referable to the external affairs power on the basis of Australia's obligations under
the conventions enumerated in the Schedule to the Act, it is open to argument whether such a power would be wide enough to justify the acquisition of State property.

If the Commonwealth's powers under s.51 of the Constitution are adequate to support legislation of the kind currently applying to the Territory in respect of Aboriginal land rights, uranium mining and National Parks, then it will prevail over any inconsistent State legislation. However, if the powers of the Commonwealth are inadequate to preserve its control over these matters, a question arises whether the Parliament can impose terms and conditions under s.121 which have the effect of reserving to itself power over those matters.

It is arguable that any attempt on the part of the Commonwealth to interfere with the distribution of legislative powers as between the States and the Commonwealth would not be upheld by the High Court. In addition, any term or condition which disadvantaged a new State in relation to the existing States may likewise be invalidated by the High Court, particularly if it adopts the United States principle of constitutional equality in relation to the admission of new States. I express no particular view on these issues. However, with these reservations in mind, it may be useful to identify the various forms which the exercise of power by the Commonwealth under s.121 may take.

The Parliament has power under s.51(38viii) to enact legislation with respect to matters referred to it by State Parliaments. If the Commonwealth Parliament was not confident of its power to legislate with respect to Aboriginal land rights or uranium mining, for example, it could require the Territory, as a condition of its admission to statehood, to refer to the Commonwealth power in respect of Crown lands and minerals. A practical difficulty with this approach arises from uncertainties surrounding such a reference of power (Lumb and Ryan 1981, 210-211). The sort of questions that have arisen include - can the reference be revoked; if a State refers a power, does it retain power to legislate on the matter referred? The whole question of referred powers is being considered by the Constitutional Commission.

The preservation of control over a new State by the Commonwealth may also be achieved by a requirement that the Constitution of the State retain some of the limitations such as exist in the Self-Government Act. Other suggestions include restrictions upon the State's power of constitutional amendment, also the reservation to the Governor-General of power to disallow State legislation in particular circumstances. This last suggestion might seem at odds with the notion of statehood though Professor Saver comments:
All the State Constitutions have disallowance provisions; they are inoperative, but it could not be said that in 1901 they had no significance and yet they were not thought to be inconsistent with the position of the States in the Federation (Sawer 1981, 100).

Section 121 of the Constitution occupies only five lines. It would be overly dramatic to suggest that it has the potential for controversy imbedded in s.92. Nevertheless, faced with the knowledge that its invocation is imminent, the members of the Law Society of the Northern Territory would do well to see constitutional law as a subject of no mere theoretical interest.
STATEHOOD ON CONDITIONS: FEDERAL REPRESENTATION AND RESIDUAL LINKS

Colin Howard

With the weird precision to which official statistics have to aspire for certain purposes, the Yearbook Australia (1985, 77) gives the estimated population of the Northern Territory at 30 June 1983 as 133,876 persons, no more and no less. No doubt that figure remains not too far from the estimated truth some three years later. I mention the point because this figure puts the Northern Territory well down at the bottom of the population table in terms of its percentage of the total population of Australia.

In round figures over 61 per cent of the population lives in the two States of New South Wales and Victoria, approximately in the proportion of 7:5 respectively. Below that there is a drop to 16 per cent in Queensland, nearly 9 per cent each in South and Western Australia and then another drop to well under 3 per cent in Tasmania. The ACT has rather over 1.5 per cent and we come lastly to the Northern Territory with well under 1 per cent. The case for Northern Territory statehood is therefore clearly not based on population. The significance of this in terms of the title of my paper is that it is reflected in an interesting way in what I understand to be one of the Territory's proposals as part of its statehood case.

Equality

As I understand it, the Territory, if it becomes a State, is not asking for any distinction to be drawn between itself and the existing States in terms of representation in the Federal Parliament. This sounds straightforward enough until one realises that it means that the new State may continue to send only one MHR to the House of Representatives in Canberra, or no doubt two in due course, but will send no less than 12 senators to the Senate. If this comes to pass, the State of Northern Australia will not be unique in having more senators than MHRs, for Tasmania already has 12 senators to five MHRs; but it will be unique in the size of the discrepancy in numbers between the two forms of representation.

Each of the original States of the Federation is constitutionally entitled to not less than five MHRs regardless of the size of its population (Constitution s.24). The fact that this constitutional guarantee extends in express
terms only to the original States probably does not prevent its being extended also to the Territory as a condition of admission to statehood, but whether this would actually be done is another matter. The existing States might well object, on understandable grounds, to any special provision being made for Territory representation in the House of Representatives if the point about a full complement of 12 senators is conceded. The original States have a similar guarantee of minimum representation in the Senate, the figure in this instance being six senators (Constitution s.7). The Constitution specifies also that the number of senators for each original State may be fixed by statute from time to time at six, or any higher number, provided always that the number is the same for everyone (Constitution s.7). Once again, none of these things applies to a new or additional State. The Territory can argue for equal representation with the rest but it is generally assumed that there is no reason of law why its arguments should be successful.

The Scope of s.121

Whether this assumption is correct is only one of the many fascinating questions which arise when we try to work out how new States can be fitted into a Constitution which acknowledges their possibility in general terms but entirely fails to grapple with the details. The Constitution is as enigmatic as a hard-boiled egg when it comes to discovering from its terms the extent to which new States are affected by the many sections which put into effect the carefully worked out federal compact between the original six colonies. (For the enigmatic character of eggs I am indebted to the Governor-General of Australia, as he now is, 145 CLR 29). It is abundantly clear, both as a matter of history and as a matter of law, that nearly all of the Australian Constitution was drafted with only the six original States in mind. It is arguable enough that it was sensible of the original draftsmen to leave the details of new State admittance, or establishment, to the future and not seek to tie the process down in advance of the occasion. Only comparatively recently has it been perceived that, flexible-sounding though this solution is, it is capable also, at least in theory, of producing some striking anomalies. It has been pointed out by Professor D J Whalan of the Australian National University, for example, that many of the restrictions on the existing States do not necessarily apply to new States, so that, as instances, it may well be the case that a new State could mint its own currency, impose its own customs duties and raise its own army, navy and presumably air force, not to mention abolish freedom of trade across its borders (Whalan 1980, 208-9).
I do not propose to retread constitutional ground which has been adequately covered in recent years by others, (see also Sawyer 1981, 91) but I recall the point that these intriguing consequences, among many others, are nowadays thought to flow from the power conferred upon the Federal Parliament by s.121 of the Constitution to 'admit to the Commonwealth or establish new States' and that the section also says that the Parliament 'may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit'. The point of reminding one of the curious anomalies which may accompany new statehood is not to linger upon interesting but improbable points of constitutional interpretation and law but to draw to attention that on any view the innocuous-sounding s.121 in fact poses some quite fundamental questions.

'States' and Terms and Conditions

The power which it confers upon the Federal Parliament to impose terms and conditions is positively Sphinx-like in its failure to communicate. For one thing it omits to say upon whom the terms and conditions may be imposed. Everyone assumes that the section means imposed upon the new State, but I see no reason why this assumption should necessarily be correct. The fundamental point about the section however is not even that but the remarkable way in which it assumes that the word 'State' has a clear, or reasonably clear, meaning for the purpose in hand. There is one line of approach which suggests that the intended meaning is indeed almost completely clear. It takes the point that at the time when the Constitution came into effect the word 'State' did in fact have only one meaning, that meaning being 'original State'. Up to and including the present moment we still have no other form of State. But an original State is necessarily one which is subject to all the many provisions of the Constitution which directly or indirectly have an impact on the status and powers of the existing States. The simplest way of resolving the s.121 conundrum about the word 'State' therefore is to assume, leaving aside minor adjustments of detail, that any new State must be in exactly the same situation with respect to legislative power and everything else, including Federal representation, as the original States.

There are however two difficulties with this straightforward analysis. The first is that, as we have seen with Federal representation, special guarantees are written in which apply only to original States. This clearly implies that new States do not enjoy the same constitutional guarantees and therefore need not be treated equally in the relevant respects. Secondly, the express mention in s.121
of the Federal Parliament having the power to include the extent of Federal representation in the terms and conditions which it imposes on admittance as a new State similarly implies that the position of a new State can be made significantly different from the position of an existing State. These considerations seems to me to at least modify the argument that the word 'State' necessarily implies, at least in all significant respects, equality of status with the original States. As soon as that point is conceded however, we are back with the basic difficulty that we do not know what is comprised within the word 'State' as used in s.121.

If the words of the section which empower the Federal Parliament to impose such terms and conditions on admission to statehood as it thinks fit are given their widest interpretation, it becomes possible to admit a body politic to the Federation under the name of a State which bears very little resemblance indeed to any of the original States. We have a telling example ready to hand in the current Territory situation. It is no news that a major factor, indeed no doubt the predominant factor, inspiring the present level of interest in the Territory becoming a State is the hope that in this way the Territory will acquire a much greater say than it has at present, at all events as a matter of law, in mining and land rights decisions which take effect within its borders. But if the extreme view of the Federal Parliament's power to impose terms and conditions is correct, there is nothing as a matter of law to prevent the Territory, whether it likes it or not, being compulsorily admitted to statehood by the Commonwealth without any significant increase in its present very limited range of powers under the Northern Territory (Self-Government) Act 1978.

Such a development would no doubt be regarded by every Territorian, and indeed everyone else, as a mere sham which sought to give the appearance of fulfilling a commitment to statehood without granting its substance. Nevertheless it is not for this reason a merely theoretical danger. The prevailing consensus of opinion among constitutional specialists is that s.121 of the Constitution, since it refers only to admitting new States to the Federation and says nothing about reversing or amending the process, empowers the Parliament to simply admit a region to statehood, regardless of opinion in the region affected, and then wash its hands of the whole affair. If this is correct, two important consequences follow. The Territory has one chance, and one chance only, to get the terms and conditions of admittance right; and it becomes essential to know what are the constitutional limits, if any, on the scope of the power to impose them. In my view this brings us straight back to what is meant by the word 'State' in s.121 of the
Constitution, for this is the only immediately obvious source from which to derive significant limitations on the power to impose terms and conditions. Or in other words, if s.121 be understood as envisaging the admission of new States to the Federation only in a form which can be recognised as including in some sense the essential of statehood as understood in Australia, what does this do to limit the scope and character of the terms and conditions?

If the answer is nothing, the word 'State' in s.121 has no substantial meaning as a matter of law, whatever may have been intended, and the remarkable conclusion is dictated that the word is simply a label which can be applied at will to any arrangement which happens to suit the parties. The speculations that I am outlining in this paper found their origin in the intriguing character of the Federal representation which the Government of the Northern Territory apparently envisages as a concomitant of admission to statehood. The nature and fundamental significance of the meaning of the word 'State' in s.121 are best illustrated in precisely the same context, representation. Would it be possible, for example, for a body politic of some description to be admitted to statehood even though it did not have an elected legislature?

The point of the question is that there is no constitutional reason why any particular land area owned or controlled by the Commonwealth should not be ruled by decree by an appointed official, as opposed to having an elected legislature and government. This being the case, is there any reason of law why such an area should not be admitted to statehood on the simple basis that it is to continue to be run by appointed administrators and have no representation in either the Senate or the House of Representatives, or indeed undergo any other changes in its arrangements? If the answer to that question is thought as a matter of logic to be no, that there is no reason of law why this should not be done, the consequence is such a startling alteration in the assumed character of the Australian Federation as to provoke some testing of the logic. Statehood must surely mean something more than a glorified administrative unit, although how much more may not be an easy inquiry.

Those with a special interest in constitutional law will be familiar with the elusiveness of such concepts as inherent functions of government, or the essential characteristics of government instrumentalities, which often present themselves in immunity contexts. Learning from that experience I conclude that no progress is likely to be made in a s.121 discussion by trying to identify essential qualities of statehood as a means of limiting the scope of terms and conditions which may be imposed on new States. A more promising avenue of approach seems to me to be a
reconsideration of the purpose served by the terms and conditions power. For a start it may be that too much importance has been attached to the express mention in the section of Federal representation.

An Alternative Interpretation

The general assumption hitherto has been that this reference to representation implies that the expression 'terms and conditions' can include basic features of the Constitution of a new State. This conclusion is thought to follow from the fact that in the Australian Federation representation in the two Houses of the Federal Parliament is a fundamental matter in itself. Or to put it more colloquially, the effect of the express reference to representation, taken in conjunction with the power to impose such terms and conditions as the Federal Parliament thinks fit, is that new States can be made less equal than original States. This reading of s.121 is however by no means necessary as a matter of grammar and, one might have thought, dubious as a matter of policy or constitutional common sense.

Constitutional interpretation in this country tending, regrettably in my view, to the literal, it is well to turn first to the grammar of s.121. The point I would make is simple. It is that it is perfectly reasonable to read the phrase 'including the extent of representation in either House of the Parliament' as inserting into the expression 'terms and conditions', which immediately precedes it, a particular form of term and condition which would not otherwise be included. This is the opposite of the way the section is usually read. At the moment it is read as if the reference to representation illustrates the sorts of terms and conditions which can be imposed, not so much adding anything to them as making sure that the inclusion of representation is put beyond doubt. I think the former much the more cogent reading of the section than the usual one for several reasons.

The first is that it immediately confers upon the word 'State' a clear and definite meaning which, for all practical purposes, is the same as the meaning the word bears in the context of original State. A new State, on this reading, is a body politic admitted to the Federation which in every constitutional respect, apart perhaps from representation in the Federal Parliament, is the same as, and on constitutional terms of equality with, the existing States. Terms and conditions then become limited to such matters as timing, transitional provisions, initial financial arrangements and all the other adjustments to relative detail which are found to be necessary in order to achieve a smooth transition from one status to another and
finally to attain statehood on an equal basis and in the same form as we have already.

This reading of s.121, in my view, also makes better sense of the slightly puzzling words in the section which say that terms and conditions may be imposed 'upon' the admission or establishment of the new State. Strictly speaking it can be said that this makes no sense, for once the admission or establishment of the new State has taken place it must be too late to start imposing conditions. But if one reads the word 'upon' not in its temporal sense but as intended to go together with the word 'imposed', the intended meaning of the section then becomes much clearer. It means 'and the Parliament may impose such terms as it thinks fit as conditions of admission or establishment'. The effect is that we know what we are getting by way of a new State, the only question being what price we expect the new State to pay, not merely financially but also in terms of its existing laws and constitution, for admission or establishment, as the case may be. We know what we are getting by way of a new State because, on this reading, the power under s.121 to admit or establish new States extends only to bodies politic which are the constitutional equivalent of our existing States.

This interpretation of terms and conditions, I suggest, is less obvious when dealing, as in the Northern Territory case, with the creation of a new State out of territory which is already part of Australia. It is probably for this reason that it has been overlooked. Because a Federal Territory has necessarily, throughout its existence, enjoyed a far lesser degree of freedom to run its own affairs than any original State, that habit of mind tends to persist and to be translated into an assumption that if it becomes a State, the Federal Parliament has complete freedom to design or specify what sort of a State it is going to be. Such a reading of s.121 is far less obvious or likely if one considers the historically possible alternative, present to the minds of the draftsmen of the Constitution, of New Zealand being admitted at some later stage to Australian statehood.

In this context various considerations may have dictated the point about representation in the Federal Parliament getting an express mention. The most probable is the highly unworthy one that some apprehension was felt about the possibility of non-whites, or people who had no property qualification, from New Zealand enjoying the same voting rights as white Australians who did have a property qualification. It will be recalled that similar motivations explain the express references in the original Constitution, now deleted by an amendment in 1967, to Aborigines. Formerly s.127 provided that 'Aboriginal natives' should not
be counted when calculating the population of the Commonwealth or of any State or Territory. Formerly also the Federal legislative power in s.51(xxvi), to legislate with respect to the people of any race for whom it was deemed necessary to make special laws, did not include the 'Aboriginal race'.

I see no reason to suppose that the express reference in s.121 to Federal representation as a term or condition which might be imposed upon a new State had any other origin than a racial one, or at least a racial one combined with a concern for property qualifications. It may also reflect contemporary doubt in some quarters about the suitability of women for admission to the franchise. If this is correct there is at the present day no reason whatever to read into the reference to Federal representation the far-reaching consequences usually attributed to it. They all flow from the assumption, mistaken in my opinion, that it implies that terms and conditions can include the Constitution of a new State, and that therefore a new State, by reason of terms and conditions, could find itself free of any of the constitutional restrictions upon the original States. The only terms and conditions of a constitutional character which are within s.121 are, in my view, such changes as may be necessary in the existing Constitution of the proposed new State to bring it into line with Australian statehood.

I referred above to constitutional policy and common sense as well as grammatical analysis. Under this head I would put not only some of the considerations that I have mentioned already, as explaining certain features of the wording of s.121, but also the very doubtful desirability, as it seems to me, of accepting a situation in which new States can be, as I put it earlier, less equal than original States. Indeed, I can see nothing to be said for this. The whole point of s.121 seems to me to be to acknowledge the possibility that parts of Australia itself, or other countries outside Australia, might attain a degree of political, social and economic development which renders them suitable in terms of population and self-government, and indeed everything else that we normally associate with a viable political unit, for acceptance as an Australian State in the fullest sense of that term.

It is inherent in the nature of a federation that the possibility should always exist of new units being added. This is indeed a very civilised way of allowing for an increase in the size of a country otherwise than by the depressingly traditional method of simple conquest or colonisation. I do not see s.121 as being in any sense intended to allow the creation of constitutionally inferior, or relatively weak, additional units within the Australian Federation. Such a development can only tend to destabilise
a federation which depends heavily on the basic belief of its population in the virtues of political and social equality. In my view this is one of the most fundamental issues which the Territory case for statehood raises.

I say that, not in the sense that I personally would wish on this occasion to either approve or disapprove the Northern Territory case for statehood, but in the sense that, this being the first time that a serious case for the admission, or in this instance the establishment, of a new State has been presented, it may prove to be of enormous importance to the future of Australia that the ground rules are correctly understood and applied. This of course means knowing what the ground rules are, which effectively means getting the interpretation of s.121 of the Constitution right. If the approach which I have made to its interpretation up to this point, proceeding as it does from the central feature of Federal representation, is correct, there ought to be no more talk about the potential State of Northern Australia having anything less than full legislative power, subject to the constitutional limitations which apply to all the other States, or anything less than full statehood as we understand it in Australia.

Representation

Nevertheless, since the reservation about Federal representation appears in s.121, however dubious its origins or its utility at the present day, the question inevitably arises, on what principles should such representation be decided having regard to the fact that the Federal Parliament seems to have a complete discretion in the matter? For my part I can see no reason why a State of Northern Australia, being part of domestic Australia, with a population made up, as in the rest of the country, mostly of perfectly genuine Australians, should not have the same representation in the Federal Parliament as any other State. If my argument that the word 'State' in s.121 means exactly what it says is correct, I can think of no acceptable principle upon which any variation in the rules of representation in the Federal Parliament should be varied. Indeed I confess that even if in the fullness of time some such other country as New Zealand were to be admitted to Australian statehood, I can see absolutely no reason why its Federal representation should be in any way varied from the normal.

My inability to think of an acceptable reason why there should be any such variation is one of the grounds on which I have considerable doubts that that particular expansion of the expression 'terms and conditions' is of any relevance at all at the present day. I would urge as a matter of policy that s.121 of the Constitution be treated as if the
reference to Federal representation were not there. It
seems to me to be potentially productive of much mischief,
which can be added to the mischief it has worked already by
leading people right off the track in the correct interpe-
tation of the section.

Residual Links

The residual legal links with the United Kingdom, which have
preserved such a noteworthy range of obscure anomalies in
the laws of the original States throughout the whole of our
short Federal history, are now fortunately of very little
importance. The passage of the Australia Act 1986 and the
Australia (Request and Consent) Act 1985, together with
mirror legislation in the United Kingdom, has probably
succeeded in bringing to an end the more absurd elements of
quasi-colonial status which our States continued to enjoy,
if that is the word, even after Federation. From the point
of view of Northern Territory statehood this is just as
well. Notwithstanding various pronouncements by the High
Court, I have always had some difficulty in bringing myself
to really believe that ancient monuments like the Colonial
Laws Validity Act, 1865 of the United Kingdom and
obscurities like ss.735 and 736 of the Merchant Shipping
Act, 1894, also of the United Kingdom, actually did continue
to work their mysterious imperial will over large areas of
Australia. This task of carefully devising a scheme which
would ensure that these mysteries extended their sphere of
influence to include a new State of Northern Australia would
have strained my limited capacity for credulity well beyond
breaking point. I should probably have had the interesting
experience, for the first time in my life, of knowing what
the expression 'the mind boggles' actually means.

But none of this need any longer concern us. There
remains the relatively minor point of what the formal
relationship between a new State and the Crown can or should
be, having regard to the fact that a direct link of the kind
which is retained by the original States through their
Governors has not hitherto existed in the case of the
Northern Territory. This is not, in my view, an issue worth
going excited about. It cannot be regarded as an essential
characteristic of statehood in Australia that there be a
Governor in the traditional sense, because the original
States retain this link with the Crown as part of their
Constitutions only because of their pre-Federation colonial
status. Their colonial Constitutions were continued by
virtue of s.106 of the Constitution, except so far as they
were incompatible with it. So far as new States are
concerned, s.106 similarly continues their Constitutions,
as at the admission or establishment of the State', until
altered in accordance with whatever the appropriate way
happens to be.
Precisely what is the Constitution of the Northern Territory at the moment seems to me to be a question upon which it would be possible to spend many, no doubt happy, hours to little purpose. All that the s.106 provision for the continuation of its Constitution seems to mean for practical purposes is that a Constitution which puts the Territory on a par with the other Australian States will have to be drafted before the establishment of the State of Northern Australia. This Constitution can then, by means of transitional terms and conditions, be brought into effect simultaneously with the establishment of the new State. If the case were that an intending new State was another country, say New Zealand, the continuation of its Constitution would have to be accommodated to terms and conditions which ensured that on New Zealand's admission to the Federation its previous Constitution became modified to the extent necessary to bring it into line with the other Australian States. Otherwise, in my opinion, the purported admission would be beyond the s.121 power of the Federal Parliament to admit new States at all.

But so far as a Governor and a direct link with the Crown are concerned, there is no essential reason why this should be either included in, or excluded from, the Constitution of the State of Northern Australia. To be on a par with the other Australian States means being able to exercise the same powers, subject to the same restrictions, as the original States. Nowadays the rule for Governors is that they act in all governmental matters strictly on the advice of their Premiers. Whether a new State would wish to adopt the institution of Governor in that understanding, or prefer to have some equivalent official whose powers were more clearly written down, or have a Governor whose powers, with the consent of the Crown, were written down, would be entirely a matter of preference or convenience.
Chapter 3

STATEHOOD: THE TERRITORY PERSPECTIVE

Steve Hatton

I preface my remarks on this subject quite simply. The Northern Territory suffers from a number of serious constitutional, political and economic disadvantages under its current status as a Territory. It is fair to say that under the current arrangement, Territorians do not enjoy equal status with other Australians.

Our goal in seeking admission to the Federation as a new State is therefore based upon the perception of current disadvantage. I would like to review the principal areas of disadvantage before moving to an analysis of the political implications of statehood for the Territory. We have identified two main areas of disadvantage:

First, those in which the status or treatment of the Territory is inferior to that of the States; and secondly, those where the Commonwealth Government has retained a legal capacity to alter current treatment of the Territory to our disadvantage.

In the first instance the Northern Territory does not under the current arrangements enjoy the constitutional rights of people in the States. Those rights which we do enjoy are provided for under Acts of the Federal Parliament, which are not entrenched in the Constitution as they are for the States.

The Territory Government believes that reliance on convention or upon the goodwill of the Commonwealth Government to preserve those rights is simply not sufficient. A number of recent events to which I will refer shortly, have served only to heighten the conviction of Territorians that such reliance is extremely foolhardy. We believe that recent incursions into Territory matters by the Commonwealth Government exemplify the Territory's vulnerable status and serves to reinforce our claim that the Territory must have its rights and privileges protected and extended by its inclusion under the umbrella of the Constitution.

The basic position is this. The fundamental rights of States under the Constitution and the Australia Act 1986 do not have automatic application in the Northern Territory. The result of Territorian status is not, however, merely nominal exclusion from the Constitution; the real result is that the Northern Territory lacks protection against uni-
lateral Commonwealth intervention - a protection which is fundamental to the principles of federalism.

One of the principal disadvantages is the extent of Territory representation in the Federal Parliament. At present, whilst the Territory has two senators, the States have 12 senators. Moreover, the Territory is represented in the Senate under the Commonwealth Electoral Act 1918, and the presence of Territory senators is not guaranteed under the Constitution. State senators hold office under the Constitution for a fixed-term of six years on a rotational three year basis (subject of course to double dissolutions). Territory senators have a term of office corresponding to that of the House of Representatives, three years or less.

Indeed, virtually all the rights which the Territory enjoys in relation to both the Senate and the House of Representatives are vulnerable in the same way. I will return to the vexed question of Senate representation later but will now turn to consider the other major areas of disadvantage suffered by the Territory under the present arrangements.

Under the Constitution, the Commonwealth has specific heads of power with all residual powers being vested in the States. However, the legislative powers of the Commonwealth with respect to the Territories under s.122 is unlimited as to subject matter and is plenary in ambit.

While there is an untested argument that there may be (by convention) some limitation on the powers to restrict a self-governing Territory, that argument offers little protection to the Northern Territory as it stands. Again, the Constitution does not have a Bill of Rights, but it does entrench certain rights most of which are not specifically applicable to a Territory at all. And so it is that fundamental rights are not constitutionally guaranteed to Territorians or to the Territory Government. For example, we are advised that should the challenge of the Queensland and Tasmanian Governments in respect to the fringe benefit tax be successful, every State Government in Australia would then be exempted from the application of the fringe benefit tax but not so the Northern Territory or the ACT. Why? Because we are not a State, and we do not have the protections of the Constitution.

Nor are we guaranteed territorial integrity, or the right of electors to approve alterations to the Constitution which would adversely affect State representation. It was this lack of a guarantee of territorial integrity fundamental to the States, which enabled the Commonwealth Government to remove the Ashmore-Cartier Islands from Territory control without consultation. I know that it did occur
immediately before the granting of Self-Government, and it could be argued that it does not fall into the context of a self-governing Territory but the fact is that it can happen at any time to the Northern Territory. The Territory, for example, by Commonwealth decree could be divided into two. Sections could be taken away. Bathurst and Melville Islands could be removed. We have no protection of our territorial integrity at all under the Constitution.

Moreover, as a reciprocal example of the lack of Territory control over its affairs, we can take the example of the Cocos Keeling Islands and Christmas Island, two separate Territories which were joined to the Northern Territory for Commonwealth electoral purposes alone, without any consultation with the Northern Territory. There is no doubt that those islands have little or no connection with the Northern Territory and the Northern Territory has no direct association with those Territories. They were simply 'lumped' into the Northern Territory, adding a few hundred votes to the Northern Territory Federal electorate. That cannot happen to a State, in fact that is why it was done to the Northern Territory.

Let me return to my earlier example about disadvantages arising, by reference to the Constitution. The Australia Act 1986 removed the colonial status of the States, but it did not change the status of the Northern Territory to which it did not have direct application.

The Territory does not enjoy direct links with the sovereign which the States have and the position of the Administrator is significantly inferior to that of the State Governors, not least because the Administrator is appointed and dismissed by the Governor-General on the advice of the relevant Commonwealth Minister. We had an example of attempted unilateral Commonwealth decision as to the term of the Administrator earlier this year and, quite frankly, it was only political pressure that prevented that proceeding. Another difference in the position of the Administrator is that, under the Australia Act 1986, a State Act of Parliament, once assented to by the Governor, is not subject to disallowance or suspension by Her Majesty. This is not true of a Territory law, which is liable to disallowance by the Governor-General within six months after the assent of the Administrator. There has been at least one occasion when the threat of disallowance has been taken virtually to the line. I refer to threats that were made to disallow legislation for a Criminal Code that was being introduced to the Northern Territory.

The fact is that all legislation that we pass in the Assembly is subject to disallowance by the Commonwealth Government by the Governor-General, on the advice of the
Federal Executive Council and the relevant Minister. It does not and cannot apply to the States, nor should it apply to a legitimate government of the people of the Northern Territory or to laws affecting only the Northern Territory. Similarly, under the Australia Act, a State Act of Parliament cannot be subject to any obligation on the Governor to withhold assent nor is it subject to reservation to Her Majesty. A law passed by the Legislative Assembly of the Northern Territory, as I have said, is liable to reservation to the Governor-General in the case of non-transferred matters.

There are many other areas in which the Territory Government is disadvantaged because its powers under the Self-Government Act are significantly inferior to the powers of the States. This is particularly true because of the constitutional basis of the Territory Government. In the main, the Constitutions of the States are enshrined in State Acts and are amenable to alteration by the State Parliaments in accordance with the procedures laid down therein. The States are substantially protected by the Constitution. The constitutional basis of the Northern Territory is found in a Commonwealth Act and, apart from a few matters on which the Assembly can legislate, alteration of that Act is beyond the capacity of the Legislative Assembly. Indeed, it may well be beyond the Assembly's capacity to take any preliminary steps to alter the Act or to devise a new constitution.

It is probable that we would need to ask the Federal Government to amend the Self-Government Act to give the Northern Territory people the right to develop their own constitution. The constitutional status of the Territory at the moment is such that we can be wiped out by the Federal Parliament simply repealing an Act of Parliament. That cannot happen in the States, and it should not be possible here. The only way we can protect ourselves is to have our status as a self-governing community of Australia entrenched on the same basis as other Australians which have their Governments protected by the Constitution.

I would like to focus next on two areas in which the powers of the Territory are expressly limited under the Self-Government Regulations. They are both extremely contentious and have had a major effect on the development of the Territory. They are rights in respect of Aboriginal land and uranium mining.

The Commonwealth does not own uranium deposits in the States nor does it legislatively control the mining of uranium there. The controls which it exercises in the industry are mainly carried out through the control of uranium export licensing. However, the Commonwealth specifically reserved to itself the ownership of uranium
deposits in the Northern Territory. It controls the mining of uranium under the Atomic Energy Act 1953 and Commonwealth approval is required by the Territory with respect to uranium mining under our Mining Act. The Commonwealth receives the royalties for uranium mining, and whilst it does make a partial reimbursement to the Territory, the Territory has been financially disadvantaged by the lack of revenue from this important mineral resource.

The extent of this disadvantage is serious. The Department of Mines and Energy has calculated that the Commonwealth will recoup all of its expenditure on Ranger and Jabiru in the first year that the company operates under full tax liability.

It is further calculated that the Commonwealth will then net about $58 million a year from Ranger's operations. If our royalty rating had been applied to Ranger, the Northern Territory Government would have received a net $85 million today from those operations. While these people accuse us of living off the people from down south, they are denying us our revenue-raising powers.

The same comment applies to Aboriginal land rights. As you are aware, the Commonwealth has not legislated as to Aboriginal land rights in the States, although there is a view that it could do so, provided it paid just compensation in respect of acquired land. It cannot unilaterally transfer the title of public land in the States without paying just compensation to the States. The Constitution protects the States against that action. But the Commonwealth has specifically legislated on this topic in the Northern Territory in the Aboriginal Land Rights (Northern Territory) Act 1976. That legislation provides for the substantive alienation of land from Territory control. This was done under s.122 of the Constitution dealing with the Commonwealth's powers in the Territories.

This Act does not provide for the payment of compensation for such actions. Further, payments equivalent to royalties for minerals on Aboriginal land are applied by the Commonwealth for the benefit of Aboriginal people in accordance with that Act. I am not arguing here the cause of land rights, although I will deal with our position on that shortly.

Here I wish to deal with our revenue base. The fact is that private royalties are payable from mine developments on Aboriginal land (when we get one or two new mines going on Aboriginal land!). There is only so much money that a company can afford to pay. If large amounts of royalties are being taken away and applied to the specific land owners for property that legally belongs to the Crown, it is deny-
ing potential revenue-raising resources for the Northern Territory Government to apply for the benefit of the community as a whole, including the Aboriginal community.

The Territory Government has made its position abundantly clear on the issue of land rights. Our Government is not opposed to the principle of land rights although there are certainly many aspects of the current land rights legislation which quite publicly we object to - we have never made a secret of that. All we are seeking is an equitable and fair approach to the issue of land rights in the Northern Territory.

We have, in a Ministerial Statement, made it very clear that we will guarantee the ownership of that land to the Aboriginal people and we are now starting the process of consultation with the Aboriginal people on the appropriate form and nature of title. I believe, and our Government believes, that the nature of the title being provided now is not good for the Aboriginal people. It is not giving them a base to build off: it is not giving them an economic capacity in many respects. That legislation is particularly paternalistic in its control and limitation of what the owners of the land are empowered to do with the land because of the approval mechanism required. We will resolve that issue with the Northern Territory people. But let me say that the Land Rights Act must be patriated back to the Northern Territory.

It is totally improper for the national Government to pass a law that only applies to a particular region of Australia. That is the role of the regional or the State Government. If the Federal Government says it has the power in respect of passing laws in respect of land rights, let it apply the law to the whole of Australia. If it is not prepared to do that let it step out of the field and leave it to the State and Territory Governments.

I will also deal with a couple of particular aspects of land rights and Commonwealth acquisition. I am dealing here with Uluru-Katajuta National Park. If that park had been in New South Wales and the Commonwealth Government sought to do what it did, it would have had to pay the New South Wales Government just compensation, the Valuer-General's valuation. What value would you put on Ayers Rock? What would you have to pay to the Government that you took it from? And then to exclude the State organisation from the continuing management of the park in its region!

In respect of Aboriginal land, Territory laws only apply on those lands so far as they are consistent with the Land Rights Act. Now, that might be good for lawyers, but it is not very good for a Government. We do not know the
extent to which our own laws have application on almost fifty per cent of our territory. The Land Rights Act does not tell us. There was doubt whether the Control of Waters Act does have full application to Aboriginal land. So now they are going to amend the Land Rights Act to recognise that it does. Why can they not simply say Northern Territory laws shall apply on all land in the Northern Territory, including Aboriginal land? How can a Government be expected to be able to govern when it does not even know if its laws apply and the extent to which they apply within its own borders? It is a nonsense, and something which the Northern Territory people and the Northern Territory Government should not be expected to put up with.

We should not be expected to be treated as mendicant servants of a Federal Government. We are Australians, we deserve the right to be treated as equal Australians and our Government deserves to have the same rights as other Governments of this nation.

We argue that it would not be possible in the States to do what they are doing in the Northern Territory, even if it were proved that the Commonwealth had the power to excise lands in the States in the same way. We believe that our Territorial status has rendered us liable to discriminatory treatment which the people of the States would never experience, and most certainly would never put up with. We are seeking to redress these disadvantages through the pursuit of statehood.

Statehood would need to include a number of things which are as follows:

First, to achieve equality, there would need to be amendment to both Commonwealth and Northern Territory legislation to ensure continuity and to provide for the constitutional status of the courts, judges and jurisdictions.

Second, Commonwealth statutes having effect upon the Territory which bear upon the new State's responsibilities would have to be amended. Again, we would require full membership with equal rights on all Commonwealth-State inter-government bodies. We would expect that control of land would be granted to the new State on the same basis as it applies to existing States.

As I said earlier: you cannot govern if you cannot govern the land. To turn the Territory Government into a piebald Government is unreasonable and it is unfair on the people of the Northern Territory. Therefore, we seek the transfer of the root title of all lands within the borders of the new State to the State Government. Powers of land acquisition should also be comparable to the powers
currently existing in the States. These modifications to the existing state of affairs would bring the Territory and its citizens to a position of constitutional and financial equality with the other people of Australia.

There remains the question of course, of political equality for the people of the Northern Territory. I would like to deal with this fairly specifically.

This is one of the thorniest problems to be addressed and one which has already provoked considerable and often heated debate. It is important that I spell out my Government's approach in precise terms.

Let me first deal with the House of Representatives, the people's house. Tasmania enjoys, as an original State, an entitlement of five members as a minimum. Representation thereafter is determined by the population quota, and the population size determines that quota. But any claim that the Territory should be treated as generously as Tasmania in a context very different from that of the 1890s is quite unrealistic.

We will not be pursuing that course. We shall abide by the constraints of the quota. We are not arguing in the people's house that we be given unequal treatment, advantageous treatment. We accept the unique situation of Tasmania. Because the House of Representatives is the people's house, it is the place where there is representation on the basis of population, and we support the continuation of that.

I do however, hasten to point out that, on becoming a State, the Territory with its high relative population increase, would soon be entitled to a second member. Remaining a Territory would delay the prospect of gaining an extra member significantly. Presently, the Territory, because of its small ratio of electors to population size (48 per cent as compared to about 60 per cent in the States), is theoretically under-represented. Having recourse as a State to the quota based on population and the advantage of "achieving an additional member once a half quota has been achieved, will thus be beneficial.

In the case of the Senate, however, the States' house, the Territory is entitled to equal representation. No relationship between Senate representation and population size will or can be accepted. Since 1901 the principle of equality, regardless of geographic size and the number of residents has been fundamental. We see no reason, philosophic or expedient, to warrant breaching that principle in respect of new States. Our claim to equality is unequivocal, incontestable, and will not be compromised
by the people of the Northern Territory. We do recognise, however, as a matter of political reality, that the immediate achievement of parity will not be easy. Although we will pursue that course as earnestly and as persistently as we can, we will not allow it to become an insurmountable obstacle frustrating the receipt of other worthwhile advantages of statehood. If we are forced to concede immediate equality we will insist on eventual equality based upon an unadorned and legally binding formula which includes a reasonable initial representation and a short time-frame to achieve equal numbers.

As a matter of justice and propriety, the Territory should have full equal representation in the Senate as a State with the other States of this nation. Our founding fathers set the Senate up to counter-balance the disproportionate representation of the large States in the south-eastern corner. They did not do that by mistake, they did it deliberately to ensure that the small States were not swamped and forgotten by the large and highly populated States. It was designed as a counter balance to the disproportionate representation in the lower house. When you look at population distribution over Australia as a nation our case for equal representation is solid. To accept something different from that would condemn the seventh State of Australia to perpetual second-class status. You cannot argue in support of that constitutionally, democratically, or on grounds of justice and equity. It must be a process that ensures that any State of Australia stands on equal terms.

My Government's intention is to pursue statehood with the utmost vigour and ultimately, to make all Territorians equal Australians.
Chapter 4

STATEHOOD: THE COMMONWEALTH PERSPECTIVE

Lionel Bowen

The Constitution, by s.121, vests in the Commonwealth Parliament the power to admit new States to the Commonwealth or to establish new States. Contrary to expectations when the Commonwealth was established, the power to admit or establish new States has remained unused. The political, financial, constitutional and other legal issues involved in creating a new State have, therefore, not been addressed in practice. In the context of statehood for the Northern Territory, the Commonwealth Government's attitude is that proposals for statehood will be examined when they are brought forward by the Territory Government, at a stage where there is an agreed view in the Territory on significant elements.

Recently, the Chief Minister of the Northern Territory has written to the Prime Minister informing him of the campaign by his Government aimed at achieving statehood and seeking discussions. A response to the Chief Minister's letter is under consideration. However, I note that detailed proposals for statehood are currently being examined by a Select Committee of the Northern Territory Legislative Assembly.

The Commonwealth Government would, of course, seek the views of the States on any detailed proposals for statehood that are brought forward. Issues of major significance for existing States would include the financial arrangements which would apply between the Commonwealth and any new State and the extent of representation of the new State in the Commonwealth Parliament. Consultation with existing States may have more than political significance. For example, s.105A of the Constitution, on which the Financial Agreement between the Commonwealth and the States is based, could require the approval of all of the existing States before the existing Financial Agreement may be varied to include the new State.

The possible further steps toward statehood are best considered in the context of a detailed proposal. Nevertheless, some general comments can be made on some of the constitutional issues that would need to be addressed. I propose to offer some thoughts on the following aspects:

1. whether the Northern Territory may be established as a new State of the Commonwealth;
2. the mechanism for establishing a new State and providing for its Constitution;

3. the question of the legislative powers to be conferred on the new State;

4. the power to impose terms and conditions upon establishment of the new State, including the extent of representation of the State in the Commonwealth Parliament.

Establishment

Of fundamental importance is the question whether the Northern Territory may, consistently with the Constitution, be established as a new State of the Commonwealth or whether it could only be admitted to the Commonwealth. That requires consideration of the meaning of s.121 of the Constitution.

Before discussing s.121, however, it might be useful to set out briefly some of the significant early historical and political events in the emergence of the Northern Territory. By letters patent of 6 July 1863, Queen Victoria annexed the Northern Territory to the Province of South Australia. The statutory authority for this was given to the Crown by the Australian Colonies Act, 1861. At the time of the enactment of the Commonwealth of Australia Constitution Act, the State of South Australia probably included the Northern Territory of South Australia annexed by the letters patent. The definition of 'The States' in covering cl.6 of the Constitution refers to the Northern Territory as being included within the State of South Australia.

An agreement was made on 7 December 1907 between the Commonwealth and South Australia for the surrender of the Northern Territory to the Commonwealth. The agreement was ratified by the Parliaments of the Commonwealth and of South Australia in the Northern Territory Acceptance Act 1910 (Cth) and the Northern Territory Surrender Act, 1907 (SA) respectively. The Northern Territory ceased to be a part of South Australia in 1910. The surrender and acceptance of the Territory was founded on s.111 of the Constitution.

Section 111 empowers the Parliament of a State to surrender any part of a State to the Commonwealth and provides further that, upon such surrender and the acceptance thereof by the Commonwealth, the part of the State that has been surrendered shall become subject to the exclusive jurisdiction of the Commonwealth. Thereafter the Commonwealth was authorised by s.122 of the Constitution to make laws for the government of the Northern Territory. It was pursuant to this provision that the Commonwealth Parliament passed the Northern Territory (Self-Government)
Act 1978. Other legislation, such as the Aboriginal Land Rights (Northern Territory) Act 1976, has also been enacted pursuant to s.122.

**Mechanisms**

I turn now to s.121 of the Constitution which provides as follows:

121. The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either house of the Parliament, as it thinks fit.

Reference should also be made to the definition of 'The States' in covering cl.6 of the Constitution. It provides as follows:

'The States' shall mean such of the colonies of New South Wales, New Zealand, Tasmania, Victoria, Western Australia, and South Australia, including the northern territory of South Australia, as for the time being are parts of the Commonwealth, and such colonies or territories as may be admitted into or established by the Commonwealth as States; and each of such parts of the Commonwealth shall be called 'a State'.

This definition in terms seems to anticipate action pursuant to s.121 to establish Territories as new States and s.121 itself is apt to authorise the Commonwealth Parliament to pass legislation which establishes a Territory as a new State.

The alternative view expressed by some commentators that Territories which have received representative and responsible government may not be established as new States, but may only be admitted, seems to have little support. I note that acceptance of this view would involve the proposition that the power of the Commonwealth Parliament would not extend to the establishment of the Territory as a State or to the creation of its Constitution.

It seems, therefore, that a new State of the Northern Territory could be established by an Act of the Commonwealth Parliament enacted pursuant to s.121 and that the power to establish would, perhaps together with s.122, authorise a Commonwealth Act in which the Constitution of the new State was set out. This would seem to be the case, although s.121
contains no express power concerning the new State's Constitution.

Having said all this, however, it may be that the Commonwealth could elect to establish a new State by imposing whatever terms and conditions it saw fit, and providing a mechanism for the Constitution of the new State to be created by legislation of the parliament of the new State. It could also provide that such legislation, once enacted, was entrenched - at least to the extent that it could not be amended except by some fixed procedure rather than a simple parliamentary majority.

Legislative Powers

I turn now to consider the question of the legislative powers of the new State. Under the Australian Federal system the Commonwealth Parliament has enumerated powers whereas the State Parliaments are not given specific powers but have general power to make laws for the peace, welfare and good government of the respective States. State legislative power is, however, by virtue of s.109 of the Constitution, residual in nature because in the event of an inconsistency between Commonwealth and State law the former prevails. In relation to a new State, questions that might need to be considered include whether the State's legislative power should be founded on enumerated powers or on a general power to make laws as is the case with the existing States, and in that case, whether some specific powers should be excluded. What limits, if any, are there on the nature of the provisions that may be inserted by the Commonwealth Parliament in the new State's Constitution? The United States Supreme Court has held that the United States Constitution requires equality of powers between new and existing States. However, the relevant provisions of the Australian Constitution are fundamentally different. It appears that the Commonwealth Parliament may, for example, include in the State's Constitution provisions denying the new State legislative competence over particular matters.

The denial of legislative competence over particular matters might be total or only partial. For instance, it might require the consent of the Commonwealth Parliament, or the Governor-General, before the Parliament of the new State may enact certain legislation. Moreover, the particular matters in respect of which State legislative competence is denied might not be matters which fall within the legislative powers of the Commonwealth Parliament. (In such a case it may be that s.121 would, at least in respect of the new State, authorise the Commonwealth Parliament to enact laws, otherwise beyond its powers, in respect of those matters.)
An important question that would have to be addressed is the effect of statehood on existing Commonwealth laws enacted pursuant to s.122 of the Constitution. With s.122 ceasing to have any application to the new State, would laws made under that provision cease to apply? One view is that support for such laws would need to be found in other heads of Commonwealth power if they are to continue to apply after statehood. On this view, for example, the Aboriginal Land Rights (Northern Territory) Act 1976, enacted under s.122, would, after the Territory becomes a State, continue to apply as it would be authorised by s.51 (xxvi) of the Constitution and, if the Act is amended to apply to land vested in the new State and 'just terms' are provided, by s.51 (xxxii) of the Constitution. Alternatively, it may be that all Commonwealth laws would continue to apply after statehood, with the power of the new State to repeal or amend such laws being dealt with in its Constitution or by the imposition of terms and conditions.

Terms and Conditions

Apart from the power of the Commonwealth Parliament to insert and entrench in a new State's Constitution provisions such as those I have referred to, s.121 also empowers the Commonwealth Parliament, upon the establishment of the new State, to impose such terms and conditions as it thinks fit.

The question of representation in the Parliament is one of the main matters that will be considered by the Select Committee set up by the Northern Territory Legislative Assembly. It is also a topic on which the Joint Select Committee on Electoral Reform of the Commonwealth Parliament, in its November 1985 report on the entitlement of Territories and new States to representation in the Commonwealth Parliament, made a particular recommendation, namely,

that no new State should be admitted to the Federation on terms and conditions as to its representation in the Parliament more favourable than those that the Committee recommends for representation of Commonwealth Territories.

This recommendation was based on the view that the historical basis for the representation entitlements of the original States is not relevant in the present day and that those entitlements, if applied, would in the case of the Northern Territory result in gross over-representation. The Constitution itself, in s.7, appears to contemplate the possibility of a distinction between new States and original States in relation to equality of representation in the Senate. The Special Minister of State recently tabled the Government's response to this and other recommendations made
by the Joint Select Committee. The recommendation was noted
and referred to the Constitutional Commission for consider-
ation. It is worth noting that Senator Macklin submitted a
dissenting report in which he argued that the Committee's
recommendation in relation to the representation entitle-
ments of new States would result in the creation of second-
class States and deny the principle of equality of represen-
tation of States in the Senate.

Section 121 specifically refers to terms and conditions
dealing with the extent of representation of the new State
in either House of the Parliament. Relevant issues that
arise in this context would include the power of the Common-
wealth Parliament to impose terms or conditions upon
establishment of a new State that conflict with the
principle of proportionate State representation in the House
of Representatives and with the nexus requirement in s.24 of
the Constitution. There is also the more general question
as to whether terms and conditions could be imposed that
were inconsistent with provisions of the Constitution such
as the judicature chapter or s.92.

These are but a few of the matters to be taken into
account when considering the question of statehood for the
Northern Territory under our Constitution.

I urge you when considering these constitutional
problems to be mindful of the Constitutional Commission
established by my Government to draft a Constitution more
appropriate to modern-day Australia. Your submission to the
Commission would be not only a welcome but a valuable
contribution on behalf of all Northern Territorians. If we
are to have a Constitution serving the needs and desires of
all Australians it is important that all sections of the
community contribute to the Commission's deliberations.
Chapter 5

FINANCING THE NEW STATE: WHO WILL PAY?

Rolf Gerritsen

Introduction

Since the advent of the Hawke Labor Government in March 1983 the Northern Territory's relationship with the Commonwealth has mostly been tense and combative. The Territory Government has seen the favourable deal it negotiated with the Commonwealth at Self-Government gradually whittled away. The determination to press for full statehood in part represents a feeling that the Territory's interests would be better secured by its having the enhanced constitutional status and powers of a State.

This paper examines the financial context within which statehood would be achieved. This context will be profoundly affected by the contemporary conflicts between the Territory and the Commonwealth. These have to be understood within the framework of the redefinition within the last decade of the measurement, even if not the concept, of fiscal equalisation. The coincidence of a changing 'political' environment and the 'bureaucratic'-cum-institutional re-evaluation of the workings of the Federal tax-sharing arrangements has adversely affected the future of the Territory fisc. The paper then considers the fiscal implications of the achievement of statehood on the terms that appear most likely to result. The argument is that, despite the Territory's probable disadvantages, the new State will achieve a considerable degree of fiscal and policy autonomy. This is because, contrary to received wisdom, the Federal-State fiscal compact allows for considerable policy diversity between the States. The example of Queensland illustrates this point. It is argued that, on present indications, the Territory will be a Queensland-like State. Suggestions are made as to how the new State could manipulate the fiscal equalisation elements of the Federal-State tax transfer system. However, if a State is determined to pursue individualistic policies, then the costs as well as the benefits have to be reckoned.

Funding the Self-Governing Territory

Self-Government came to the Territory as a considerable boon. Apart from the obvious attractions of removing 'Canberra' as the focus for day-to-day decision-making and allowing the citizens to elect their own responsible administration, the associated financial agreements were
very profitable for the fledgling Territory Government. Between 1979/80 (the first full year of Self-Government) and 1984/85 Commonwealth funding increased from $440 million to $846 million. This represented a compound annual growth of almost 18 per cent in nominal terms and about 10 per cent in real terms. The consequent high relative levels of public sector expenditure meant that, at a time when the rest of Australia was in recession, the Territory boomed (Gerritsen 1985, 264-65; Gerritsen & Jaensch 1986, 148). Economic growth from 'easy' money from Canberra meant that the Territory Government could pursue without fiscal cost its politically attractive high expenditure - low local taxation strategy.

The generosity of these Commonwealth funding flows was a consequence of the tax-sharing arrangements negotiated as part of the Memorandum of Understanding, the central element of the 1978 Self-Government package. The structure appeared superficially similar to that of the usual Federal-State tax transfer mechanisms. Provision was made for revenue sharing grants; specific purpose grants; general purpose capital funding; and semi-government and local authority borrowings. Obviously unusual was the inclusion of both additional assistance grants and the supplementary special financial assistance procedures. The additional assistance grants, reducible annually from $20 million, were to be phased out by 1985 and were intended to assist the establishment of Self-Government. The supplementary assistance measures were to cover any needs shortfalls in the additional assistance grants during the establishment period (Mathews 1985, 11ff). In any case these grants never totalled more than $20 million annually.

The munificence of the Self-Government package lay instead in its procedures for determining the general tax-sharing revenue assistance grants. These were unique to the Territory's relationship with the Federal Government. The Territory's entitlements were to be calculated by the per capita difference method rather than the factor assessment method applicable to all the other States. This meant that the Territory's grants, as well as reflecting the in-built factor of the fixed proportionality of Commonwealth income tax collections growth common to the other States, uniquely included an automatic escalator to cover population growth. The Territory grants were also separate from the other States' tax-sharing pool.

The first two years of Self-Government were financed by undifferentiated global allocations. In 1980/81 the new grant system was introduced. The following year the Commonwealth arbitrarily determined all State and Territorial grants. The fiscal year 1982/83 saw the Territory's revenue assistance again calculated with the per capita difference
methodology. This proved so profitable that the Territory Government was understandably anxious to claim permanent constitutional status for the system.

In the meantime considerable misgivings as to the equity and needs assessment accuracy of the per capita difference method began to be expressed by those parts of the Commonwealth bureaucracy associated with Federal-State funding. The Grants Commission was concerned at the tendency of the Territory's 'disability factors' to increase, supposedly reflecting initial data deficiencies (CGC 1983, 24ff; Mathews 1985, 14-15). In general the Commission preferred the needs assessment method applied to the other States. This preference was also strongly put to the 1983 Grants Commission hearings on Territory funding by the Commonwealth Treasury. The Treasury argued that the fact that the disability factors increased over time, rather than declining marginally as was to be expected, proved the per capita difference system unsatisfactory. It calculated that the Territory accrued a substantial (unfair?) comparative advantage from its unique method of grant calculation (CGC 1983, 27).

The Treasury was also expressing a 'hidden agenda' in this matter. This was that it accepted, along with most economists, that such a funding mechanism encouraged a low requirement for State taxes and eliminated 'some of the responsibilities for sound economic management at the sub-national level' (Gramlich 1984, 239). This agenda was part of a long standing Treasury ambition to enforce greater fiscal discipline upon the States.

So the forces of Federal bureaucratic argument were arrayed against the Territory. These pressures could be expected to persist, given the nature of the Commonwealth Treasury. All that held them at bay was Prime Minister Fraser's political disposition in favour of the Territory. When that was removed, bureaucratic persistence could be expected to prevail.

The Advent of the Hawke Government

Reacting to the experience of the Whitlam Government, the new Labor administration was determined to avoid conflict with the States. The Franklin Dam issue aside, they largely succeeded (Sharman 1984, 288-89). But similar success with the Territory was not achieved. Intergovernmental conflict soon become endemic. Probably this was inevitable. Argumentation arose as a result of the Commonwealth's retention of powers over Aboriginal lands, uranium mining, National Parks, etc (Heatley 1984, 45; Gerritsen 1984, 34). The Commonwealth also reneged on its promise to build the Alice Springs to Darwin rail link. Though of contestable
economic value (cf Stanley 1984; 11ff), this proposal had become a shibboleth of Territory politics.

The Territory's 'Crisis'

These matters came to head in November 1983 when the Territory Government called a snap election. This was justified by the Commonwealth Government's making two decisions that were presented as inimical to the Territory's interests. The first of these was the uranium decision: to prevent the further development of the Territory's putative mines at Koongarra and Jabiluka while approving the Roxby Downs mine in South Australia. The second decision was the creation of a Kakadu-style, Commonwealth controlled National Park at Uluru. Unlike the previous minutaie of bureaucratic disputation, these provided examples an electorate could be roused by. And they were. With an Ayers Rock logo and the slogan 'Let's Rock Canberra', the CLP overwhelmed the Territory Labor Party, winning 19 of the 25 seats (cf Loveday & Jaensch 1984). The campaign against 'Canberra' was continued throughout 1984 and resulted in the former Chief Minister, Everingham, winning the Federal seat of the Northern Territory from Labor in the election late that year.

This was not unusual. The threat or the actual application of electoral sanctions to a Federal Government that is successfully presented to a State electorate as hostile to the interests of that State is one way of forcing the Commonwealth into greater compliance with the State's view of the inevitable, numerous disputes between the Commonwealth and each State. The Premier of Queensland, Bjelke-Petersen, did this in 1974. The consequent electoral costs sustained by Labor, on the State as well as the Federal levels, ensured that when the Hawke Government came to power it treated the Queensland Government with great circumspection (Sharman 1984, 294).

Paradoxically the CLP government was too successful. Its 1983 victory removed the possibility of a Labor Northern Territory. The then Labor leader, Collins, had used this prospect, together with his position on the ALP National Executive and the respect so garnered with the Prime Minister, to protect the Territory from planned Commonwealth cutbacks (Gerritsen 1984a, 34). For example, in May 1983 the Cabinet Expenditure Review Committee decided to end the electricity subsidy to the Territory in the forthcoming Federal budget. Collins was able privately to prevail upon the Prime Minister to reverse the decision. This was not an isolated instance. Collins' undoubted influence in Canberra exacerbated the Territory Government's anxiety about the Federal Government's intentions (Heatley 1984, 4). The 1983 defeat drastically reduced Collins' influence in Canberra.
The loss of the Territory's seat in the 1984 Federal election removed the last vestige of Territory ALP influence on the national Government. But now the Territory Government had no further electoral sanction it could apply to the Hawke Government. The consequence was not long in arriving.

The paradox of an impregnable CLP having no further political costs it could apply to the Federal Labor administration acted in concert with the growing 'bureaucratic' pressure in Canberra to reorganise Federal-State funding. This latter impetus received bipartisan support from the new 'dry' ascendency in the Liberal Federal Opposition.

Paralleling the redefinition of the Commonwealth-Territory grant relationship, described above, it had for some time been apparent (at least to the bureaucrats in the Grants Commission and the Commonwealth Treasury) that the time-honoured policy of Federal fiscal equalisation had come awry. A policy that originally had intended to cross-subsidise the less populous States, so that they could provide services at levels comparable to NSW and Victoria, had evolved into a situation where those 'equal' service levels were being maintained with a substantially lower relative taxation 'effort' from the small States. Two successive Grants Commission relativities reviews had recommended a redistribution of tax-sharing grants that redressed the balance in favour of NSW and Victoria. On each occasion the Fraser Government had shrunk from the hard political choices required. In 1984 the Hawke Government instituted another relativities review (CGC 1985b). This time the recommendations were to be implemented. An ancillary consequence was that the Territory's separate funding arrangements were also to be ended. The May 1985 Premiers' Conference formalised the future reordering of the Territory's fisc. It climaxed a decision-making process that ended the favoured position of the Territory with regard to Federal funding.

The deal struck under the 1978 Memorandum of Understanding had been intended to apply for six years before review. That review came at a politically disadvantageous time for the Territory Government. The combination of political and bureaucratic imperatives was fatal to the Territory. The Premiers' Conference ratified the gradual removal of the Territory's unique funding allowances. From 1988 the Territory was to be funded on the same factor assessment basis as the States. In the intervening triennium the arrangements under the Memorandum were to be altered to bring them closer to those obtaining for the States. This adversely affected both the general revenue assistance and the special grants entitlements of the Territory.
A harbinger of the changed circumstances came with the 1985 Grants Commission review of Territory finances. The Commission found that the Territory had been overfunded for 1982/83 (CGC 1985). The Territory response was to withdraw its application for special assistance for the next two fiscal years, but the Commonwealth advertised its intention to recover the supposed funding surpluses for 1983/84 and 1984/85 (Budget Paper No 7 1986/87, 28).

The 1984/85 Federal budget had also reduced the Territory's funding, both absolutely (by $12.6 million from 1983/84) and as compared with what it would have obtained with the pre-review fiscal mechanisms. The 1985/86 Federal budget introduced further stringencies, dramatically reducing specific purpose payments for recurrent purposes from $191.19 million to $98.828 million. The 1986/87 budget shaped Commonwealth funding in an overtly State-like manner. Specific purpose capital funding increased by 12 per cent and general revenue funds by 13 per cent, while specific purpose recurrent payments and general purpose capital funding decreased by 16.7 and 23.1 per cent respectively (Budget Paper No 7 1986/87, Table 135, pp 198-99). The Territory was, like the States, being forced into politically unpalatable choices through the Commonwealth easing control over non-capital payments in transferring specific purpose recurrent payments into the general revenue category. The per capita decrease in funding for the Territory forced the choice between the erosion of service levels or higher local taxation. The Territory Government in 1986/87 was forced to raise 25 per cent of its expenditures, a large increase over the 14 per cent it had raised annually from 1978/79 to 1984/85.

Preserving Policy-Making Autonomy; The Example of Queensland

A key to predicting the fiscal future of the Territory lies in understanding how Queensland has been able to preserve its policy-making choices in the Federal system. If the Territory follows the Queensland example it is unlikely to continue its policy of the last two years of increasing in real terms the tax burden of its citizens. Instead it will opt for increased off-budget funding of services and an erosion of the effective level of services.

Most past writing on Australian federalism has concentrated on the States' relationships with the Commonwealth. From this emerged a now conventional picture of Australian Federal-State relations. This tradition saw the post-war balance of power in the federal compact as having shifted towards the Commonwealth from the States because of the growth of Commonwealth revenue raising powers. The States have not expanded their tax bases, proving both
politically reluctant and also restricted by High Court decisions in various excise cases. As a consequence the Commonwealth has ostensibly gained control over the States through its provision of fixed-purpose grants:

... the Commonwealth Government has been able, through the grants power which was given to it under a separate constitutional provision, to superimpose its own decisions on those of the States in all the important expenditure fields for which the States are formally responsible. Far from defining financial powers and imposing mutual obligations on the Commonwealth and the States, the Constitution as interpreted by the High Court gives the Commonwealth virtually unfettered control not only over its own finances but also over those of the States (Mathews 1983, 37-38).

'Unfettered' fiscal centralisation allegedly encouraged inter-State uniformity, a tendency that was even strengthened in the 1970s during the Fraser Government's supposedly decentralising 'New Federalism' initiatives (Mathews 1983, 43). For this interpretation, accepted by many economists, Australia has never had a 'problem' with regional disparities and exhibits an 'astonishing' degree of homogeneity in economic and social welfare (Higgins 1981, 21).

This outline of a historical evolution of Australian fiscal federalism towards a centrally controlled system might imply that State differences (and policy autonomy) were being eliminated. That is not always seen as the case:

... for all the rhetoric about the growth in central control and the standardization of public services, the differences in these public service levels turn out to be surprisingly great (Gramlich 1984, 239).

Another school of analysts I call the 'regionalists' share Gramlich's conclusions if not his methodology. The 'regionalists' operate within the Canadian staples theory (Stevenson 1976) or Australian neo-Marxist (Stilwell 1983) paradigms. This school asserts a defining role for the mining sector. They claim that the control over the export mining sector of the 'peripheral' States (Queensland and WA principally) has tipped the balance of power in the Australian Federation towards them and away from the Commonwealth and the 'core' manufacturing States, NSW, Victoria and SA (cf Gerritsen 1985).

However recent developments, particularly the Commonwealth's assertion of its constitutional control over mineral export licensing in the last decade, has indicated
that the regionalists overstated the political power of the 'peripheral' States (Head 1984, 320ff; Gerritsen 1984, 10).

Nevertheless the regionalists' description of the 'domestic' policy outcomes still wields some popular influence. They posit two typologies of Australian State. These are the socially 'liberal', welfare-oriented 'core' States, and the socially 'illiberal', minimalist-government 'peripheral' States. These features are claimed to be the product of the different economic bases of these groups of States.

From these divergent models we can anticipate two discrete budgetary patterns. The core States would have larger welfare expenditures and higher levels of taxation; the peripheral States the opposite. The latter States would be expected to have lower mineral royalties, lesser contributions by the private sector to infrastructure provision, lower environmental standards, 'and so forth' (Stevenson 1976, 85).

Of course these models have their exceptions. Their advocates would accept that all Australian States have the accoutrements of the modern welfare state - Ombudsmen, women's affairs, and consumer affairs and environmental protection agencies, etc. However, expenditure analysis reveals the supposed truth behind these facades. There is a substantial quantitative if not qualitative difference in governmental commitment between an Ombudsman's office with a budget of $60,000 per annum and one with an annual budget of $260,000, especially if those States had similar populations. So a valid and useful measure of policy priorities lies in a comparative evaluation of State budgets.

Fortunately the data for such an exercise exists in the material prepared by the Commonwealth Grants Commission in its relativities reviews. The Commission has produced what it calls 'standardised' budgets, these having been corrected both for 'non-standard' revenue raising or expenditure and to exclude 'abnormal' items. They are statistically neutral for differences such as: demographic structure; population size and dispersion; societal composition; climate and topography; and economic-environmental factors. The resulting 'standard' State budgets are validly comparable, and provide a superior analytical methodology to the (population) weighted averaging of State budgets to derive standard deviations and hence the coefficients of variation on each expenditure item. Using this latter method Gramlich finds expenditure coefficients of variation between the States of up to 0.409 for 'community development' and 0.505 for 'recreation and culture' (Gramlich 1984, 240, Table 2). These coefficients are very high, over twice the average for the other expenditure items, and seem to support Gramlich's
case for significant inter-State diversity:

State expenditure differences seem by and large to be unexplained by differences in incomes or spending power or by differences in population structure and climate. That is a healthy sign, for it indicates that the system appears to be accommodating taste differences and is not just passing along income or cost differences. Moreover, if anything, differences are largest in areas in which tastes might be expected to vary and play a strong role, such as culture and community development... (Gramlich 1984, 243).

The Gramlich approach contains debilitating distortions because it incorporates without suitable adjustment both substantial classification inconsistencies and also some differences in fiscal capacity and expenditures needs (cf Mathews 1985). So it has less utility for demonstrating governmental preferences than the Grants Commission's standardised budgets technique (which provides an index of real effort undistorted by relative endowments).

What do the State Budgets Reveal?

Given Lasswell's dictum that politics is about who gets what, when and how, it is obvious that fiscal outcomes are central to evaluation of the policies of governments. Their budgets, particularly as standardised by the Grants Commission, provide a good indicator of the real (as distinct from the rhetorical) priorities of the Australian States. From the 1981 relativities review I have prepared tables of the implied service level factors for four States as standardised against the New South Wales/Victoria 'average' (Gerritsen 1986, Table 3,4). The results are quite suggestive. Budget analysis indicates that instead of two uniform blocs of States - the 'core' and 'peripheral' States of the 'Regionalists' - there are two sets of blocs of States. These sets are grouped by their different revenue and expenditure behaviours.

The revenue camps can conveniently be separated by their levels of taxation 'effort'. The high tax bloc comprises New South Wales, Victoria and South Australia, with implied revenue effort factors (IREF) of 103.9, 106.1 and 103 respectively. Tasmania, with a revenue effort factor of 0.89 is a low tax effort State (the opposite result from that expected from some of the regionalist models). The low tax bloc contains Western Australia (with an IREF of 0.89), Tasmania and Queensland, the latter having an IREF of 0.78, the lowest of all the States (Gerritsen 1986, 15). South Australia, which exhibits greater revenue effort than the rest of the latter group, is partly
differentiated from the low tax bloc, and to that extent conforms to the regionalist models.

The camps defined by expenditure 'effort' are in different sets. The low expenditure effort (small government?) camp comprises solely Queensland. The high expenditure set includes all the other States. For our present purpose there are two interesting features of this dual set formation.

Firstly, that NSW/Victoria are the most marginal members of the high expenditure set (Gerritsen 1986, Appendix, Table 2). Regionalist theory, as well as commonplace political observation and partisan political rhetoric, would predict that they would be big spending States rather than displaying somewhat more fiscal restraint than common for Australian States.

Secondly, that Western Australia and Queensland display significantly divergent expenditure behaviour. Again regionalist theory, as well as the fact that they had governments of the same political-cum-rhetorical ilk in 1980, would have led to the expectation that they would have similar expenditure orders.

Applying a 'sign' test for paired data (Gerritsen 1986, Appendix) supports the impression created by figure 1:

![Figure 1: Comparative Implied Service Level Factors 1979/80](image)

The upper solid line represents the six-State average of the implied service level factors for each of the budget expenditure items, the lower broken line that for Queensland for each expenditure heading. Queensland is clearly below the average for Australian States' expenditure effort.
However, equally clearly, Western Australia is not significantly below the average expenditure effort (cf figure 2). This result belies the regionalist's hypothesis that the mineral export industry has created common political patterns. The different expenditure behaviour of Queensland and WA are inexplicable with the regionalist thesis.

![Graph showing Inter-State and W.A. Implied Service Level Factors](image)

**Figure 2:** The Western Australian Comparison 1979/80

(As for figure 1, the unbroken line represents the six-State average of the implied service level factors and the broken line the factors for Western Australian expenditures.)

When compared against South Australia as a 'control' the differences between Western Australia and Queensland, and the similarity between WA and South Australia, are again obvious (cf figure 3). This figure represents graphically what the nonparametric 'sign' test for paired data (Gerritsen 1986, Appendix, Table 2) discovered: that Queensland is the only State that is significantly variant in its expenditure patterns. Gramlich's calculations, even with a different methodology, achieved the same result. Gramlich posited that Queensland was the 'normal' outlier to the extent that excluding that State from the calculations usually lowered the coefficient of variation by about fifteen per cent (Gramlich 1984, 241).

Indeed the most substantial qualification that needs to be made of the statistical utility of the data is not of the validity of the methodology but whether the single budget year, 1979/80, is a data base that is free of the potential distortions of the electoral cycle. That cannot be definitively answered here and awaits the results of my further analysis of other budget years. Also, though here
neglected, the base level of expenditure is a variable that is important. For example, a period of neglect of a particular service may be followed by large expenditures, thereby producing a statistical anomaly if only one of these years is selected in the data.

![State Ranking](image)

**Figure 3: Comparative State Rankings by Implied Service Level for Key Expenditure Items 1979/80**

For this table the States represented are Western Australia (black), Queensland (dark hatching), and South Australia (lighter hatching).

However, whatever the statistical method, the conclusions appear inescapable: that Queensland alone of the States has unique fiscal patterns, and that the Federal tax-sharing system allows States considerable choices on both the revenue and expenditure sides of their budgets.

Such results complement more commonplace observations about Queensland being 'different' (Charlton 1983). These analyses usually focus on that State's agrarian populism (Lewis 1978; Smith 1985) and are of inadequate explanatory utility (Head 1986).

Consequently we are left with three typologies of States as derived from their fiscal traits:

Firstly, the low expenditure - low revenue effort model, as exemplified by Queensland (this is illustrated by the State's abolition of death duties; its lack of a financial institutions duty; and its low excises on beer,
cigarettes and petrol). There is some evidence that this is not a particularly innovative governmental system (Nelson 1985). Secondly, the higher expenditure - low revenue effort model, in this case a sample comprising Western Australia and Tasmania; and finally, the high expenditure - high revenue effort model, here represented by New South Wales, Victoria and South Australia. The inclusion of South Australia in the high expenditure - high revenue effort category is consistent with the analysis of Mathews, the foremost authority in the field of Federal fiscal relations (cf Mathews 1983, Table 3.3, p 56).

The system of fiscal federalism does not, of itself, preclude diversity in the fiscal behaviour of the States. Deliberate political choices can explain many if not most of the differences shown in State budgetary patterns. The States have a considerable degree of policy autonomy. Such findings are reinforced by similar American research that also shows that control does not follow the Federal dollar (Wirt 1980). This conclusion has obvious implications for Territory statehood. If we accept that the Territory has in 1986 virtually achieved 'statehood' in fiscal terms, then the policy choices it is making are a clear indicator of the type of State it will be once formal statehood is achieved.

Direct budgetary comparison of the Territory with the other States is difficult and likely to be misleading. Nevertheless the conclusions that can be inferred about the Territory suggest that when it achieves full statehood it will develop fiscal patterns that will place it in the low revenue-low expenditure effort typology with Queensland (cf Gerritsen 1984b, 1985; 264ff). Evidence for that proposition is seen in that the Territory Government has persisted with balanced budgeting since the real reduction in its transfer payments for 1984/85. The rural conservatism of the National Party in Queensland and (potentially) the Country-Liberal Party in the Territory provide a distinct policy model in Australian State politics. A feature of this minimalist State model has been its non-innovatory (conservative?) nature.

The Territory Fisc After Statehood (Who Will Pay?)

This is the central question the Conference wanted answered. An obvious answer given the analysis above is that the Territory Government will have to raise continuously about 25 per cent of its expenditures in the future. So a greater fiscal discipline over expenditures than in the past will have to be exerted.

This seems to have been already recognised. In 1986/87 the Territory Public Service is to have its staffing and
functions reorganised, including the reduction of vehicle fleets and first class travel, etc. Its 1986/87 budget indicates that the Territory will begin to move away from excessive subsidisation and closer to cost-recovery for its services, particularly utilities. A promising start seems to have been made in curbing the impractical grandiosity of past Territory Governments' development schemes (cf McHenry 1985, see also 'Tuxworth's headlong pursuit of his vision' Bulletin, 3 December 1985). The Government is withdrawing from its ludicrous acquisition of the casinos ('NT Govt calls it quits after a flutter on casinos' Australian Financial Review, 11 September 1986).

A corollary must be a redefinition of the role of the public sector. In the past the Territory has seen as an indispensable part of the public sector's role the operation of a system of financial guarantees to 'enable entrepreneurs to finance projects with good potential but not seen by financial intermediaries as meeting their credit guidelines' (Caldwell 1985, 38). This has allowed Sheraton-franchise hotels and the Yulara project to act as drains on the Territory Treasury. That policy appears to have been stopped ('NT Govt refuses financial aid to bale out big, posh Beaufort' Australian Financial Review, 15 September 1986). This portends a more realistic notion of the public sector's place in the Territory economy. Hopefully with improved economic and statistical information past mistakes will not be repeated.

But increased governmental fiscal rectitude brings problems potentially more serious than voter dissatisfaction.

For example, one constraint on increased taxation is 'tax base flight' (Musgrave 1983). As the public choice theorists remind us, the mobility of the population restricts the tax capacity of sub-national governments by introducing the possibility that the citizenry may react by exercising the 'exit option' and leaving the State (Brennan & Buchanan 1980). Redistributive policies may thus prove self-defeating (Grewal 1986). The crucial element in any calculation as to whether this restraint applies is the concept of 'locational surplus' (Grewal & Mathews forthcoming). This theory has central significance for planning the Territory's future.

According to the notion of 'locational surplus', each location has particular attributes that provide unique satisfactions for its population, depending upon their respective (heterogeneous) preferences (Grewal 1986, 3). Thus, for example, Aboriginal communities provide a 'locational surplus' to their inhabitants: the social benefits of the gregariousness of these villages outweighing
their limited economic opportunities. The vital question for the future taxation policies of the Territory is what is the degree of the 'locational surplus' of the people of Darwin and the other urban centres of the Territory.

Traditionally the Territory has had very high population mobility rates (Jaensch & Loveday 1983, Chapter 4). Perhaps because of this, its employers have implemented policies that have presumed a very low level of 'locational surplus' accruing to the inhabitants of the Territory. Recruitment conditions for both public and private sector employees have typically included generous leave entitlements providing transport to southern cities. Even worse, contracts usually include provisions for the paid movement of the personal effects of the employee back to their city of origin. It is a valid question as to whether such 'incentives' have outlived their usefulness. It is probable that they create a self-fulfilling devaluation of the 'locational surplus' of living in Darwin. Certainly the city has its attractions as a place of domicile. Whether these would counterbalance increased tax rigour is the moot point, but this could only be discovered by the appropriate surveys of practices. It may be that the monies spent on employment 'incentives' would be more fruitfully applied to improving tertiary education services if this secured greater retention rates for employees (with the consequent improvements in labour productivity). Of course such a policy would continue the present imbroglio with the Federal Government over the university. But the Territory (and the Commonwealth?) will just have to accept that their different perspectives and responsibilities will occasionally result in such clashing priorities.

The problem here is greater than the 'shopkeeper', balance-the-budget mentality of the Territory's economic policy-makers, as expressed in their reluctance to raise 'normal' (in Australian terms) levels of taxes. In eschewing a reasonable tax effort, the Territory Government is accepting a devalued level of 'legitimacy' for their State, a devaluation that belies the aggressive parochial pride of Territory political rhetoric.

A minimal tax effort may reduce the Territory's effectiveness in other than fiscal matters. For example, the Territory's stamp tax rate is about one-tenth the national average. This is not a wise subsidy of business because it antagonises those other States whose businesses use the Territory to lessen their stamp tax obligations ('NSW acts to close the Darwin shuffle' Australian Financial Review 14 October 1986). The support of the other States of the federation is needed for the Territory to achieve statehood.
Conclusion: the Future of the New State

That is not to say that new directions will yield instant results. As successive observers have noted, economic development is the central difficulty for Territory Governments (Warhurst 1981; Heatley 1982a). And the prospects are not promising in the medium term. For example, the Territory's mineral wealth has yielded abundant political disputation but little economic benefit in comparison with its potential (Heatley 1982b; O'Faircheallaigh 1985). Federal policies on uranium mining in particular disadvantage the Territory. The large Aboriginal population both imposes high service costs with little possible future revenue benefit, and provides a continuing source of intergovernmental tension. The combination of the tyranny of distance and the small scale of the local market will continue to exact social, infrastructure servicing and economic costs.

A hard and unjaundiced look will have to be taken at the new State's place in Australia's fiscal federalism. That system is not as fixed as is often supposed, and a creative approach could exact maximum relative advantage for the Territory.

For example, the $4.3 million the Commonwealth is to pay the Territory in 1986/87 in lieu of 'State' uranium royalties is a derisory sum. Rather than fruitless disputation with Canberra about the ownership of uranium in the Territory, a more profitable approach would be to secure Grants Commission recognition that the 'royalties' are inadequate in comparison with those that would be levied under the Mining Act (NT). Accordingly that potentially greater 'revenue effort' should be included in the Commission's calculations as to the Territory's entitlements. A similar argument could be advanced in relation to the revenue consequences for the Territory of the Commonwealth's control of Aboriginal land.

There are other possibilities. Thus, in the structure of Federal funding the relative mix over time between general and specific purpose grants has profoundly affected State fiscal policies. Economic theory posits that specific purpose grants encourage greater taxing effort from the States, while general revenue grants stimulate State expenditures without inducing commensurate increases in tax product (the 'fly paper effect', Gramlich 1977). That seems to apply in the United States (Gramlich 1969). But in Australia the evidence suggests that the States have tended to use general purpose grants to hold down deficits or to decrease their tax effort rather than to augment their spending (Blackburn 1980, 34). Emulating such an approach
is not necessarily the best course of action for the Territory.

This suggests that a more calculating and less paranoid attitude to Federal funding will pay dividends. At least the Territory can maximise its policy autonomy.

Opportunities have been lost in the past. If the Territory had hoist the Commonwealth on its own petard over the 60-40 funding deal for the Alice Springs to Darwin railway in 1983, it would have gained a railway funded through special access to Loan Council loan allocations. The Territory's approach to achieving its own university reveals a similar fiscal unimaginativeness. Instead of funding an independent university college from recurrent revenue it should have evolved the institution from the Darwin Institute of Technology. Then it could have 'captured' the five million dollars the Commonwealth provides annually for degree-level courses at the Institute.

The possibilities for creative manipulation of Federal financial relations are greater than an obsession with Commonwealth 'controls' allows.

Recent research hypotheses that small States can manipulate tax-sharing mechanisms to increase policy-making autonomy. By reducing their participation in specific purpose grant programs, and achieving commensurately greater general revenue grants, they can, de facto, obtain a share of the other States' specific purpose grants, plus greater freedom in spending the overall level of Commonwealth assistance (Chessell 1986, 26). Also, by maximising their capital works expenditure, small States can circumvent the Grants Commission inquiries' concentration on recurrent expenditure. And by funding the large expenditure needs of State business undertakings in the budget, small States can use the fiscal equalisation procedures of the Grants Commission to extract a cross-subsidy from the Commonwealth and the large States (Chessell 1986, 29). Access to Loan Council funding for local government also allows great opportunities for creative fiscal manoeuvring on the part of the Territory Government.

The Territory Government has been more successful in extracting political than it has fiscal advantage out of its recent relationship with the Commonwealth. So even though it has virtually achieved 'fiscal statehood', this has exacted some costs through reduced Commonwealth funding. These costs have been imposed almost entirely upon the present generation of Territory taxpayers by the Territory Government's fixation with balancing the budget, and (in effect) requiring the current taxpayers to fund the future services created by contemporary capital works expenditures.
Rather than overspending on capital works, the greatest immediate danger for the future State of the Northern Territory is in a form of fiscal paralysis. This could be an understandable reaction to past experience with casinos, hotel project guarantees, etc., or anxiety about the future levels of Commonwealth funding. Alternatively it could occur in a too-ready adherence to the currently universally fashionable 'deficit fetishism'. That the Territory Treasurer planned a balanced budget for 1986/87 should be a source of anxiety not pride. Such an economic stratagem limits the potential productive employment impact of the Government (and has negative implications for intergenerational equity). For the Territory/State a strategy of counter-cyclical fiscal stimulus is responsible and desirable. The Territory has none of the monetary constraints (on exchange or interest rates) of the Commonwealth in the area of its deficit. Economic leadership from the public sector is a role that recognises both the history and the exigencies of economic development in the Territory. This leadership cannot be abandoned now that the Territory faces the greater responsibilities of 'fiscal statehood', but is an appropriate and necessary aspect of achieving formal statehood.
Chapter 6

THE SLOW ROAD TO STATEHOOD

Dean Jaensch

Introduction

As the title suggests, this paper ranges widely, over what has happened, the party politics of the issue, and the possibilities and probabilities. The focus is essentially on the politics of the issue of statehood. Questions of law, the Constitution, and economics are also central to the question (and are, themselves, 'political'), but other papers will focus specifically on such themes.

The style and foci of the paper may be discerned from some well-known aphorisms, each of which can be identified in one or more of the themes discussed below.

Politics is 'A strife of interests masquerading as a contest of principles' (Ambrose Bierce).

'Persistence in one opinion has never been considered a merit in political leaders' (Cicero).

'Politics is not the art of the possible. It consists in choosing between the disastrous and the unpalatable' (Galbraith).

'The tragedy of all political action is that some problems have no solution; none of the alternatives is intellectually consistent or morally uncompromising; and whatever decision is taken will harm somebody' (James Joll).

'A politician thinks of the next election; a statesman, of the next generation' (James Clarke).

'Politics is who gets what, when, and how' (Lasswell).

Activists and Arenas

A number of individuals and groups are activated by the proposal for statehood, with a variety of reasons for their interest. Some may be single-minded for statehood in the hope of deriving a benefit from the removal of 'outside' constraints on their activities in the Territory. Other groups are equally strongly opposed, because the
'constraints' protect their interests. Some may be concerned about the uncertainty of the current debates — they simply cannot establish what statehood will mean, in detail, for them and their specific interests. As a result, they tend to feel threatened by the proposal.

Further, these groups are competing in a variety of arenas. If the question is put to a referendum, for example, the arena is electoral. The groups will be involved in seeking and shaping the opinions of the people in general. For some groups, it is easier to influence (or try to influence) public opinion than to try to influence party politicians, or constitutional legal advisers, and so on. Other groups may see an advantage in not allowing the decision to be resolved by referendum, in that they might suppose themselves better able to control the outcome in the legal, bureaucratic, and party arenas than in the electoral arena.

Of course, a referendum may be a 'fall-back', or a 'legitimising' component. Obtaining a majority of public support would be a vital asset, especially in relation to any disagreement with the Commonwealth Government. The 'fall-back' aspect could arise if a party were divided on the issue, and decided to allow the electorate to resolve the indecision.

To make matters more complicated, the elected Governments of the Territory, the States, and in Canberra, are obvious targets of pressure from both sides. But they are also 'players in the game', with interests to seek, or to defend, and with some power to determine where the decisions will be made, who will be admitted as participants, and with what terms of reference. The media, all at the one time, are targets of pressure; the means of applying pressure to the electorate, and they also have views on the issue. The bureaucracy, Federal and Territory, have interests in the question. And the political parties are forced to balance a number of competing factors: ideology, internal factional strains (a possible product of competing positions on the implications of statehood), and the always-important 'guess-timates' of how electoral fortunes will be affected by the positions taken.

Finally, some of the interests and groups have more potential for influence, effectiveness, and power, than others. Some have access to government, bureaucracies, parties and the media; others do not have an easy road to influence and favourable publicity. Some have wealth, numbers, status, or other means of leverage in an arena; others lack one or more or all characteristics which grant the potential for success.
Any discussion of what has happened, what could happen, and why, needs therefore to be surrounded by caveats, because the issue of statehood encompasses all of the components noted above. It is not, as some have attempted to portray it, a simple question, with compelling, unarguable reasons, leading inexorably to a straight forward answer. Of course, those who do claim that the issue is a simple one, are themselves playing the political pressure game.

Background

The slow and halting history of constitutional and political development of the Territory up to the grant of (limited) Self-Government in 1978 need not be repeated in detail (see Heatley 1979, Jaensch 1979, Heatley 1981, Donovan 1981, Powell 1982). However, some events and themes are relevant to the thesis of this paper.

The transfer of the Territory to the Commonwealth in 1911 removed all representation for Territorians, ended local participation in policy-making, and the style of administration was summed up by the portfolio of the administering authority - the Minister for External Affairs. The grant in 1922 of one representative (with no voting rights - almost a non-member) in the House of Representatives, was the first, small, recognition. Speaking rights (and voting rights limited to motions to disallow Territory Ordinances) were granted in 1936. Not until 1968 did the sole representative receive full membership of the House of Representatives.

From 1947 to 1974, a representative body existed for Territory affairs, although the inaugural Legislative Council contained a minority of elective members. At the end of the life of the Council, eleven of the seventeen members were elected. But this was essentially representation without power. The Administrator, and the national Government, retained a veto power over any Ordinance, and the Council had no authority over revenue matters.

Throughout this period, complaints were made about the slow advance towards Self-Government. The recurrent theme of the responses from Canberra was that responsible government could not be granted until the Territory was self-sufficient. This was also the dominant theme of the negotiations which led to the formation of the first fully-elective parliament in 1974. The guidelines for negotiations between the Council and the McMahon, Liberal-Country Party, Government included:

any transfer of functions of local concern for which final authority was to be vested in the
Territory would involve accepting a related financial responsibility (cited in Jaensch and Loveday 1979, 28).

The 1972 election of a Labor Government in Canberra raised the hopes of Territorians for some impetus in the process of constitutional reform. As Heatley and Powell (1978, 114) pointed out:

The most innovative moves towards Territory self-government had stemmed from, or been attempted by, previous Labor ministries and, from the late 1950s, Labor in Opposition had shown increasingly strong support for the constitutional ambition of Territory politicians.

In 1971, the National Conference of the ALP had incorporated into the Labor platform a fully elective Legislative Assembly, negotiations on powers to be transferred, and local government 'wherever practicable'.

But the actions of the Whitlam Government were slow, indecisive, and cosmetic rather than substantive. They reflected previous Liberal practice rather than Labor rhetoric. One major problem was a disjunction within Labor platform and policy. It was apparently in favour of rapid constitutional development, and it had been very vocal in criticism of the inaction of the Liberal-Country party Government. But it was also opposed to the creation of new States, and devolution to a quasi-State of the Northern Territory was in conflict with the thrust of the Whitlam new federalism policy. In the end, the Government fell back to the tried and tested method of resolving such problems - it established a parliamentary committee.

This cross-House, cross-party committee tabled an unfinished report at the 1974 dissolution of the Parliament, and was re-formed to continue its studies into the new Parliament. It was ironic, but in the history of the Territory not unusual, that the final Report of this Committee, two of the terms of reference of which included the principles and practices of, and means of representation in, the proposed Legislative Assembly, was completed and tabled a month after the first elections for the Assembly were completed!

Territory reactions to the report gave the impression of qualified satisfaction. The report did not satisfy those who sought a rapid transfer to statehood, nor those who sought 'State-like' functions for the Assembly and the Executive as a substantive indication that progress would occur. The main thrust of the report was one of compromise; between those who were demanding statehood and those who
sought continued 'Territory' status, and between federalist and centralist structure and authority in the period of transition to further autonomy.

Despite assurances of rapid consideration and implementation from the Whitlam Government, no action was taken. The Government was unable or unwilling to act for several reasons. Commonwealth public service Departments, which would be involved in loss of authority and power, resisted changes; initiatives for reform were stultified by partisan differences, and conflicts between a Labor Commonwealth Government and a Territory Legislative Assembly dominated by the Country-Liberal Party; by resistance in some sections of the Federal Labor Party to devolution of powers; and the overshadowing constitutional crisis emerging in Canberra.

The Legislative Assembly was losing patience. As majority leader Goff Letts told his members,

having acquired a fully-elected Assembly and having produced a blueprint as to where the next moves might be, everything stopped. We went into the doldrums for a period of fifteen months (NT Parliamentary Record, 1976, 215).

Following the 1975 election, the Fraser, Liberal-Country Party, Government stated its intention to carry through the transfer of powers which had been under negotiation for a decade. Pressure from the Territory was intense, and feelings were strong, as shown by the comments of Letts in late 1976:

broken promises... shameful neglect... a story of stop and go, hope and failure, of many personal and collective tragedies, and always in the background the factor of remote administration, remote control, big brother knows best (Sydney Morning Herald, 23 Otober 1976).

Finally, on 1 January 1977, the initial transfer of powers to the Territory was agreed, and the passage of the Northern Territory (Self-Government) Act 1978 granted most 'State-like' functions.

The Contemporary Issues

There are a number of themes in the contemporary debates on 'statehood' for the Northern Territory: attitudes and aspirations, the 'politics' of the Constitution, representation, party politics, and specific issues are only some of the components. Some of these have their roots in what has gone before; others raise new questions.
It is immediately obvious that none of these is exclusive of the others. Party ideologies, policies, interests, and electoral hopes, for example, clearly have an impact on all other components. It is also obvious that the variety of interests noted earlier, and the varieties of their modes of activity and potentials for influence, are involved in the analysis of each theme.

(i) **Attitudes and Aspirations**

Do Territorians want statehood? Is the contemporary 'push' from the CLP, and elsewhere, a product of clear public demand? Or is the issue merely part of the continuing electoral, inter-party and Territory-Canberra warfare?

Statehood was elevated to prime status by the surprising (to all!) statement by Prime Minister Fraser in the 1975 election campaign promising 1980 as the goal. This unequivocal promise was given further substance when the Fraser Government, in July 1977, guaranteed statehood by July 1979 (Stephens 1979, 178). The Territory Labor party seized these promises as a hope for election victory, and ran its 1977 Territory campaign, almost single-issue under the slogan 'First Things First - Statehood Later'. The CLP was on the defensive over the question of Labor's allegations of financial burdens, and especially as its own submissions to the 1974 Committee had dismissed statehood as a matter of even medium-term concern.

The contemporary debate emerged as a natural development of the anti-Canberra style of the Everingham administration, through the accession of Tuxworth to Chief Minister, and the suggestions that the Memorandum of Understanding would be modified in terms not as favourable to the Territory. Further, once Tuxworth had placed statehood back on the agenda (and internal CLP differences over details kept it in the headlines), other sectors joined the 'bandwagon', including major Territory pressure groups, and some Labor members, including John Reeves, the Territory member of the House of Representatives 1983-1984. The culmination of these pressures was the statement by the new Chief Minister, Mr Hatton, on 28 August 1986: **Towards Statehood**.

But what of the public attitudes? Senator Kilgariff is undoubtedly correct when he states that for most Territorians statehood is a non-issue, at present (Kilgariff 1985, 2). Certainly surveys conducted in 1982 (Jaensch and Loveday 1983) and 1983 (Loveday and Jaensch 1984) suggest that statehood was not of great concern to the urban citizen. In response to the question 'What are the most important problems that the Territory Government should do something
about', only 13 (out of 3,810) responses mentioned statehood in 1982, and only 45 (out of 2,152) in 1983.

In 1985, the Tuxworth Government commissioned a survey by the Roy Morgan Research Centre. The 780 respondents were asked to state which of 19 issues was 'most important to you'. Only four per cent said 'becoming a State' was the most important issue (Roy Morgan 1985, 11, 12). The report noted that

Within the context of important issues for the Northern Territory, the issue of statehood has a relatively low priority. Out of 19 issues, 'becoming a State' rated 14th, being mentioned by only 20% (Roy Morgan 1985, 11).

There is little indication in these data of strong public support for, let alone an active commitment to statehood, in the Territory electorate.

On the other hand, there is a well-developed 'anti-Canberra' sentiment, well-fostered by the CLP, notably in the 1983 Territory election. This sentiment is already of an intensity to offer the potential for what Senator Kilgariff saw as a possible prerequisite:

Territorians might need to develop, perhaps, a sense of grievance - a perception of themselves as being disadvantaged, before the prospect of statehood holds appeal, as an alternative to Self-Government (Kilgariff 1985, 2).

The future of the Memorandum of Understanding is a key component in any such development, as are the tactics of the CLP under its new leadership.

Certainly the development of the issue will be related to some degree to the views of Territorians, and both the major parties and other interested groups will be concerned to monitor those views. They will also be concerned to change the views of Territorians. How both processes are accomplished could be an important component of the continuing debates.

(ii) The 'Politics' of the Constitution

The Constitution provides for the establishment of new States. But, as in so many questions, this statement has become surrounded by constitutional, legal and political arguments. Much of this has been canvassed by Senator Kilgariff in his paper, and by Nicholson (1985).
There are no precedents for the means of creation of a new State. Hence we need to separate constitutional statements and 'non-statements', political positions, and possibilities. Constitutionally, the creation of a new State is in the power of the Parliament. In political realities, the Parliament would certainly take account of the attitudes of the Territory and the existing States.

How would it establish these attitudes? A choice of arenas is available, the choice depending on the potential for success in each. One arena is simple Government-to-Government communication, with the impetus being the recent formal request from the Territory Government for statehood. But this would inevitably involve the Parliament, which would almost certainly widen the arena, and seek, possibly by a referendum, some evidence that statehood was favoured by a majority of residents of the Territory.

There is argument as to whether a Constitution for the Territory needs to be in place before creation of the new State. In political terms, it would be necessary for such a document to be part of the process. At this point, I would quibble with one section of Senator Kilgariff's paper. He states that (p 6)

the formulation of a Constitution through a Territorial Convention, and the submission of the Constitution to the voters of the Territory, would follow the pattern which was established by the colonies last century, in the formulation and adoption of their respective Constitutions.

This was the method for the Australian Constitution in the 1890s, but it was not the model used by the colonies in the 1850s. This is not to reject it as the most sensible method for the Territory. In fact, it is probably a political necessity.

It will also be of political advantage to obtain the support of the existing States. There are many grounds on which Governments (and alternative Governments) of the States may decide to oppose statehood. Some non-Labor State Governments may vehemently oppose statehood as it could weaken the rigidity of the Constitution. The present Queensland Government, for example, could well be firmly opposed to a new numbers-game where a Constitutional amendment could be carried by a 4-3, rather than only by a 4-2, majority of the States. This is a prime example of a protection of an interest. Where the Queensland Premier currently has to convince only two other States that reform of the Constitution should be opposed, he would need the support of three other States. Territory statehood, then, could well be perceived as increasing the potential for
constitutional reform, and while that interest is far from the immediate argument about statehood, it is one which will be strongly protected.

The grant of statehood to the Territory would also have implications for some established conventions of Commonwealth-State relations, especially for the 'numbers game' at Premiers' Conferences and Loan Council meetings. Under the present voting agreement the Commonwealth has two votes and each State has one, making eight votes all told. In the event of a tied vote, the Commonwealth can exercise a casting-vote as well. That means that a combination of the Commonwealth and two States constitutes a majority. If the Territory was admitted as a State, then the total votes would be nine rather than eight, a tied vote would be impossible, and the casting-vote redundant. Admission of the Territory may then imply a re-examination of the 'numbers game', an implication that both the Commonwealth and the existing States may need to contemplate with some caution.

(iii) Representation

Much of the recent discussion has revolved around economic and financial issues. But, increasingly, the question of representation has dominated both intra-party, and general, debates.

The question appears to be relatively simple: How many members and senators should the new State have? The Constitution (s.121) leaves it to the Parliament to decide 'the extent of representation in either House of the Parliament, as it thinks fit'. But there are some potential constraints. Section 7, inter alia, requires for the Senate 'that equal representation of the several Original States shall be maintained' (emphasis added). Further, s.24, inter alia, sets the minimum representation in the House of Representatives for any original State at five, and establishes the nexus.

If the Territory was granted representation as an 'Original State', this would demand five members in the House of Representatives and twelve senators. But this would grant Territorians a 'numerical representation' well beyond those of other States, including Tasmania. On the basis of 1981 Census data, (Territory population 122,800) the ratios would be as follows.

<table>
<thead>
<tr>
<th>Population per</th>
<th>MHR</th>
<th>senator</th>
</tr>
</thead>
<tbody>
<tr>
<td>New South Wales</td>
<td>121,791</td>
<td>436,417</td>
</tr>
<tr>
<td>Tasmania</td>
<td>85,460</td>
<td>35,608</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>24,560</td>
<td>10,233</td>
</tr>
</tbody>
</table>
In December 1985, the population of the Territory had grown to 146,600, a rate of increase which would support a second member in the near future. This is what the Territory Government demands for the House of Representatives. Assuming a continuation of the rate of growth of the Territory's population, then by 1988 two MHRs for the Territory would be based on a population ratio of almost 83,000, equivalent to Tasmania.

But the Chief Minister's statement demands equality of representation in the Senate, if not immediately, then on the basis of a legally-binding formula which includes a reasonable initial representation and a short time-frame to achieve total numbers (1986, 18).

But what is 'reasonable initial representation', and how short should be the 'time-frame'?

Political party aspirations also need to be brought into the equation. Where one seat in the House of Representatives, and two senators (which could be expected to be one each from Labor and Liberal) do not provide any basis for party confrontation in the context of the whole Parliament, full representation of five and twelve seats respectively becomes a real attraction for both major parties, and more so for the National Party. To analyse this, we need to utilise past election patterns, and hence enter the realm of electoral prediction. The paragraphs following, then, need to be interpreted with the usual caveats.

As noted earlier, the party system in the Territory is very 'young', and shows less stability than elsewhere in Australia. This is especially the case for the Aboriginal population, and among new arrivals (on the latter, see Jaensch and Loveday 1983). However, there has been a clear trend to a two-party, CLP-Labor, system. On the other hand, the Territory has a history of minor party and independent involvement, and some successes, in elections. The relatively small population, the isolation of some communities, and local issues, have the potential to provide personal and issue politics with a greater importance than elsewhere. Further, the CLP, like the LCL in South Australia in the 1950s and 1960s, contains potential for fission. The CLP was formed in 1974 by an amalgamation of the existing Liberal and Country Parties. Since then, and especially in the past year, there have been increasing suggestions of a tension within the CLP, of growing disagreements between a 'Liberal' faction based on Darwin and a 'Country' faction in the other towns and pastoral areas. In 1986, there have been reports (see, for example, Northern Territory News, 4 October 1986) of imminent intervention by the National
Party, especially the Queensland National Party, in direct conflict with the CLP.

Assuming the continuing existence of the CLP as the sole non-Labor Party, and using past trends of party support, then the representation of the Territory would be within the following ranges.

<table>
<thead>
<tr>
<th></th>
<th>With Full representation</th>
<th>With 2 MHRs and 4 senators</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(5 MHRs, 12 senators)</td>
<td></td>
</tr>
<tr>
<td>Best ALP Result</td>
<td>2</td>
<td>6</td>
</tr>
<tr>
<td></td>
<td>3</td>
<td>6</td>
</tr>
<tr>
<td>Best CLP Result</td>
<td>ALP</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>CLP</td>
<td>5</td>
</tr>
</tbody>
</table>

The attraction for the CLP of full Senate representation is obvious. Where limited representation would almost certainly mean a tied result (to win both Senate seats at a normal election the CLP would need over 66 per cent of the vote), twelve senators offer real potential.

As Sharman (1985) points out, the recent increase in Senate numbers may make harder the task of minor parties to win representation. This is not necessarily the case in the Territory. Given that full representation by twelve senators would be based on an (estimated 1988 population) electoral quota of only 24,000 voters and given the idiosyncratic nature of the Territory electorate, there is some real potential for minor parties and independents. There is even more attraction for the National Party. On the national scene, the National Party's representation has been at a relatively stable 'plateau' for decades. Full 'Original State' representation, for the Territory offers the National Party the opportunity significantly to increase its representation, if CLP senators decide to sit with the Nationals, or if a separate Territory National Party is formed. In this may be part of the explanation for the strong support for statehood, with 'full' representation, from some sections of the CLP. The table above is also part explanation for the more than cautious reactions from some sections of the Labor Party.

But there has been no consistent party line. The argument between Mr Tuxworth and Mr Everingham about the number for the Senate was widely reported with Everingham insisting that there must be 12 senators at the beginning of statehood. However, the Federal Liberal Leader, Mr Howard, 'did not believe equal Senate representation should be a non-negotiable pre-condition for statehood' (Northern
Territory News 17 August 1985). His proposal, supported by others, is for a 'natural progression' to equality, a proposal that representation would increase to 'full representation', with growth of population.

To return to the questions of a reasonable initial representation in the Senate, and the time-frame for equality, let us assume that a minimum ratio would be that of Tasmania. If existing population trends continue, and if statehood was granted in 1988, then Territory representation could be two MHRs and four senators.

The national Labor Party has given no indication of a commitment to 'full representation'. It would be surprising if it did so, given the apparent hegemony of anti-Labor parties in the Territory electorate. But there is a further problem for Labor. The party has never been a supporter of the Senate, as a 'house of review', and this was given further impetus by the events of 1975, and by the balance of power in the hands of the DLP in the 1960s and 1970s, and the Australian Democrats in the 1980s. There is little likelihood that a Labor Government in Canberra would support, let alone propose, equal representation in the Senate for the Territory.

Further, State Labor Parties, and State Labor Governments, would probably not support equal representation, especially given the probability of a continuing anti-Labor majority in the new State. But the Territory Labor party has emerged not only as a strong proponent of statehood, but as demanding full Senate representation as well. To John Reeves (1985, 33) there is an 'irresistible argument for equal representation in the Senate... any less... would be... a sellout', and this was echoed by the then leader, Bob Collins, in a press release.

A further possible implication of the issue of representation concerns the nexus, although there have been views expressed that the provisions of s.24 may not necessarily apply on the admission of a new State (see Cole 1986, 1,5). The implications are set out in the following table.

<table>
<thead>
<tr>
<th>Members</th>
<th>HR</th>
<th>Senate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Existing State representation</td>
<td>145</td>
<td>72</td>
</tr>
<tr>
<td>Existing NT, ACT representation</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Existing total representation</td>
<td>148</td>
<td>76</td>
</tr>
<tr>
<td>If NT is represented by 2 MHRs, 12 senators</td>
<td>Total</td>
<td>149</td>
</tr>
<tr>
<td>Additional MHRs required by nexus</td>
<td>23</td>
<td>86</td>
</tr>
</tbody>
</table>
The important point for those who argue that full Senate representation is necessary to provide the Territory with a 'real' voice in Canberra is that none of the extra members of the House of Representatives will be allocated to the Territory. There is also an interesting issue in the requirement for 'proportionate representation' in s.128. If this means that each original State should retain one-sixth of the total members of the Senate, then the granting of two senators to each of the two Territories has already modified the requirement. Granting twelve senators to the Northern Territory would significantly change the ratio.

(iv) Party Politics and Policies

The argument common to the unusually bi-partisan proponents of full Senate representation is that the Territory would have to be guaranteed on equal voice with other States in the States' House. But this assumes that the Senate is a 'States' House'. Certainly there is the potential for senators to put a 'State's view' in party rooms and in committees, but on the floor of the Senate discussions are essentially party-based. The potential for the representatives, in the Territory in both the House of Representatives and the Senate, to be a voice for the Territory may be muted by party cohesion and party discipline.

Party policies, as separated from party politics, have also shown some interesting trends. As Heatley (1986, 233-4) states 'By 1960, the ALP was the leading party protagonist for the development of northern Australia... especially as its party opponents showed little interest in northern affairs'. As well, despite the national Labor Party's caution over the question of the Senate, the thrust for 'self-determination', and eventually for 'self-government' has come more from the Labor Party, in both opposition and government, than from the Liberal and National Parties. Yet an examination of party ideologies, and especially attitudes in regard to federalism, suggests that the reverse should have been the case!

The Australian Labor Party has consistently had a policy of modifying the original, 'three-tier', Federal structure towards a more 'national' concept, a policy which received its clearest interpretation in Whitlam's New Federalism in the early 1970s. While Labor has been supportive of 'self-government', it has never been in favour of proposals for the formation of new States. As Whitlam stated (CPD, H of R, 33, 12 October 1961, p.1991), 'the Australian Labor Party is not averse to new States. It is, however, averse to sovereign States'. The support from Labor for 'self-government' is therefore justified within the party's policy framework. (The 1984 Platform calls for a similar process for the ACT).
What is more difficult to understand is why the Country/National Party is only a recent 'convert' to statehood for the Territory. Given that the party has been a prime actor in past new States movements, that its commitment to federalism is total, and that it would probably benefit in representation from the creation of new States, its caution in regard to Territory statehood is difficult to understand.

The Liberal Party has also traditionally been lukewarm to, if not relatively disinterested in, the issue of new States, and specifically in regard to statehood for the Territory. The Hawke Government does not seem to have a policy on statehood. Beyond the 'promise' that the Territory will be treated as a State for financial purposes from 1988, the issue is simply not on the agenda.

(v) Three 'excluded' issues

The grant of Self-Government under the 1978 Act specifically excluded three areas of policy-making: Aboriginal affairs, uranium mining, and National Parks. In terms of practical politics, these are far from discrete topics.

Before commenting briefly on the current debates, it is worth noting that these issues were excluded, in 1978, by the Fraser - LCP Government. Hence

even with a 'sympathetic' Federal administration the NT government was unable to achieve devolution to local control (Heatley 1986, 238).

Devolution by a national Labor Government, especially to an apparently entrenched CLP administration in the Territory, is very unlikely indeed.

The Platform of the Australian Labor Party is unequivocal on each of these topics, and about the inter-relationship between them. For example, note the following extracts from the Platform.

(National Parks)
Opposing mining or any other activity in National Parks which adversely affects the prime function of the park, i.e. nature conservation.

(Abo rigines and Islanders)
Ensure that Aboriginal and Islander people in each State or Territory have access to land rights held under secure title in accordance with the Woodward principles by seeking complementary State or
Territory legislation, and where this is not introduced use Commonwealth constitutional powers and legislation to achieve these objectives.

(Uranium)
Prevent the development of any mines, other than Nabarlek, Ranger and Roxby Downs.

Such commitments can only be achieved by a national Labor Government retaining control over the three areas. But the Labor Parties in Australia are not of one mind. Certainly the left faction(s) will resist any transfer of authority to the Territory. And the stance by Premier Burke in Western Australia on the issue of uniform land rights has exposed a deep 'Federal' division within the party. But the Territory Labor Party has been equally unequivocal. As John Reeves (1985, 32) put it,

the Territory would be entitled to have the Uluru and Kakadu National parks transferred to it. It would also be entitled to control uranium mining and Aboriginal land rights.

Of course, the 1967 amendment to the Constitution placed final authority over Aboriginal policy in the hands of the national Government. The arenas were therefore broadened, and made more complex. Constitutional questions took on political and party political components. If a national Government has the desire, and the political will, to use that authority, 'then statehood is no 'protection'. Further, if a national Government did devolve authority over land rights to the Territory, then this might be the impetus for demands from the third Federal level for the devolution to be 'passed on'. The new Local Government Act (NT) (which came into force in July 1986) contained significant changes to municipal and community government powers and functions. Community governments were inaugurated in 1979, and the then Minister emphasised that his Government (cited in Turner 1986):

believes that the residents of the Northern Territory Aboriginal communities are as much a part of the Northern Territory as any non-Aboriginal community and their citizens are as Territorian as any resident of Darwin, Alice Springs or other towns.

The Councils were envisaged as a step in the process away from 'welfarism' to self-determination for Aboriginal communities. But statehood may increase pressures from local, especially Aboriginal, communities for further devolution of powers to local government along the lines of other States. Such devolution to the 'third' level of
federalism is a central component of Liberal and National Party policy; whether the CLP would agree is another matter.

In regard to uranium mining the Australian party situation is as Heatley describes: 'bi-polar rivalry between the ALP and non-Labor parties' (1986, 240). But intra-party tensions over the interpretation of the official policy continue to plague the Federal ALP, and there is no doubt that the Territory Labor Party is well aware of the political and electoral importance of the issue.

At the 1986 ALP Conference, the then Leader Bob Collins strongly opposed a left-wing attempt to have the Hawke Government close down all uranium mining. He stressed that his Aboriginal constituents supported both operating mines, Ranger and Nabarlek, and had signed agreements with mining companies to develop the Jabiluka and Koongarra uranium deposits (Press Release, 8 July 1986), and that uranium royalties had played an important role in development of Aboriginal communities. The problem is whether the Territory Labor Party, let alone the Federal Labor Party, would be willing to accept the implications of Territory authority over uranium mining, especially as that authority is likely to be in the hands of the CLP. Dealing with these issues will not be easy for Labor. There is no problem for the CLP in the Territory, nor for the national Liberal and National Parties: full transfer is the only option.

The Territory Labor Party has a further problem, beyond the issue of federalism and States' rights. The three issues impinge on Territory electoral politics. Following the 1983 election, Labor holds six seats in the Legislative Assembly. Four of these (Arafura, Arnhem, MacDonnell and Stuart) contain an Aboriginal majority. To support the CLP's statehood proposals may put this electoral base at risk, and provide impetus for the formation of an Aboriginal party. Further, there is little evidence that such policy would provide any extension of electoral support in the urban areas of the Territory. In fact, the Territory Labor Party is in a 'no win' situation in each policy area. Its final decisions, then, may well be made on a 'least electoral harm' basis.

(vi) Prospects and possibilities

The issue of statehood is firmly on the agenda of political debate, but only at the level of political leaders, political parties and pressure groups in the Territory. As noted above, the electorate in general does not seem to be as concerned. In fact the 1985 survey (Roy Morgan 1985, 17)
found that 38 per cent of the sample considered statehood 'a good thing', 35 per cent said it was 'a bad thing', and 22 per cent felt that it 'wouldn't matter'. More important, there is little indication that it is a question at the forefront of intra-party and inter-party debate in national and State politics. The prospect for further progress, then, may depend on the extent to which the CLP Government in the Territory can force the issue in the national scene, and the extent to which national and State Governments and Oppositions are ready and willing to consider it. There seems little likelihood of the latter in the immediate future.

What, then, are the possibilities? One practical aspect is that the relationship between the Territory and Canberra, especially the CLP and the Federal Government, has not been conducive to amicable discussions. The key point has been well-stated by Senator Kilgariff (1985, 8):

The quality of the statehood the Territory is offered will depend upon the view which prevails and the attitude of the Commonwealth Government of the day, in the matter of statehood for the Northern Territory.

The problem for the pro-statehood case is that previous CLP Governments have deliberately used 'Canberra-bashing' as a prime political tactic, especially as an electoral appeal. The necessity for a change in approach has been recognised in some sections of the CLP (see Northern Territory News, 2 December 1985). But the potential electoral value in Territory politics of an anti-Canberra style may be difficult to resist.

Further, aspirations for statehood may well depend on the attitudes of the existing States. The question of representation may well be the most important in this area, but financial implications will also be raised by the States. Hence proponents of statehood will need to heed the advice from Mr Ian Sinclair (Northern Territory News 10 August 1985) to 'concentrate ...in negotiations with the other States'.

The debates on the question of statehood will need to encompass a number of issues - representation, financial questions, and the 'excluded' powers are the most controversial. They will also have to be conducted in a number of arenas: intra-party (especially intra-Labor); Territory and the Federal Government; Territory and the State Governments; and within the Territory itself. The last is not unimportant and has been recognised by Senator Kilgariff (1985, 15):

it may be that the Territory would be best advised to bide its time, developing its relationship with
the Commonwealth, and promoting the concept of statehood within the Territory, so that when the time eventually comes to work out the terms and conditions which will be imposed upon the new State, the Territory will be dealing with a more receptive Territory population and a sympathetic and supportive Commonwealth Government (emphasis added).

The question is, however, whether a Liberal-National Commonwealth Government would be any more 'sympathetic and supportive'. The answer may well depend on the quality of the case put forward by the Territory, but it is more likely to be decided by more 'political' questions, not the least of which is the party component of the representation issue. And on this, the Liberal Party may be indeed cautious.

A further arena comprises the Aboriginal population of the Territory. Statehood may have important implications for Aborigines, especially over such issues as land rights, devolution of authority to local Aboriginal communities, and mining. Further, as the Aboriginal people comprise over 25 per cent of the population of the Territory they have every right to full consultation and full participation in the processes towards statehood. The Territory Government will need to provide mechanisms which can guarantee such consultations and participation.

Conclusion

Senator Kilgariff (1985, 2) makes a plea which all, in principle, would support:

It is essential that in the negotiations which will need to take place between the Commonwealth and Territory governments the final terms and conditions which will operate under statehood be reached to the mutual satisfaction of the parties (emphasis added).

Given the history of Australian politics, and despite the consensus thrust of the first Hawke Government, mutual satisfaction is not often attained. It is an extremely rare product of inter-party debates, and despite the 'conversion' of some Territory Labor members to statehood, mutual agreement of Labor and Liberal/CLP, national and/or Territory, is very unlikely.

But if we define 'parties' more widely, to encompass the many interests in the Territory which will have a position on statehood, then there is a new question: which 'parties' will be satisfied? Mutual agreement is unlikely to
be reached on the question of Uluru and Kakadu among mining interests, conservationists, Land Councils, traditional owners, the Federal Labor Government, and the CLP, to mention some of the interests with concerns in the impact of statehood on this one issue. Uranium mining, and land rights, include all of these interests, and more. Given recent history, not all interests can, or will, be mutually satisfied. Further, some of the interests are mutually exclusive!

Statehood is obviously on the political agenda in the Territory. But the intensity of commitment varies among the different players in the different arenas. The CLP is determined, and some of the economic interests in the Territory will be willing and able to provide a range of supports. The Territory Government can, at any time, broaden the arena by holding a referendum on the issue. Within the current climate of financial stringency, this could be held with the scheduled general election.

In the Territory party arena, the CLP is apparently divided only on some specific details of statehood. The Labor Party, on the other hand, contains sharply contrasting positions on the issue itself. Electoral considerations can therefore re-emerge. The CLP could elevate statehood to one of its prime planks at the next election, offer a referendum, and hope to obtain benefits from possible public tensions in the Labor Party. But, on the evidence available, a pre-condition for a referendum would have to be a broad public education campaign on the implications of statehood. The problem is that practical politics is rarely played out on an 'educative' basis, and that party propaganda may not be the best way to involve the Territory electorate in the statehood debate. And any referendum would be a political gamble. Without a clear majority, the Territory Government's case would not carry the force necessary to convince other States, and the national Government.

The national arena is crucial. There seems little possibility of Territory statehood becoming part of the national political agenda, displacing the state of the national economy and its components. Certainly the leaders of the national Liberal and National Parties have expressed support for the principle of statehood, at some time in the future. But this is a long way from active support for a rapid process towards a State.

The conclusion, then, returns to the aphorisms at the opening of this paper. The proposal for statehood has already been surrounded by interests masquerading as principles; parties, people and groups have had differing opinions, at different times, for different reasons; the
issue and its implications have been used for electoral rhetoric; whatever decision is made, by whatever means, at some time in the future, some will benefit, some will be harmed. Most important, Lasswell will have the last word: the political decision on statehood is a matter of who gets what, when, and how. The question will be resolved by interests rather than principles, by party politics rather than mutual satisfaction, and ultimately by who carries the biggest stick, the biggest carrot, or both.

The problem for the Territory case for statehood is that it seems to lack either an unarguable 'carrot' with which it will attract active support from other States and the Commonwealth Government and opposition parties, or an irresistible 'stick' in the form of pressure which can be applied to force the acceptance of the case. Seeking both should be a prime aim of the proponents.
Chapter 7

COMMERCe AND COMMUNICATIONS:
DEVELOPMENT AND THE NEW STATE

James Strong

Other papers presented at this Conference by distinguished lawyers examine historical and interpretive aspects of the Constitution and statehood. This paper sets out to examine some practical aspects of possible statehood and their implications from a commercial point of view.

Section 121 and Practical Effects

Apart from the complex question of parliamentary representation, the effect of s.121 of the Constitution emerges as being of central significance to the potential benefits of statehood to the Territory. In other words the critical question is: upon what 'terms and conditions' would it become a State?

Those terms and conditions would determine whether statehood would make any real change to the economic future of the Territory or simply be more of a symbolic and procedural nature, albeit with important legal and parliamentary implications.

The important issue is the future status of Commonwealth legislation applying now to the Territory, based upon s.122 of the Constitution, with and without the support of other heads of power under s.51 of the Constitution.

Major questions which emerge in relation to existing Commonwealth laws governing the Territory include:

1. Will that legislation remain valid if the Territory becomes a State?

2. Can the Commonwealth require the preservation of that legislation as a 'term and condition' pursuant to s.121 at the time of admission or establishment as a State?

3. Could the new State subsequently remove that legislation or challenge its validity on grounds of a discriminatory effect upon that State?
4. What is the relevance of s.109 of the Constitution to such a situation?

Aviation

Before examining those questions I am unable to resist the temptation to refer to aviation issues.

1. Northern Territory Legislation

Section 49 of the Northern Territory (Self-Government) Act 1978 provides that:

Trade commerce and intercourse between the Territory and the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

This section picks up generally the provisions of s.92 of the Constitution, which is expressed to apply only 'among the States' and extends it to 'the Territory and the States'.

Section 35 of the Self-Government Act provides that Regulations may be made under the Act (by the Commonwealth Government) 'specifying the matters in respect of which the Ministers of the Territory are to have executive authority'.

By Statutory Rules No. 105 of 1980, executive authority in the matter of 'Civil Aviation within the Territory' was transferred to the Ministers of the Territory.

These provisions effectively establish the Territory as having the equivalent jurisdiction and status as a State in matters of air transportation, with one important exception, described below.

2. Commonwealth Legislation and Restrictions on the Operations of the ANAC

The Australian National Airlines Commission (ANAC) (trading as Australian Airlines) is created and empowered to operate air services by provisions in the Australian National Airlines Act 1945. This Commonwealth enactment confers rights which are limited to inter-State air services in the absence of sympathetic State legislation. It appears that a similar limitation could arise in the event of the Territory gaining statehood. This would be compounded in the absence of a changed attitude by the Government of Western Australia.
Australian Airlines has no power to operate within a State unless that State takes either of two courses:

i. it refers its power over air transport to the Commonwealth under s.51(xxxvii) of the Constitution, or

ii. it adopts the relevant law of the Commonwealth so that its operation extends to the State.

Western Australia has not taken either of these courses. Queensland and Tasmania have referred their powers. In the absence of specific steps taken when the Territory achieves statehood, Australian Airlines will be prevented from providing services within the Territory.

3. Links Between Western Australia and the Northern Territory

A further complication arises in that services to and from the Territory from Western Australia along the Perth/Port Hedland route will not be 'protected' by s.122 of the Constitution. The 'protection' is the result of an interpretation by the High Court of s.122 of the Constitution, which enables the Parliament to make laws for the government of any Territory.

By virtue of this power, the Australian Airlines (then TAA) service between Perth/Port Hedland and Darwin was upheld as being within the constitutional power of the Commonwealth (see Attorney-General (WA) Ex rel Ansett Transport Industries (Operations) Pty Ltd v Australian National Airlines Commission (1976) 138 CLR 492) and therefore within the power of the ANAC.

The difficulty was the provision of the sector between Perth and Port Hedland, being entirely within the State of Western Australia, that State not having adopted the relevant Commonwealth legislation or referred its powers.

It is my vigorous submission that, in the interests of competition and choice, the Territory should legislate at the time of achieving statehood to adopt s.19A of the Australian National Airlines Act so that Australian Airlines has the right to operate within the new State. However, it would not be within the power of the Territory alone to permit services linking Darwin or other ports to Western Australia. Australian Airlines will have to prevail on the Western Australian Government to resolve the same problem within that State or the Territory will be denied major airline services.
It is important to note that adoption of s.19A would not give Australian Airlines an unrestricted right to operate within the new State. It could do so only in accordance with the laws of the State applicable to transportation by air, for example if the law was such that a State licence was required to operate air services, Australian Airlines would not be able to offer services until such time as it was authorised by virtue of:

i. the adoption of s.19A, and

ii. by obtaining the requisite licence.

These are important issues to be considered by the Territory Government. The same issue could arise in relation to any service from a State other than Queensland or Tasmania where there is an intra-State sector as part of that service to the Territory.

Section 121 and Aviation

This brings forward the important question of 'terms and conditions' upon which a new State is established or admitted, discussed later in this paper.

On the view that the Commonwealth may impose a wide range of terms and conditions for the entry of the Territory as a State, one of these could be a requirement for the new State to adopt s.19A of the Australian National Airlines Act.

The alternative restrictive interpretation of s.121 would not allow such a proposal.

From a personal point of view, I would comment that it would seem to be far preferable for the new State to adopt the legislation by choice for the purpose of providing scope for improved air services, choice and competition within that State.

'Terms and Conditions'

The power of the Parliament under s.121 to admit new States has yet to be exercised. Accordingly the range and extent of the terms and conditions able to be made or imposed is a matter for debate. Leaving aside the question of parliamentary representation, the possible imposition of any other terms and conditions could be one of the most important issues of possible statehood.
This results from the wide range of existing Commonwealth legislation applying specifically to the Territory on important issues such as mining and land use, issues which are of practical commercial significance.

Purpose of Statehood

Why should the Territory become a State?

Apart from questions of wishing to attain equality and status in the political sense, a major aim must be to attain sovereign powers as a State, subject to the Constitution. Restrictions on powers of the Territory can be put forward as impediments to growth and economic capacity of the Territory and its reliance upon Commonwealth funding.

To use a common vernacular phrase, this becomes a case of 'Catch 22', or at the very least a circular argument.

Clearly, these are as much political questions as legal issues, and the approach will be based mainly upon the views of the Government of the day holding a majority in Parliament.

The issues are the eternal issues of Federation, that is the distribution of power between the central and State Governments, the extent of subsequent intrusion into State powers by the Commonwealth as in recent important High Court decisions such as Koowarta and the Franklin Dam case.

As another speaker has commented, any Federal Government is unlikely to cede power in an area where it knows or expects that the new State would act in contravention of its own policies.

'Admitted' or 'Established'

Other speakers have referred to the arguments relating to whether a new State is 'admitted' as a complete entity with its own Constitution, or 'established' by the Commonwealth on its terms and conditions. Differing views exist and will be clarified eventually only by judicial interpretation.

An interesting point is whether the Commonwealth could force statehood on an unwilling Territory. Another issue is the power of the Commonwealth to subsequently alter its legislation under s.121 so as to alter the status or powers of the new State.
Equality for the New State

From a commercial point of view, the argument for equal treatment of the new State has considerable merit. If the purpose is to establish a State which will attract investment, economic growth, employment and increased population, then any extent to which the State is limited in its powers will detract from its commercial status. Split powers result in dual jurisdiction in terms of liaison, approvals, administration and therefore costs for business and the general community.

Professor Howard has set out clearly the case for admitting a body politic which is on the same basis as other States, so as to avoid a 'less equal' State. This view has been followed in the United States and Canada.

Discrimination

Mr Justice Toohey has referred to an important development in recent High Court decisions of the concept of the federal nature of the Constitution preventing the Commonwealth from discrimination against any of the States.

Existing Federal Legislation

The obvious examples of areas of conflict are those where substantial Commonwealth legislation exists, covering activities of present and potential economic significance to the Territory - that is, Aboriginal land, other land use and mining, including uranium.

Several speakers have followed the logical path of examining whether the Parliament is empowered to enact such legislation by virtue of other heads of power under the Constitution, such as laws with respect to defence, trade and commerce, external affairs, and Aborigines. By this logic, legislation validly enacted within a prescribed power of the Commonwealth will prevail over any inconsistent State legislation.

However, this analysis ignores entirely the fact that generally such legislation has not been introduced to apply to the existing States. The power was exercised directly by the Commonwealth when the Territory was not a State.

Despite a sustained period of energetic debate, and the ebb and flow of intentions, the Commonwealth has not moved to impose on the other States legislation relating to Aboriginal land other than that intended to protect sacred sites in the stated absence of other legislation. Similarly,
the Commonwealth has not moved to acquire the ownership of uranium in any State.

The Franklin Dam case is the only instance of the Commonwealth imposing its will directly upon a State in relation to a large area of State-owned land.

In the realities of politics and a federation, this legislation would have been unlikely to be applied to a new State of the Northern Territory.

Is this historical sequence going to result in a permanently different status for the Territory? Even the valid exercise of powers by the Commonwealth would not seem to remove the possibility of the new State challenging differential treatment compared to other States.

Reference of Powers

Mr Justice Toohey has referred to the uncertainties surrounding a requirement by the Commonwealth for the new State to refer to the Commonwealth power in certain areas. These relate to the termination of the reference and the concurrent residual power of the State.

Industrial Matters

This is an important issue for economic development and the Territory has a unique opportunity to implement a new approach. The Conciliation and Arbitration Act 1904 is applied to the Territory by virtue of s.53 of the Self-Government Act in several special ways. Normal technicalities in relation to requirements for the existence of 'an industrial dispute' and the existence of 'an industry' are made unnecessary by s.53, and Awards may be made more easily.

The Territory is prevented by s.53 from making laws governing the hearing and determination of labour disputes. If the Territory did not wish to set up its own conciliation and arbitration system and it is likely that the Commonwealth would oppose such an approach, the question arises whether the Commonwealth power under s.51(XXXV) extends sufficiently to be applied by s.121 to regulate this area after statehood. However, it is clear that this could be resolved by appropriate legislation of the new State.

The issue I would raise is that the Territory should not proceed blindly to adopt the entire Commonwealth legislation in its present form including the wage-fixing and union registration system without modification, given
the problems generally agreed to exist in that legislation. An eclectic approach is to be preferred so as to benefit from the substantial experience we have had under the Commonwealth system, by allowing more flexibility.

**Political and Commercial Aspects**

From these proceedings it can be seen that regardless of the very complex and interesting legal issues surrounding statehood, the future course of this matter is likely to be dominated by ordinary political arguments based on centralism versus federalism, and respective Commonwealth and State policies.

Financial pressure could be applied by the Commonwealth which would mean that a negotiated approach was steered through these issues. However, if regard is not paid to the practical aspects of impediments to commercial and economic growth, and a legal landscape is not created which will encourage investment and growth, the Northern Territory and Australia will be disadvantaged, permanently.
Chapter 8

CONSTITUTIONAL FUNDAMENTALS: SHOULD THEY INCLUDE FUNDAMENTAL FREEDOMS?

Peter Hanks

If the Northern Territory is to achieve statehood within the Australian Federation, the writing and adoption of a new State Constitution will be essential. This necessity will provide the opportunity, not presented in Australia since the 1890s (when the constitutional conventions negotiated the present Commonwealth Constitution), of working with a clean slate - of drafting a basic constitutional instrument without the restraint on imagination and creativeness which an existing Constitution provides. One of the critical items on the drafting agenda will be the question whether the new Constitution should guarantee fundamental political values - whether these relate to individual freedoms or to institutional structures.

Over the past decade, the proposition that fundamental freedoms should be accorded a special constitutional status has reappeared on the political agenda in Australia and in other countries with which we share common political values - the United Kingdom, New Zealand and Canada. The last country has adopted a Charter of Rights, with fundamental constitutional status in Schedule B of the Canada Act 1982 (UK), New Zealand has published a White Paper promising a Bill of Rights (New Zealand 1985) and the United Kingdom, through its accession to the European Convention on Human Rights, has both exposed its governmental processes to scrutiny against the yard-stick of fundamental freedoms, and invigorated the debate on a constitutional Bill of Rights for that country. In Australia, there have been the Whitlam Bill (never publicly released), the Bowen Bill of Rights Bill 1984 (passed by the House of Representatives but withdrawn by the Government in the Senate) and the current reviews being undertaken by the Constitutional Commission and the Victorian Parliament's Legal and Constitutional Committee.

All of these developments and proposals have in common the concept of according special legal or constitutional status to identified political values - free speech, the free exercise of religion and the right to resist unreasonable police action, for example. That special status is intended to raise the identified values above executive and legislative interference - to ensure not only that the values control or inhibit the actions of
governments, bureaucrats and police, but also that those values cannot be diluted or frustrated by legislation.

These developments can help us to focus on the basic questions on which the constitutional endorsement of fundamental freedoms hinge — those of technical practicability and of political desirability. At the heart of each of these questions is the relationship between the elected parliament and the judges.

The Technical Question

The critical technical question is how to ensure that any identified freedoms remain 'fundamental' — how are they protected against legislative interference or extinction? How are the implications of conferring broad legislative power on a new State legislature (broad power which carries with it the right to make and unmake legislation) to be avoided.

If the Territory is to achieve statehood, the status of its Constitution will be critical to the technical question of erecting and preserving fundamental freedoms — or any other fundamentals. The Constitution itself would almost certainly be enacted by the Parliament in the exercise of its Territories power in s.122 of the Constitution, for there is no other body with the legislative power to enact a Constitution for the Territory. (The current constitution comprised in the Northern Territory (Self-Government) Act 1978, gives the Territory legislature no power to alter or replace that constitution, a power which is reserved to the Commonwealth.) The Constitution may well be drawn up, and given its political legitimacy, by Territory representatives — in the same way as the Australian Constitution was drafted by colonial representatives in the 1890s; but its formal endorsement, its legal legitimacy, would require the action of the Parliament — just as the Constitution derived its legal status from its enactment by the imperial Parliament at Westminster).

Once enacted, the new Constitution would probably have the same legal status as the Constitutions of the six original States. I say 'probably', because it would be open to the Commonwealth, when enacting the Constitution to attribute special status to the Constitution or to some part of it, or to impose special status on the Constitution as a condition of admission of the Territory to statehood (under s.121 of the Constitution); but the political pressure on the Commonwealth to accord the same status to the new Constitution as that enjoyed by the Constitutions of the existing six States would be substantial. (The legal question — whether the Parliament can write a 'special' Constitution when establishing a new State — is not free
from controversy. Professor Howard argues, in his contribution to this Conference, that the Commonwealth may not make a special, more restrictive Constitution for any new State. I do not agree; but I believe that political factors will ensure that our debate remains academic.)

It is a consequence of the legal status accorded to the States that their Constitutions are amendable through the normal legislative process, a point made emphatically by the Privy Council in McCawley v The King [1920] AC 691 and regularly repeated by the courts (see for example, West Lakes v South Australia (1980) 25 SASR 389). This means that a government with control of the parliament could propose legislation whose impact would be to amend, repeal or modify the Constitution; and, if the Constitution included any 'fundamental freedoms', to erode or destroy those freedoms; and once enacted by the parliament, that legislation would take effect and override any earlier guarantees, however 'fundamental' their character. This is, of course, the doctrine of the sovereignty of parliament, expressed in the context of the United Kingdom Parliament in such cases as Ellen Street Estates Ltd v Minister of Health [1934] 1 KB 590; and British Railways Board v Pickin [1974] AC 765.

However, even in McCawley the Privy Council accepted that there might be situations in which this general, flexible, status of a State Constitution could be restricted: 'The legislature of Queensland', it said at 714, 'is the master of its own household, except in so far as its powers have in special cases been restricted'. This point was expanded by the High Court of Australia and the Privy Council in Attorney-General (NSW) v Trethowan (1931) 44 CLR 394, [1932] AC 526, where it was held that sections of the New South Wales Constitution Act, 1902 dealing with the upper House in that State could not be amended or repealed by the State's legislature through its normal legislative processes. That decision was effective to guarantee the Legislative Council against the Lang Government's attempts, endorsed by the State Parliament, to abolish the upper House.

The decision in Trethowan endorsed the validity and efficacy of s.7A of the Constitution Act, which prohibited the presentation for the Royal assent of any proposed legislation affecting the House unless that legislation had been approved by the electorate at a referendum. The reasoning used by the judges to support their reduction of the State Parliament's law-making powers was based (a neat example of judicial esoterica, this) on the proviso to s.5 of the Colonial Laws Validity Act, 1865. That proviso demanded that any legislation passed by the New South Wales Parliament (and other State parliaments) must be passed through any specially prescribed procedure if the
legislation dealt with 'the constitution, powers and procedure of the legislature."

The model provided by s.7A of the Constitution Act has been adopted for a variety of purposes in other State constitutional provisions: In ss.7B, 11B, 26, 27, 28 and 29 of the Constitution Act, 1902 (NSW) - protecting the maximum life of Parliament, the system of compulsory voting, the system for distributing Legislative Assembly electorates and the system for conducting Assembly elections; in s.3 of the Constitution Act Amendment Act of 1934 (Qld) - protecting the unicameral nature of the Queensland legislature; in s.53 of the Constitution Act of 1867 (Qld) - protecting the office and powers of the State Governor; in s.10a of the Constitution Act, 1934 (SA) - protecting the status of the Legislative Assembly and Legislative Council and the mechanisms for resolving inter-house disputes; in s.88 of the Constitution Act, 1934 (SA) - protecting the system for distributing Legislative Assembly electorates; and in s.73 of the Constitution Act 1889 (WA) - protecting the office and powers of the State Governor, of the Legislative Assembly and Legislative Council and protecting the current electoral system. Each of these provisions requires a referendum before legislation which interferes with the protected elements can be passed into law. Less rigorous protections (requiring special majorities) are built into s.18(2) of the Constitution Act 1975 (Vic), which protects the structure of the State Parliament, the Crown and the Supreme Court; and in s.41A of the Constitution Act 1934 (Tas), which protects the maximum life of the House of Assembly.

So there are a substantial number of legislative precedents for building into State Constitutions restrictive legislative procedures which must be followed if the State parliament is to legislate on topics which are thought to be 'fundamental'. On the basis of those precedents, would it be possible for a new State Constitution to demand, say, that the newly created State Parliament can only infringe the principle of absolute freedom of speech if its legislation is approved by the voters at a referendum? The New South Wales experience has shown that such a restriction can be highly effective: it prevented the passage of legislation to abolish the Legislative Council in that State in 1931 (when the courts enjoined the Government from using the standard legislative procedure to achieve that end) and in 1961 (when the voters rejected the Government's Bill which would have abolished the Council).

The difficulty with building on these legislative precedents is that each of the provisions is concerned with protecting elements in the structure of government, not with individual freedoms - except to the extent that the New
South Wales and South Australian provisions protect the right of citizens to participate on an equal basis in elections for the houses of parliament. Their broad institutional orientation is a reflection of the proviso to the Colonial Laws Validity Act, 1865, which endorsed and made effective only those restrictions on legislative power which protected the 'constitution, powers and procedure of the legislature'. Section 5 of the 1865 Act has now been replaced by s.6 of the Australia Act 1986 (Cth), which is similarly limited. If a State legislature attempted to use the Trethowan model as a means of protecting non-institutional fundamentals (the 'right to work', or freedom of speech, to take contemporary examples), that model could offer no prospect of success - the foundation on which it was constructed, now s.6 of the Australia Act, simply will not adapt to that purpose. The obvious fact that the foundation had quite specific and limited dimensions was made, in a rather confused way, in South Eastern Drainage Board v Savings Bank of South Australia (1939) 62 CLR 603; in Commonwealth Aluminium Corporation Pty Ltd v Attorney-General (Qld) [1976] Qd R 231; and in West Lakes Ltd v South Australia (1980) 25 SASR 389.

There are indications that the courts may not need to rely on the former s.5 of the Colonial Laws Validity Act in order to make effective any provision demanding compliance with restrictive legislative procedures. In Trethowan Dixon J (in a cryptic passage which has since received a great deal of attention) suggested that even the United Kingdom Parliament, which was not bound by the Colonial Laws Validity Act, could be required to follow restrictive procedures when legislating on specified topics. If that parliament did not follow those procedures, he said (44 CLR at 426),

the courts might be called upon to consider whether the supreme legislative power in respect of the matter had in truth been exercised in the manner required for its authentic expression and by the elements in which it had come to reside.

The South African Supreme Court, in Harris v Minister of the Interior [1952] 2 SA 428, and the Privy Council, in Bribery Commissioner v Ranasinghe [1965] AC 172, upheld the validity and the efficacy of restrictive legislative procedures which were not supported by the Colonial Laws Validity Act. In the latter case, Lord Pearce rejected (at 200) an argument that, because the Ceylon Parliament was 'sovereign' it had the power to make and unmake any legislation:

A parliament does not cease to be sovereign whenever its component members fail to produce among
themselves a requisite majority, eg, when in the case of ordinary legislation the voting is evenly divided or when in the case of legislation to amend the constitution there is only a bare majority if the constitution requires something more.

In Victoria v Commonwealth (1975) 134 CLR 81 (the Petroleum and Minerals Authority case), Gibbs J endorsed that statement and said that Harris and Ranasinghe showed that restrictive legislative procedures prescribed for certain types of legislation would be enforced by the courts, and that legislation which had not followed the restrictive procedures could be declared invalid. And, Gibbs J said (at 163), this 'principle which has been evolved is not limited to constitutional amendments'; and he adopted Lord Pearce's assertion in Ranasinghe that 'a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its powers to make law'.

Some of these propositions were considered, albeit cursorily, by the Full Court of the South Australian Supreme Court in West Lakes v South Australia (1980) 25 SASR 389. The Court managed to avoid committing itself on these propositions, but two judges appeared to be sceptical that restrictive legislative procedures could have a wide application to the passage of legislation by a State parliament. King CJ suggested two ways in which the effect of the Ranasinghe argument might be avoided: first, a special majority requirement might be rejected 'as an attempt to deprive parliament of powers ... where the legislative topic which is the subject of the requirement is not a fundamental constitutional provision' (at 397); and, second, a restrictive legislative procedure which required the consent of some persons or body outside 'the representative legislative structure' would be a 'renunciation pro tanto of the law-making power' and therefore ineffective (at 398). Matheson J also showed (at 422) that he was unwilling to accept the full implications of the Ranasinghe reasoning as developed by Gibbs J in Victoria v Commonwealth. In particular, he rejected the idea, which is central to establishing effective restrictive procedures for legislation, that parliament can require, when entrenching some matter, 'that the entrenching section itself can only be repealed by the same procedure'. West Lakes indicates the possibility of judicial reaction against the legal positivism which underpins the propositions in Trethowan, Ranasinghe and Victoria v Commonwealth - there are strong suggestions that some judges want to draw the line and prevent the legislative process being rigidified any more than the High Court and Privy Council decisions in Trethowan compel.
Another foundation, which might be used to ensure the effectiveness of 'fundamental' constitutional provisions (including guarantees of freedoms), was put forward by the Full Court of the Supreme Court of Western Australia in *Western Australia v Wilsmore* (1981) 33 ALR 13 proceedings - see 149 CLR 79). The court pointed to s.106 of the Constitution, which provides that 'the Constitution of each State shall continue ... until altered in accordance with the Constitution of the State'. That section, the Court said (at 18), made it essential for the Western Australian Parliament to adhere to the more onerous procedures specified in the State Constitution when it legislated to reduce voting rights:

[Section 106 of the Constitution] by its own force and for its own purposes is a law which requires that such manner and form provisions as are to be found in the State Constitution conditioning the power to amend the Constitution be observed.

If this assertion were to be generally accepted, then many of the technical difficulties associated with establishing fundamental freedoms and protecting those freedoms against legislative interference would be resolved: so long as the State Constitution demanded that legislation dealing with or impinging on the freedoms in question must be passed through a specified (and restrictive) legislative procedure (for example, a two-thirds majority in the assembly, or a referendum of all electors), then that procedure would have to be followed because failure to do so would involve a breach of the Constitution; and any resulting legislation would be invalid because of that breach.

The Political Question

Putting aside the technical questions (not because they are resolved, but because they can too easily distract us from the substantial issue), we need to consider whether it is desirable, or politic, to entrench a series of fundamental freedoms in a new constitutional document.

At one level, this appears to be a ludicrous question, for the values which are most often listed for inclusion in fundamental freedoms are 'motherhood statements' - freedom of speech, the press, assembly, conscience and religion; access to justice; the right to work and to strike; a right to equal protection of the law; and rights to education and privacy (these items are taken from the catalogue in Australian Constitutional Commission, 1986, 15-16). But the question does not focus on the worth of those values; rather it asks whether the most appropriate way of advancing these
rights is through their constitutional entrenchment, for there is a price to be paid if that approach is taken to their advancement.

There is no doubt that many other political systems have seen constitutional entrenchment as the way to go: the United States led the way at the end of the 18th century; and the 20th century has seen scores of countries follow that lead. Even Australia went a little way down the road when the Constitution was drafted so as to guarantee the right of jury trial for any person indicted for a crime against the laws of the Commonwealth (s.80), as well as 'the free exercise of religion' and to prohibit 'the establishment of any religion' (s.116). The latter guarantee was something of an aberration, for it only restricts the Commonwealth but appears in 'Chapter V - The States'; and neither it nor s.80 has ever proved an embarrassment to Commonwealth legislative or executive action.

More recently, and more systematically, Canadian politicians agreed to adopt a Charter of Rights - an ingredient in the negotiated package which saw the patriation of the Canadian Constitution (and a perceived diminution in the autonomy of the Provinces). The Charter has fundamental constitutional status, and guarantees a wide range of individual freedoms, drawn from the International Covenant on Civil and Political Rights. Already, the Charter has assumed extraordinary significance in the legal and political discourse of Canada, stimulating a wide range of litigation. Amongst the challenges to legislative policies and government activities have been attacks on legislation rationing the broadcasting time available in political campaigns (National Citizens' Coalition Inc v Attorney-General (Canada) [1984] 5 WWR 436); on the practice of requiring motorists suspected of intoxication to blow into a breathalyser (R v Therens, [1985] 4 WWR 286); and on legislation limiting the right of medical practitioners to charge above the prescribed 'scheduled fee' (to use the Australian term - see Ison 1985, 17-28, for a description of some of the impacts of the Charter).

The Charter has proved something of an inspiration, with the New Zealand Government releasing a draft White Paper and a draft Bill of Rights; and the Commonwealth Government sponsoring the 1985 Bill of Rights Bill. Only the New Zealand document would, if enacted, entrench the nominated freedoms against later legislative interference. The Commonwealth Bill of Rights Act would have only prevailed against earlier legislative invasions and would not prevail over later Commonwealth Acts. In this sense, it would not have been entrenched (see Hanks 1986b). There are technical reasons why entrenchment of a Commonwealth Bill of Rights is not feasible without formal alteration of the
Constitution (Winterton 1980); and, no doubt, political reasons why the Government chose not to put the Bill of Rights through that alteration process; but the Government rationalised the omission to entrench its Bill of Rights by references to the need to maintain a degree of flexibility in such pioneering legislation - a rationalisation which I am happy to accept (Hanks 1986a).

The critical question which must be addressed, if fundamental freedoms are to be expressed as overriding values, is that of the inevitable tensions which would be created for a system of government which is built on representative democracy. Any fundamental, specially protected propositions involve the entrenchment of one generation's political culture and the imposition of that culture on future generations. Tom Paine asserted in The Rights of Man (in 1791, the sexism might have been excused) that 'Every age and generation must be as free to act for itself as the ages and generations which preceded it'. Why should this generation assume that its successors will lack its prudence, insight and sensitivity; or that today's solutions will meet tomorrow's problems?

Further, if fundamental freedoms are to override inconsistent governmental and legislative action, they will need to be enforceable. Whatever process of enforcement is adopted, the institution (in most cases, a court) which is empowered to assert the fundamental freedoms against government and legislature will itself become a player in the political process. Assume, for example, that a Constitution guarantees 'the right to work', that the legislature establishes a system for registering trade unions of workers, part of which offers members of registered trade unions better conditions of work than non-members; and that the validity of the legislation is challenged on the ground that it undermines the guaranteed 'right to work'. If a court is called on to rule on that challenge, how can it avoid imposing its political priorities on those of the elected legislature? It cannot be a simple matter of 'applying the words of the Constitution'; for, until interpreted and given concrete application, those words have no definite meaning; and the very process of interpretation is a political act.

Of course, Australian courts have long claimed the power to invalidate legislation sponsored by elected governments and enacted by elected parliaments: '[T]his court is the guardian of the Constitution', said Barwick CJ, when the High Court struck down the Petroleum and Minerals Authority Act 1973 (in Victoria v Commonwealth (1975) 134 CLR 81, 118). Implicit in that statement is a claim that the judges act as disinterested 'guardians', with a higher loyalty, not to a political party or ideology, but to a
reified concept - 'the Constitution'. But the claim is
disingenuous: judges are necessarily political actors,
developing (through the processes of interpretation and
precedent manipulation) and enforcing their own policies. It
is by no means uncommon for judicial policies to be elevated
above legislative policies which have evolved through the
more open political processes of party policy formulation,
democratic elections and parliamentary debate. For example,
the Petroleum and Minerals Authority Act, declared invalid
by a majority of the High Court in 1975, had been the
subject of a double dissolution of the Commonwealth
Parliament, a general election and the only joint sitting of
Commonwealth Parliament in Australia's history. The High
Court found a flaw in the enactment procedure (as the Court
interpreted that procedure) and, through its legal invalida-
tion of the Act, denied the political legitimacy of those
elaborate parliamentary and electoral processes. This
objection to the Court's assertion of authority over the
democratic processes was made eloquently by Jacobs J, who
dissented:

[N]o court in the absence of clearly conferred
power has the right to thwart or interfere with
the people's expression of their choice. The
people's expression cures any formal defects which
may have previously existed. That is democratic
government within the terms of the constitution by
which the people elected to be governed (Victoria
v Commonwealth (1975) 134 CLR 81, 275-6).

The work of the High Court in the interpretation and
application of s.92 of the Constitution is an excellent
illustration of the political character of judicial review
in Australia. When the High Court and the Privy Council
decided, in the Bank Nationalisation case (Bank of NSW v
Commonwealth (1948) 76 CLR 1; Commonwealth v Bank of NSW
(1949) 79 CLR 497) that s.92 protected the rights of each
private bank to engage in interstate trade, they were not
only telling the Chifley Government (elected with a majority
in both Houses of the Parliament) that it could not pursue a
particular economic measure, they were also opting for a
laissez-faire reading of the section and elevating that
approach to political economy above the more collectivist

The political power of judges is something which we
have learned to live with in Australia; and no doubt it will
be with us for a very long time to come. But we do need to
ask ourselves whether we want to add to that power at the
expense of our more open, representative and accountable
political processes: do we want to increase the catalogue
of economic and social issues which are seen as legal
questions to be settled through litigation (with all the
limited access problems and trivialisation of issues which that involves), rather than political questions for debate, development of policy, negotiation and compromise?

The point is that most of the values which are proposed for inclusion in a list of fundamental freedoms are, for all their superficially inoffensive character, intensely controversial because they lack precision; because they do not have a commonly agreed meaning and because they confront each other. There are political institutions – elected legislatures – which are reasonably well suited to giving these fundamentals some meaning and to reconciling the tension amongst them and between them and other values. But is there anything in our experience which suggests that the courts should replace those institutions?

There are, of course, many people who would support that replacement: they point to the unrepresentative nature of elected legislatures, to the tendency of elected legislatures to ignore the interests of minorities, and to the corruption of the political process through the domination of political parties or the media's trivialisation of issues. For these people, giving the courts power to assert fundamental freedoms against the legislature offers an opportunity to advance the interests of the politically disenfranchised and to bring a more dispassionate and deliberate approach to crucial social issues. This perspective might be valid where a society is particularly heterogeneous – where significant minority groups are excluded from effective participation in the political process and where their interests are sharply opposed to those of the majority, which has a demonstrated tendency to ignore or override those minority interests. In that type of situation, it might be argued, the health of the political system requires an injection of anti-majoritarian values, an injection which only a non-representative and unaccountable institution, like the courts, can offer.

Even in Australia, with its largely homogenous society, there may be self-contained political units in which these tensions and inadequacies of the democratic system are evident and the Territory is seen by some people as illustrating those problems with its sharply divided white (majority) and black (minority) communities. But it is, at least, a relevant question whether the appropriate solution for such inadequacies is to abdicate political power in favour of the judiciary. The difficulty here is that a minority group, such as the Territory's Aboriginal population, has no reason to believe that judges will be more sensitive than politicians to its interests. A more productive response to this type of problem may be to look for measures which will invigorate the representative character of the legislature. That is, rather than establish
a super-legislature, a watchdog to ensure that the elected representatives conform to some judicially-constructed ideal in their deliberations and output, it might be better to construct the legislature in a way that guarantees that it both represents and is accountable to the broad range of interests in the community.

It is at this point that my general antipathy to 'fundamental' guarantees is compromised: I would argue for the need to build into the structure of any representative legislature some guarantee of that representative character—some restraint on manipulation and distortion of the political base of the legislature. There is a model, by no means complete, in Part V of the South Australian Constitution Act, 1934, which establishes a standard of 'one vote, one value' for the distribution of electorates in the Assembly, entrusts the responsibility of distributing those electorates to an independent commission and ensures that the commission's distributions are self-executing. These provisions are entrenched against legislative interference. A most extensive model appears in the Constitution Alteration (Democratic Elections) Bill 1985, sponsored by the Australian Democrats and given a first reading in the Senate. That Bill would have added to the Constitution a guarantee of 'one vote, one value' and a guaranteed minimum franchise (for all citizens over 18) for both Commonwealth and State elections.

Provisions such as these would, of course, require judicial enforcement; and the tensions between democratic and authoritarian institutions, which I have already discussed, could well emerge if the courts were to strike down legislative initiatives which, in the view of the courts, infringed the guaranteed values. But, because the courts would be acting only to ensure the political legitimacy of the representative legislature, this would be a tolerable invasion on legislative sovereignty: it would advance the claims of the legislature to authority across a broad range of potentially controversial subject matters. A Constitution which ensured the opportunity of citizens to participate in the electoral process, by protecting a minimum franchise as well as the equality of voting rights, would go a long way towards ensuring that the representative legislative body - the parliament - could legitimately claim to be the appropriate forum in which critical questions of 'fundamental freedoms' should be settled.
Chapter 9

MAINTAINING JUDICIAL INDEPENDENCE IN THE NEW STATE

Kevin O'Leary

There is no need for me to emphasise the importance of this Conference for the Territory, or the importance of the various topics that will be discussed during the course of it. As the President of the Law Society, Mr Giles, has said, it is the first public conference convened to discuss some, at any rate, of the many questions that must be considered, and answered, before the Territory assumes a new role as the seventh State of Australia. I hope it is only the first of many to come. The Law Society of the Northern Territory and the North Australia Research Unit, therefore, are to be congratulated on the initiative they have shown in taking the lead, and in trying to create a public awareness of some of the issues involved in statehood. And it is good to see in attendance so many of those to whom we will look for leadership and guidance in preparing the road ahead for statehood.

At this Conference I have been asked to speak on the subject, 'Maintaining Judicial Independence in the New State'. It is undoubtedly a topical subject, at least in some places and in some of its aspects, but it is, of course a subject of fundamental importance when one is considering the creation of a new State or the admission of a new State in the Commonwealth of Australia. It is obviously a subject too vast to do full justice to in an address such as this, but I think some observations on it can be made which will serve as a basis for discussion, and one would hope, for serious consideration, by those who will finally have the task of framing the Constitution of the new State of the Northern Territory.

The independence of the judiciary, as we regard it today, like others of our modern ideas of constitutional law and constitutional government, developed very largely out of the massive struggles and convulsion in England in the seventeenth century, and out of the many attempts during that time to frame a written Constitution for England. For example, from the attempts to frame a Constitution following the execution of Charles I, there emerged the idea of a separation of powers as a safeguard against the tyranny both of a single person and a representative assembly; there also emerged the idea of stating certain fundamental rights of the subject, and the idea of rendering those rights permanent, by denying validity to any legislation which attempted to affect them. And the conventions of that time also anticipated other developments in our later constitutional law, as, for example, the control of the
executive, aimed at by the leaders of the Long Parliament, anticipated the solution ultimately supplied by the growth of the system of cabinet government (see Holdsworth, 1937, 157).

And out of the great struggles of that time there grew too a new awareness of the value of the theory of the supremacy of the law, and a recognition of the judiciary as a separate and independent organ of government. Speaking of the supremacy of the law, John Pym, one of the most remarkable men of the revolution against the Stuarts, in opening the reply on the Bill of Attainder of the Earl of Strafford in 1641 said:

The law is the safeguard of all private interests. Your honours, your lives, your liberties and estates are all in the keeping of the law. Without this, every man hath like a right to anything.

The Earl of Strafford, some of you will know, had been Charles I's Chief Adviser, and probably as a result of Charles' threatened use of force against Parliament, Parliament passed a Bill of Attainder against him. It was after that that he is said to have exclaimed, in the words of the Psalmist: 'Put not your trust in Princes'.

And speaking of the supremacy of the law, it is not without interest to note that when Charles I himself was brought to trial for high treason, although he refused to recognise the jurisdiction of the court (he thought, with some justification, one might think, that high treason was a crime committed against the King, not by him) he did say, without his usual stammer (so it is recorded): '...if power without law may make laws...I do not know what subject he is in England, that can be sure of his life or anything that he calls his own'.

And, as I have said, it was out of the struggles of that time that there eventually emerged the recognition of the judiciary as an independent and separate organ of government. In constitutional theory, that is accepted under our present system. I have been interested to note, though, that one of the issues being considered by the Commonwealth Constitutional Commission is whether the judiciary should be a constituent part of government, and an interesting new development may yet come out of that. At present, however, the judiciary is a constituent part of government, and it is a separate, independent and equal organ of government. The trouble, though, with the role of the judiciary in government is, I think, that it is so little understood; there is too little appreciation of how sensitive and fragile it is, and too little awareness of just how easily that role may be eroded to the detriment of the common good.
The role of the judiciary in government is, in short, to uphold the supremacy of the rule of law. Dicey said of the rule of law that it means:

a. The absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the influence of arbitrariness of prerogative, or even wide discretionary authority on the part of the Government;

b. equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts; and

c. the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals as defined and enforced by the courts.

I think it is also generally accepted under our system that to perform its role in government, it is essential that the judiciary be independent both of the executive government and of the legislature. But here again, I fear, there is too little understanding of what is meant precisely by the independence of the judiciary, and why the judiciary must necessarily be independent. It is sometimes thought that the independence of the judiciary means no more than that it must be left free to go about its day-to-day business in the court, and that there must be no interference with its judging process. So also, the necessity for independence is often thought to be simply to preserve the integrity of that judging process. Those matters are, of course, important, but the independence of the judiciary, and the necessity for it, involve a great deal more than that.

First of all, what is meant by the independence of the judiciary? In the Southey Memorial Lecture in 1981 (13 Melbourne University Law Review, 334), Sir Ninian Stephen, then a member of the High Court, said that his definition of an independent judiciary was 'a judiciary which dispenses justice according to law without regard to the policies and inclinations of the Government of the day'. I think, with respect, it is difficult to give a better definition of it than that.

But why is it necessary that the judiciary be independent of both the executive and the legislative arms of government?
The short answer to that is that judicial independence is necessary as an essential guarantee of liberty under our system of government. As Sir Guy Green said in his paper, 'The Rationale and Aspects of Judicial Independence', delivered in Brisbane on 25 August 1984: 'Neither parliamentary democracy nor the rule of law can exist if the judiciary is not independent, because then it is not the general law, or if a statute is applicable, the law as laid down by Parliament which is applied to a particular case, but merely the values of the government of the day'.

In his article, 'Minimum Standards of Judicial Independence' (58 ALJ 340) Mr Justice King, the Chief Justice of South Australia, said (at 32): '...independence [of the judiciary] is rightly regarded as the indispensable condition of free constitutional government and the ultimate safeguard of the rights and liberties of the citizen'.

And in the lecture to which I have just referred, Sir Ninian Stephen, speaking of an independent judiciary, particularly in the context of present day governments, had this to say (at 338):

Governments of the present day necessarily pose a greater threat to individual liberties than did those of last century. Modern governments are expected to intervene in areas previously little regulated and the result is a greater intrusion into the private lives of those they govern. The greater that intrusion, the more occasions there will be for the citizen to complain of it. For redress of such complaints, whether because of a denial of benefits to which a citizen is entitled or of unlawful interference with his freedom of action according to law, it will be primarily to an independent judiciary that the citizen must look. And only an independent judiciary, including, of course, those who staff courts set up to review exercises of administrative discretions, can offer the assurance that those intrusions are kept within the limits which the law imposes.

The more difficult question arising out of all this, though, is what is required in terms of government machinery and organisation, to ensure that the judiciary is in fact independent of both the executive and the legislature. Somewhat surprisingly, perhaps, it is only in fairly recent years that that question has received the critical analysis and consideration which it obviously deserves. But much attention has been given to it in recent times, internationally and here in Australia. Thus, both the International Commission of Jurists and Lawasia have developed criteria for judicial independence, and in New Delhi in October 1982 the International Bar Association (IBA) adopted a set of minimum standards of judicial
independence, that is, a set of standards as the irreducible minimum which must be attained if judicial independence is to be said to exist, the minimum which can be regarded as compatible with the existence of judicial independence. And in Australia, too, a great deal of very valuable work is being done by the Australian Institute of Judicial Administration both towards creating an awareness of the importance of judicial independence and towards seeking practical solutions to giving effect to it. And at the present time here in the Territory, a small committee consisting of representatives of the judges and of the Attorney-General is also considering the matter, and it is hoped that, with some assistance from the Australian Institute of Judicial Administration, a satisfactory arrangement can be worked out.

This is not the place, nor is it the time to embark on any examination of all that is involved in giving practical organisational reality to the concept of the independence of the judiciary. It is sufficient, I think, if I state a few general propositions which I believe enjoy wide general acceptance, and then draw attention to some other matters which are perhaps not quite so generally accepted, but which ought to be very much to the forefront of our thinking when drafting a Constitution for the new State of the Northern Territory.

In the first place, I think it would be generally accepted that if we are to have a Constitution, the judiciary should be recognised in it as a separate, independent and equal organ of government with the executive and the legislative organs. Further, I think there would be general agreement that, for the proper fulfilment of their role, the Constitution should ensure both that the judges themselves enjoy personal independence, and that the judiciary as a whole enjoy what has been called collective independence vis-à-vis the executive. By the personal independence of judges I mean (as the IBA Standards define it) that 'the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control'. By collective independence I mean the securing to the judiciary, as a whole, without undue executive control (and I put it no higher than that at the moment) of adequate financial resources out of which there will be provided the personnel, the facilities, and the buildings to enable the judiciary to perform its proper constitutional role.

Just how all this might be achieved was the subject of an important seminar in Melbourne last year on the constitutional and administrative responsibilities for the administration of justice. In spite of the difficulty of the subject, and the variety of views expressed, there was, in fact, a large measure of agreement reached on a number of important matters. Certainly there was unanimous agreement
that the present system is unsatisfactory, and that there is need for change from the conventional Australian model of the court system. And the general view also emerged, from the executive no less than from the judiciary, that the judges should take a more active role in the management of their courts, that they need to be, to a greater extent than they are now, 'masters in their own house'. And I think I should also note here that there was very substantial agreement on the question of integration of the courts.

The only fully operating, and, I believe, reasonably satisfactory, mode of court administration we have in Australia so far is that which applies to the High Court. Victoria is working on a rather different model which I think is still in the process of developing. If I read the trend rightly, though, I think there is a growing number (including, I note, the present Chairman of the Australian Institute of Judicial Administration) who think that perhaps the High Court model should be seen as the one to be adopted throughout the whole Australian court system, because it does work, and it works without impinging too much on judicial time. Perhaps that is the view that will prevail in the end, but we will have to wait and see.

Those, of course, are not the only matters to be considered when speaking of the independence of the judiciary. There is also, for example, the question of the appointment of judges, and the question of their removal, but there is no time here to venture, even if one dared, into those troubled waters. Nevertheless, those questions are ones which must be faced in time. May I just mention, though, one of those other matters touching the independence of the judiciary which has been for some years now, and is, the source of much concern both here and in England. It is the growing practice of governments to involve the judiciary in political controversies by appointing judges to chair committees and commissions to investigate highly controversial and political affairs. As far back as 1868, when there was a proposal in England that judges should hear election petitions in which, I gather, complaints against corrupt practices in elections would be heard, the then Lord Chief Justice, Sir Alexander Cockburn, with the unanimous support of his judges, wrote to the Lord Chancellor expressing their 'strong and unanimous feeling of insuperable repugnance to having these new and objectionable duties thrust upon them'. He went on to say: 'We are unanimously of the opinion that the inevitable consequences of putting judges to try election petitions will be to lower and degrade the judicial office, and to destroy or at all events, materially impair the confidence of the public in the thoroughgoing impartiality and inflexible integrity of the judges...'.

The present Lord Chancellor, Lord Hailsham, is well known for his opposition to the practice. Speaking in the
House of Lords in 1971, he said:

Judges must be kept, so far as possible, out of political controversy. Obviously in the course of ordinary judicial duties a judge, be he high or lowly, must occasionally, and will occasionally, find himself in what I might describe as the eye of the storm. He may be compelled by virtue of his office to decide a case which cannot fail to give widespread offence whichever way he decides... But it is altogether another thing [to assign judges] to arbitrate in a highly charged matter between the rival views of two highly political parties.

In an address to the 1978 summer school of the Australian Institute of Political Science, Professor GS Reid, who was then Professor of Politics at the University of Western Australia, dealt with some aspects of the use of judges in non-judicial roles. He said:

The Executive Government has gained from using the undoubted talents of selected members of the Judiciary, Federal and State, for particular purposes. It has also gained from the dignity and authority that a judge brings to an Executive function. It is apparently looking upon the Judiciary as an invaluable pool of human resources to be drawn upon to assist it in policy determination and policy implementation. But there are problems – even if the respective Benches can afford to release Judges for Executive work. For example, is it in the public, or the Judiciary’s interest that the status and prestige of the Judiciary should be shared with other parts of Government? Will the qualities of the Judiciary be diluted if selected Judges establish a direct participatory nexus with the policy-making and policy-implementation processes of governing?

It is for reasons such as these that the High Court of Australia, with what Sir Owen Dixon called 'only one trifling exception' during the First World War, has always maintained the position that its judges ought not to be Royal Commissioners. A number of requests have been made to it, but have been refused. In the United States the Supreme Court under Chief Justice White and again under Chief Justice Stone adopted the policy that members of the Court do not serve on committees or perform other services not having a direct relationship to the work of the Court. That policy has not always been adhered to, but on the occasions when it has been departed from, it has resulted in widespread criticism of the Court. In Victoria, as we know, the judges of the Supreme Court still adhere to the famous Irvine Memorandum of 1923 in which the then Chief Justice of
Victoria, Sir William Irvine, expressed strong views about Supreme Court judges being exposed to controversy by being called upon to make findings, particularly in sensitive matters such as political matters, as Chairman or Member of a Commission of Enquiry appointed by the Government. The principles according to which Victorian judges view the question were later re-formulated by a resolution of the judges on 20 October 1952, set out in Sir Murray McInerney's article in 52 ALJ 540 at 545. It is perhaps worth mentioning here that Article 16 of the Statute of the International Court of Justice at the Hague reads: 'No member of the Court may exercise any political or administrative function or engage in any other occupation of a professional nature'. And reflecting on this question one wonders whether some inkling of the mischief it can create was not present to the mind of John Adams when he was drafting the Constitution of Massachusetts, and particularly Article XXX of the Declaration of Rights declaring the separation of governmental powers. It reads:

In the Government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a Government of laws and not of men.

Not all would hold such a rigid view as that adopted by the High Court or by the Victorian judges. New South Wales takes a rather more liberal view (I think sometimes with regret), but the present Chief Justice, Sir Laurence Street, in setting out his views on the approach to be adopted to a request from the Attorney-General to make a judge available for an inquiry or other public duty outside the ordinary course of his judicial function, was at pains to say that he attached importance 'to the tradition that, except in special circumstances, judges remain independent of, and disengaged from matters of public disputation falling outside the discharge of ordinary judicial duties': see 52 ALJ 661. But whatever precise view one takes, I think there can be no doubt that, as a matter of principle, judges ought to be left free to perform their proper constitutional duties and that neither the executive nor the legislature should involve them in duties or assign them tasks which in any way impinge on the performance of their proper constitutional role.
Chapter 10

DRAWING UP A NEW CONSTITUTION:
CONSULTATION AND CONVENTIONS

Peter Bayne

The 'transition to statehood' dominates the discussion of constitutional issues in the Northern Territory. Constitution-making has received much less attention, but the link with the transition has been noticed. There is debate within the ranks of constitutional lawyers as to whether there must be a constitution in place before the Territory could become a State within the Commonwealth, the answer to which question is bound up with other questions concerning the role of the Commonwealth in the making of the Constitution. It is useful in the first place to take note of the questions which arise under the Australian Constitution inasmuch as debate over a Constitution for the Northern Territory could become obscured by a failure to appreciate the different points of view.

Admission and Establishment

Section 121 of the Constitution provides:

The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit.

The orthodox view is that admission is the process apt to deal with a new State comprised of a community outside the limits of the Commonwealth (such as New Zealand). Establishment on the other hand is apt to deal with a community within an area of the Commonwealth, that is, within an existing State or Territory (Quick and Garran 1901, 968ff; Commonwealth of Australia 1929, 16; Durack and Byers 1978; Byers 1980). (The particular problem of the seat of the Commonwealth Government may be left aside). Thus, the Northern Territory might be established as a State, although in such a case it would nevertheless be accurate to speak of the Parliament of the Commonwealth establishing the new State and then admitting it to the Commonwealth (Byers 1980, 11).

The power of the Commonwealth Parliament 'would authorise a law providing what [a new State's] Constitution should be...For the power to establish without more
necessarily implies authority to frame those structures without which establishment as a State is impossible. The power implies everything necessary or convenient to make it effective' (Byers 1980, 8). The Constitution might deny to the new State legislative competence in certain areas, (so that it would have less power in these regards than the original States), and such limitations might be entrenched in the Constitution (Byers 1980, 8,14). The Act of the Commonwealth Parliament which established and admitted the new State would therefore create the new polity and prescribe the powers of the respective arms of its Government. It might also prescribe the conditions under which the new State was admitted, including matters concerning representation of the people in the Commonwealth Parliament.

This orthodox view is opposed in some respects by Professor Lumb (Lumb 1978). The nub of Lumb's view so far as concerns the Constitution of a new State is that 'those Territories which have received representative and responsible government may not be established as new States (that is, receive from the Parliament a Constitution giving them statehood or have it imposed upon them), but may be admitted only [,] so that Commonwealth power in such a case does not extend to their establishment as a State...' (Byers 1980, 10). With respect, I would agree with the former Commonwealth Solicitor-General that Commonwealth power over the Northern Territory is unrestricted, and that this power extends to the modification of the constitutional framework under which the Territory Government operates, that is, while the Northern Territory is a Territory (Byers 1980, 11; cf Madzimbamuto v Lardner-Burke [1969] 1 AC 645). That the Commonwealth will assert its control is evident from the dispute between the Commonwealth and the Territory Government concerning amendments which the latter had proposed to the Criminal Code Act (Wilson 1984; Andrews 1986, 102).

Whatever answers are given to these questions, Senator Kilgariff argues that 'the development of a Constitution for the new State could be of value to a Territory Government in at least three important respects' (Kilgariff 1985, 4). The Senator's reasons should be noted in his own words:

Firstly, it assists in the development of the statehood issue. It brings the matter to the attention of those who would hope to have some input into the document, and would indicate to the Commonwealth Government that the Territory is serious in its wish to develop to full statehood. Secondly, [the Constitution] could be put to the people of the Northern Territory for ratification, in the form of a referendum...A negative reaction ...would serve as a warning to the Territory Government that its move towards statehood was
premature... or that the [Constitution] was unaccept able. Alternately, a positive reaction to the proposed Constitution, and its ratification... would indicate, not just to the Commonwealth Government, a support for statehood, on the basis of the provisions of the Territory Constitution. [Thirdly],... The Commonwealth Parliament might be less inclined to insist on changes to an established and popularly accepted Constitution, than it would be to a relatively 'new' Constitution which has not gained popular acceptance. The opportunity exists, for the Territory,... to pre-empt the imposition of a Commonwealth drafted Constitution on the Territory (Kilgariff 1985, 5-6).

The Senator acknowledged that it might be difficult as a matter of law to bring any pre-statehood Constitution into legal effect, but that this did not preclude steps to draft a Constitution and have it ratified. As to the nature of the process, the Senator advocated that the Constitution be formulated by a constitutional convention and then submitted to the voters of the Territory. This 'would follow the pattern which was established by the colonies last century, in the formulation and adoption of their respective Constitutions' (Kilgariff 1985, 6).

The appropriate method of adoption of a pre-statehood Constitution was addressed by Chief Minister Hatton in his Ministerial Statement of 28 August 1986. His proposals differ significantly from those of Senator Kilgariff. Mr Hatton envisaged that the drafting process would be under the control of the Select Committee on Constitutional Development, (which I understand comprises three Government and three Opposition Members of the Legislative Assembly). Their draft would then 'be submitted for ratification to a convention representing a broad cross-section of community interests and opinions'. (The details of the composition of this convention and its powers were not specified). Finally, the draft Constitution would be put before the Territory electorate in a referendum (Hatton 1986, 26).

While it is clear that the two statements referred to above acknowledge that the preparation of a Constitution will be a significant step in the transition to statehood, they were concerned primarily with stating a position on the powers of a new State (and its representation in the Commonwealth Parliament) vis-a-vis the Commonwealth and in comparison to the existing States. The comments on the constitution-making process were made more in passing. It is the object of this paper to take up the question of constitution-making and to deal with it from a comparative perspective.
I must at the outset make it clear that what knowledge I have has been gleaned from published material available to me in Canberra, and this will undoubtedly limit the usefulness of what I have to say. It also appears to me that progress towards a Constitution is at a very early stage. There is little to describe and analyse, and the matter of the process of constitution-making can be dealt with by an outsider only in a very general way. It must also be acknowledged that the question of process is a political one, and will be answered by politicians. The most that can be achieved in a paper such as this, at this time, is to discuss the choices that are open. Whether any account will be taken of them is another matter.

Comparative Constitution-Making

It would, however, be wasteful of our time if I were to make no attempt to deal with the question in a Territory context. The central proposition I have to advance is that decisions about the process must be made after careful regard is had to that context. There could well be a tendency, even on the part of those with long experience in the Territory, to seek to reproduce the process followed in some other jurisdiction. The experience of the States provides an obvious model, but the socio-economic complexion of the Territory is very different from that of the States, and different even from the condition in the Australian colonies in the 1890s. It is well to insert here one of the canons of constitutional prudence distilled by Professor McWhinney from his study of comparative constitution-making:

Rule 11 Be cautious in your borrowings from other constitutional systems, developed from other societies. Remember the principle of the non-transferability of constitutional institutions. What works beautifully in another society may turn out very badly, or at least quite differently and unexpectedly, when translated to your own society, since the underlying political, social, and economic conditions may be quite different between that other society and your own (McWhinney 1981, 135).

As much may be said about the process of constitution-making. To quote again from McWhinney:

Study of the different modalities of exercise of constituent power in different countries indicates a wide variety of options as to the arenas for constitutional drafting and enactment. The choice among these different options may be made casually or inadvertently, but it will never be value-neutral in its consequences. What looks like a
simple, technical machinery choice may in fact predetermine or influence the final substantive recommendations as to the content and direction of a new, or 'renewed', constitutional system. The evidence would suggest that governments are very often aware of this truth, and shape their choice of the instruments of constitution-making accordingly (McWhinney 1981, 27).

The necessary link between process and substance underlines the need to relate choices as to both the social and economic context in which they are made.

**A Plural Society**

Now, at the risk of error on my part, it is necessary to consider what appears to me to be one distinctive characteristic of Territory society which will bear on the choice of process.

Obviously, and fundamentally, the Territory is a plural society, namely 'a society containing within it two or more communities which are distinct in many (predominantly cultural) respects — colour, beliefs, rituals, practices... and which in many areas of social behaviour remain substantially unmixed; a society whose elements acknowledge, or are constrained by, an overall political authority, but are strongly disposed to the maintenance of their own traditions and are therefore motivated towards separatism' (Bullock and Stallybrass 1977, 477). It is characteristic of a plural society that 'the problems of preserving order and freedom are great; a slender unity easily breaks into warring national, racial or religious groups...The plural society has created moral, legal, and political problems of a new degree of difficulty...' (Bullock and Stallybrass 1977, 478). The plural nature of Territory society is reflected in what a political scientist described as the 'two electorates' (Heatley 1981, 29). There is a resonance of Disraeli's observation that nineteenth century England was comprised of two nations, the rich and the poor.

The urban electorate is predominantly (some 80 per cent) non-Aboriginal. The 25 per cent of the total population who are descended from the Aboriginal people who occupied the Territory prior to its colonisation live primarily in what may be loosely called the rural areas. It is estimated, however, that Aborigines comprise more that 50 per cent of the long-term population (see sources cited in Andrews 1986, 101). Geographical separation emphasises the cultural differences between the two communities. There are major differences in political organisation, and in the nature and extent of the participation of each in the economy. The Aboriginal community is not well integrated
into the political and administrative sectors. Only one MLA is an Aborigine, and the percentage of Aborigines in public sector employment is well below 25 per cent. These matters are well known, and hardly need elaboration here. The question which they raise is how the process of constitution-making is affected by them.

For some, there is no particular problem. It might be argued that for the Aborigines constitution-making is 'whitefella business', and consultation would be a pointless exercise, (cf the stereotype attitude to the involvement of Aborigines in elections described by Loveday and Summers 1981, 86). A more generous view might be that the Aborigines must make the most of what they can of a process open to all. This latter view would be quite spurious, for most Aborigines simply do not have the same access to government that is open to the rest of the population. These views might however be put aside, for political leaders in the Territory have recognised, on the vital issue of land rights law at least, that there must be consultation with the Aboriginal community. The centrality of this issue requires that it be mentioned in a little detail.

Statehood is seen by Territory politicians to require that the new State should have constitutional equality with the existing States. Mr Hatton's assertion that the '[c]ontrol of land is fundamental' (Hatton 1986, 14) would no doubt be widely supported in the non-Aboriginal community. So too would those matters which Mr Hatton saw as following from this claim. First, it is argued that the Aboriginal Land Rights (Northern Territory) Act 1976 must be 'patriated to the new State by some agreed method, such that it becomes part of the law of the new State and comes under the administrative responsibility of the new State Government' (Land Matters 1986, 1). Secondly, while 'patriated land rights will provide existing ownership guarantees', there might nevertheless be provision made for 'alternative tenure arrangements' (Hatton 1986, 14). (One possible change contemplated seems to be from title held in trust to individual title).

In relation to this second matter, Mr Hatton allowed that any change would be preceded by 'full consultation' (Hatton 1986, 14). The importance of consultation to the Aborigines is underlined if regard is had to the question of what compensation might be paid by a new State Government should it acquire land. The paper on Northern Territory Constitutional Disadvantages attached to Mr Hatton's speech lists as one of a number of disadvantages of the present powers of the Territory legislature that it has 'no power to make laws with respect to the acquisition of property otherwise than on just terms' (Constitutional Disadvantages 1986, 18; and see Nicholson 1985, 708). Does this suggest that
the new State should have this power? The continual emphasis that the new State should be on an equal footing with the existing States suggests that this might be the view taken. At the same time, however, the paper notes as another disadvantage the ability of the Commonwealth to acquire land in the Territory, but not in the existing States, without the payment of compensation (Constitutional Disadvantages 1986, 19-21). This indicates further that the principle that land not be acquired except on the payment of just terms is not seen as fundamental, but only that the Territory, both at present and as a new State, be placed in the same position as the States. Of course, to deprive the Aborigines (for a second time [Woodward 1974, 2]) of their land, or to deprive them of their interests in land, would be a matter on which there might be expected to be full consultation.

Consultation with the Aboriginal community should not be limited to questions concerning land. Again, so much was recognised by Mr Hatton. Speaking generally of the fears held by many sections of the Territory community about the transition, he noted that 'support by Aboriginal Territorians is a key consideration and we will strive to overcome their concern' (Hatton 1986, 24). Just how there might be consultation is not a matter in respect of which I can offer much in the way of sensible comment. The particular characteristics of the organisation of Aboriginal communities within the plural Territory society will require imaginative responses to the problem, but this says very little that is helpful in a practical sense. From what I have read, the experience gained in census-taking might be of considerable value (Loveday and Wade-Marshall 1986).

Recognition of the significance of the Aboriginal community and its interests leads to a recognition of the interest in the constitution-making process of the Commonwealth Government and Parliament. Of course, the question of the representation of the new State in the Parliament will be a matter for negotiation, not just with the Commonwealth but also with the States. This question can be put aside here as it is not a matter which will affect the internal Constitution. The Commonwealth Government and Parliament may also seek to influence the content of the Constitution of the State formed out of the Territory, and one area where its interest might be expected to be strong concerns the position of the Aboriginal population, and in particular its rights in relation to land. The Commonwealth must be mindful of its international obligations in this respect. This is not to say that the Commonwealth Government at the relevant time will have any concern with these matters, but the possibility is there that it might. The same might be said about two other areas of current Commonwealth interest: mining operations (in particular uranium and offshore resources), and the National Parks.
Process and Expectations

It is now appropriate to deal more explicitly with the question of the process of constitution-making.

Decisions as to process are shaped by expectations as to content. Is the Constitution to be simply a vehicle for the exercise of state power, in which case it will be concerned to describe the institutions of state power and the relationships between them, or it is also to express notions about the manner and quality of the exercise of that power? If the first is preferred, (and if the pattern of the Constitutions as found in the Australian States were the preferred model, this would be the choice made), then the constitution-making process need not be very complicated. Indeed, unless it was thought desirable to provide a framework for the decentralisation of power, it might require little more than some tinkering with the basic structure of government found now in the Northern Territory (Self-Government) Act 1978. If, on the other hand, the Constitution is intended to deal with the manner and quality of the exercise of state power, the process will be more complex.

From what I have read, which on this point is little, the current political leaders of the Territory do not seem to be much concerned with limiting government power. The paper Constitutional Equality with the States argued that equality 'would need to include...assumption of a State type responsibility for matters relating to civil liberties' (in Hatton 1986, 50). At present, the States are not limited by law concerning the manner with which they deal with civil liberties, so perhaps this argument suggests that a new State formed from the Northern Territory should not be so limited. The Government's proposals for the Criminal Code suggest so (see Wilson 1984, and Andrews 1986, 102). A clearer attitude to the general question is revealed in a speech by Mr Jim Robertson to the 1986 Queensland Convention of the Young Liberals (Robertson 1986). The first High Court decision in the Kenbi Land Claim case (R v Toohey; Ex parte Northern Land Council (1981) 151 CLR 170) was said to have 'wide if not alarming implications'. This, because the Court allowed that a decision taken by the Administrator of the Northern Territory, as representative of the Crown, was susceptible to judicial review. Mr Robertson preferred what he described as the earlier judicial attitude that

it was not considered possible to look behind such decisions to ascertain whether they were arrived at improperly or unfairly, or with regard to extraneous considerations, or because of some misconception or other reason. Decision-making at this highest level was a matter of government policy, to be arrived at in confidence and in
which political and other considerations would legitimately be taken into account without fear or question (Robertson 1986, 8 and 10).

The point of dwelling on these attitudes is to focus attention on a critical question of content as it will affect the process for making the Constitution. While the thinking of the current Government appears to be opposed to restricting the power of the state, the notion that the Constitution might deal with this question might yet be accepted. To adopt this approach would mark a departure from the Australian pattern to be found in the recent history of the Commonwealth of Nations. Neither tradition provides any reason to make the choice one way or the other. It might however be argued that the plural nature of Northern Territory society points to a need to address the question of how the rights of at least the Aboriginal minority might be protected. In essence, the choice is a political one.

The same may be said of the question whether the Constitution should contain provisions to accommodate the plural nature of Northern Territory society. A study by Palley (Palley 1968) might be instructive. For example, consideration might be given to the recognition of Aboriginal law, both as an element of underlying law, and as a body of law (perhaps concerned only with procedure) to be applied in Aboriginal communities.

Process Choices

I come now to the question of process. In his comparative study of constitution-making, McWhinney distinguishes a number of methods, and the analysis which follows borrows from his book (McWhinney 1981, 27ff).

First, there is the 'expert commission'. It is a device likely to be availed of by a government concerned to improve or modernise its constitution. (Developments at the Commonwealth level in Australia bear this out). The commission may or may not be comprised of parliamentarians; if it is not, the danger that the government will lose control of the agenda increases, and the appointments to the commission are likely to be made with this possibility in mind. It is also likely that the government or legislature will insist that it exercises the 'constituent power' to change the existing constitution.

McWhinney's concept of the role of a commission is perhaps too limited. Such a body, whether comprised of members of the legislature or not, could well undertake extensive community consultation as a prelude to the formulation of proposals for a constitution. A process of
this kind might well be required in the Territory if there is to be meaningful consultation with the Aboriginal communities and with others whose access to Darwin is constrained. Without wishing to suggest that it is inadequate to its task, the process of consultation of the Australian Constitutional Commission is hardly a model for the Territory. This process is essentially one which will occur within a highly literate elite. The Territory might find more instructive guidance in the experience in Papua New Guinea. The commission appointed to make recommendations for an independence Constitution consulted extensively with the many communities in the country. Those in the Territory familiar with this period in Papua New Guinea might point to its disadvantages. A commission of this kind might well affect the course of political as well as constitutional development. If it does its job, it is highly likely that the community will become more interested in politics. On both accounts, the incumbent governing party or coalition is likely to be wary of initiating such a process. On the other hand, such results may be seen as advantages in a situation where the community is wary of progress to independence (see Andrews 1986, 99). While the Papua New Guinea Commission created problems for the Government, its activities certainly created interest in the process which in turn created a climate in which the prospect of independence became less fearsome to many Papua New Guineans. The resulting constitution, although achieved more painfully than anticipated, might also be one to which there is a greater degree of commitment by politicians and the public than would have been the case if a more elitist approach had been followed. I do not suggest that an identical condition prevails in the Territory, but it has been noted by Senator Kilgariff that the process of constitution-making might well stimulate more community support for the transition to statehood.

'Executive diplomacy' is another mode identified by McWhinney. In his view, it is likely to be found in a federal system in the process of change. In that situation, '[i]t may (then) be found politically prudent, even if not legally obligatory, to negotiate a new political-social consensus between the political leaders of those different units before entering upon those fundamental changes...' (McWhinney 1981, 31-32). The formal process might not provide for this kind of interaction, but it may be a political prerequisite to the process. In the Territory context, these observations suggest the need for 'diplomatic' relations between the Commonwealth and the Northern Territory Governments, and perhaps between leaders of the two electorates. Certainly, McWhinney's observations would seem to be equally applicable to a plural society as well as to a federal one.
The constituent assembly has been much favoured as a process for constitution-making. According to McWhinney, it represents the culmination of the constitutional thinking of the Age of Enlightenment, though it needs to be understood that he speaks of a constituent assembly elected by direct popular vote and therefore having its own direct political mandate and claims to political, as well as constitutional legitimation (McWhinney 1981, 33). The unsuccessful Australian Constitutional Convention of recent times was on this account a pale reflection of its predecessors, (even having regard to the pattern of the 1890s), which might of course account for its failure.

The Papua New Guinea model was also not quite in the classic tradition although close to it. The Constitution was debated and adopted by a Constituent Assembly. This body was comprised of the Members of the pre-Independence House of Assembly who simply declared that they were possessed of the authority of the people to enact a constitution. The process had an explicit legal objective. The pre-Independence constitution was contained in the Papua New Guinea Act 1949, but no attempt was made to create the Constituent Assembly in accordance with its terms. This device to achieve an autochthonous constitution might well be studied in the Northern Territory context.

While it would be a bold step and contrary to the Anglo-Australian tradition, an assembly that was widely and fairly representative of the community in the Territory might provide a fillip to community interest in the process and provide a sounder basis for the transition. It may be questioned whether there is in the Territory, at the present, an already existing, and continuing societal consensus as to the nature and desired direction of fundamental political, social and economic — and hence constitutional — change; a condition in which, according to McWhinney, a constituent assembly can be most effective (McWhinney 1981, 33). But, he continues, '[e]ither that, or the constituent assembly must itself be conceded enough time, within the definition of its mandate, to wait for such a societal consensus to develop or to get out itself and try to build it' (McWhinney 1981, 33). Again, of course, a body of this kind could well be seen as a threat by an incumbent government. To avoid this, the constituent assembly might well be the legislature under another name, but in a system where party discipline holds, the assembly is not likely to play an independent role and might not achieve the benefits that might flow from the work of an independent and widely representative assembly. (The pre-Independence House of Assembly of Papua New Guinea was not under the control of the Government coalition of the time).
There is to be found in United States political history frequent resort to the constitutional convention as a means for both the creation and the reform of a constitution. There is a vast body of literature on the subject, but rather than traverse this territory it might be more useful to describe briefly the experience in Alaska. On the face of it, there might be some useful parallels to be drawn with the Northern Territory, but I must leave it to others to determine this.

Alaska was admitted as a new State on 2 January 1959, but the Constitution approved by the Act of Congress had been adopted by a constitutional convention in February 1956 (and had been ratified by the electors of Alaska shortly thereafter). The preparation of the Constitution was a critical step in the transition to statehood. Statehood had been first proposed in 1916. The first determined moves occurred in the late 1940s when the legislature of Alaska established an Alaska Statehood Committee 'as a bipartisan nongovernmental body to promote the statehood cause, assist the delegate in Congress, undertake necessary research, and otherwise plan and prepare for statehood, including preparation of studies for a constitutional convention' (Fischer 1975, 8–9, referring to Session Laws of Alaska 1949, Chapter 108). Initially, effort was devoted to attempting to persuade 'Washington' by representations to Congressional hearings. Frustration in this quarter led to acceptance of the notion, opposed initially on the ground that it would cause delay, that Alaska should draft its own Constitution as a means of demonstrating its readiness for statehood. In 1955, the legislature passed a law for the holding of a constitutional convention (Fischer 1975, 13 and 247ff for the text of the law). The convention's broad mandate was 'to take all measures necessary or proper in preparation for the admission of Alaska as a State of the Union' (Fischer 1975, 13, 17). Some of the main features of the convention and how it operated should be noted.

The scheme of electorates for convention delegates departed deliberately from that which governed the election of members of the legislature. An election on the pattern of the latter 'would have effectively prevented representation from all but a few of the larger communities and would not have permitted territory-wide election of any delegate' (Fischer 1975, 18). The larger communities were urban in nature. Fischer describes how the scheme for the election of delegates differed (Fischer 1975, 14–16). One device was to allow for the election of a number at large from the whole territory considered as an electorate. According to Fischer, 'the result was by far the most representative assembly ever elected in Alaska' (Fischer 1975, 22). It was a diverse body in terms both of the regions and communities represented and of the occupational backgrounds of the
delegates. There was, however, only one non-white ethnic Alaskan elected. The elections were conducted on a non-partisan basis, and the voluntary organisations which had worked for statehood were well represented.

The convention was allowed by the law which created it 75 days in which to complete its task, with a two week recess. But the planning also allowed for time to publicise the coming of the convention, to hire research consultants and have them prepare papers for the convention delegates and the public (Fischer 1975, 19-20).

The question of the site of the convention was treated as a matter of importance. The Alaskan seat of government (Juneau) 'had the necessary physical facilities...but it also had the unsavoury reputation that often goes with legislative politics: special interest lobbying, heavy drinking and the like'. So, instead, the site of the campus of the University of Alaska (near Fairbanks) was chosen. 'The university location...was seen as providing the isolation and academic atmosphere appropriate to writing a state constitution' (Fischer 1975, 18).

The convention completed its task in the time allowed. Most of the work of formulating proposals for the text of the Constitution was done in committees, and the drafting was the responsibility of a committee. Individual delegates could nevertheless put proposals to the convention. The work of the convention was in public, and hearings were held at which members of the public could put their views. These procedures generated considerable interest in the work of the convention.

In the final result, only one of the 55 delegates dissented from the vote taken to adopt the Constitution. Adoption was then followed by a ratification campaign, and the Constitution was ratified by a 2 to 1 margin (17477 to 8180).

Ratification was then followed by renewed attempts to have Congress pass a law to admit Alaska as a State, and 'the fact that Alaska had a "model constitution" was frequently cited in arguments and in the record [in Congress] as evidence of Alaska's readiness' (Fischer 1975, 183). The Alaska Statehood Act was finally passed by the Senate on 30 June 1958. The electors of Alaska approved of statehood by an 85 per cent margin, and Alaska became the 49th State on 3 January 1959.

The story of the making of the constitution in Alaska is of course only one of many that could be told. What is taken from it is for those more familiar than I with the conditions in the Territory. It does, however, point to
some of the larger questions involved in making decisions as to process. If there is no groundswell of demand and support for a constitution within the community, or within sections of the community, should it be part of the process to build that support? What kind of constitution should the process yield? These are of course political questions, and how they are answered depends upon the assessment one has of the needs of the community and the vision one has of the kind of community in which one wants to live.

There might be an argument that these questions be avoided as far as possible, although that is a political choice too. There are obvious risks (for politicians) in a course of action which stirs widespread community interest in questions about the nature of government. The potential benefits are however substantial. Far more happy will be the community which is committed to support of its institutions of government and the precepts according to which it acts.
COMMENTARY

Peter Loveday

Peter Bayne's remarks about consultation have a direct bearing on the exchange yesterday between Dr Heatley and Dr Jaensch, concerning support for statehood. Dr Jaensch had reported that few people, in surveys he had carried out, had named statehood as a high priority problem which the Government should do something about. Dr Heatley, however, reported that a more recent survey had shown more widespread support for statehood.

I believe that Dr Jaensch and Dr Heatley are talking about two different things, namely acquiescence and support. They are to be contrasted, as was implicit when Dr Jaensch explained that anyone arguing for statehood south of the border needed firm and bipartisan support. Mere popular acquiescence in the recommendation of a committee in Darwin will have little weight down south.

Acquiescence, it should be emphasised, is relatively easy to achieve - a public relations or information campaign to raise the level of public awareness will do the trick. But as long as this is a one-way flow of information it generates mainly passive awareness when what is wanted, as Peter Bayne and Dean Jaensch have argued, is active support, generated in a more deliberately engineered two-way flow of information and opinion. The various groups with interests in statehood would be stirred up to debate the issue, and that would include Aboriginal groups and organisations. It would therefore not be sufficient to ask someone like ex-Senator Bonner to 'explain' statehood to the Aborigines; a much more thorough effort to develop opinion among them would have to be undertaken.

This brings me to the Aboriginal Land Rights (Northern Territory) Act 1976 and consultation. The proposal to 'patriate' that Act, as Lorraine Liddle has explained, has already made Aborigines apprehensive about statehood and the only way of allaying their fears will be to 'come clean' on what kind of guarantees Aborigines will be given following patriation of that Act.

The best way of understanding their apprehension is to consider what is happening in Alaska under the Alaska Native Claims Settlement Act (see Case 1984; Berger 1985). The Act was passed in 1971 to provide for the extinguishment of all native land claims in Alaska in return for the grant of 44 million acres to Alaska native corporations and cash payments of nearly $1 billion. But the US Congress provided that the land granted would be inalienable for 20 years only
and after that the corporations could put their land on the market if they wished to do so. Needless to say, most of them will have to do so in order to meet debts, municipal rates and taxes and other obligations, so that from 1991 the Alaskan natives will once more be dispossessed of land - this time for ever - and converted into even more dependent and demoralised minorities in town and country than they are now. It will be a great social disaster of great cost to the State.

The lesson for the Territory is immediate. The Territory Government, with the encouragement of the Commonwealth, is about to embark on a major new initiative for developing, under the Local Government Act (NT), a much higher level of community autonomy for Aborigines, to be supplemented as far as possible by Aboriginal economic enterprises. It is clear that many, perhaps most, of these enterprises will be land-based in one way or another. The Government's proposals for a major reform, the long term object of which is to reduce the dependence of Aborigines on welfare, are quite similar to the policies which brought the Alaskan native village and regional corporations into existence. And here, as there, one must ask what will happen to the policy of the Government and to the Aborigines themselves if the patriation of the Land Rights Act results in the termination of inalienable freehold and the placing of Aboriginal land, or key parts of it, the bits that have value for economic enterprise, on the market?

Comments about the process of consultation in Alaska remind me that a similar process has occurred in Canada's North West Territories (NWT) where in 1982 a plebiscite was held on the division of the Territories to settle one of the tensions of a plural society before further steps could be taken towards full provincial status, the equivalent of statehood (Abele and Dickerson 1985; see also Dacks 1986). One message is that because the overall result of the plebiscite was only marginally in favour of a division of the NWT and it was regionally lopsided, debate about the division has continued unresolved ever since. In other words, a referendum here may resolve nothing and even set back the cause of statehood - the opposite of what happened in Alaska by Peter Bayne's account.

Another aspect of this matter is that the process for achieving statehood or provincehood in a plural society is far more complex than that of simply drawing up a Constitution and putting it out for the politicians to pass through parliament and maybe a referendum. A political package has to be negotiated and here this will be a complex package, as the Chief Minister indicated, a package of which the Constitution is not necessarily the central part, especially for the Commonwealth and the States. The parallels between our
Territory and Canada's Territories are very close (Hodgins, Loveday and Grant, forthcoming) and we cannot expect that the process of attaining statehood here will take much less time than it is taking in Canada, where the resistances are much the same and provincehood still unattained.

The resistances and the doubts about the value of full provincial status are so great that Gordon Robertson, a long time Commissioner of the NWT, equivalent to our Administrator but with a more political role, has set them out in detail (Robertson, 1985). They include, as they do here, doubt as to the fiscal capacity of a Province which has a special economy and a very small and poor population dispersed over a huge area, if it were forced to live in the Federation on the same financial terms as the other Provinces. And they include doubts, touched on in Dr Jaensch's paper, about the readiness of the existing Provinces to accept new ones when that would upset the balance of power between the existing Provinces and regions and between them and Ottawa. We already have glimpses of this problem here in the argument about Senate representation. In Canada it has been recognised but not yet confronted, much less solved.
COMMENTARY

Graham Nicholson

Today we have had addresses on a wide variety of subjects relevant to the theme of this Conference. The Chief Justice has reminded us of some fundamental principles of our system of government which we have inherited from the United Kingdom. The Chief Minister has described in a forceful manner some of our present disabilities. Dr Jaensch has described some of the constitutional history of the Territory, and in addition has reminded us that the question of statehood for the Territory is primarily a political one.

My comments are primarily directed at the papers by Mr Justice Toohey and by the Deputy Prime Minister on the legal and constitutional issues, as these are the matters of interest to me.

Both Mr Justice Toohey and Mr Bowen indicated that their primary interest in relation to the method of granting statehood to the Territory was under s.121 of the Constitution. This is the most likely method that suggests itself, although there may be another method that is available; that is, by amendment of the Constitution as a result of a successful Australia-wide referendum. There are, however, difficulties with this method.

Whichever method is used it seems to be overwhelmingly accepted by those experts who have addressed the issue that a Commonwealth Territory can be granted statehood within the Australian Federal system. In addition to the views of various commentators, I would refer you to the comments of Gibbs J, as he then was, in the First Territories Representation case (1975) 134 CLR 201 at 248 and of Barwick CJ in the Second Territories Representation case (1977) 139 CLR 585 at 592, to support this view. This position must extend to the Northern Territory, because the High Court has made it clear on several recent occasions that the Northern Territory remains a Territory of the Commonwealth. The fact that the Territory was formerly part of the original State of South Australia would not alter this conclusion.

In further support of this conclusion, I would suggest that it is not by accident that the Territories power in s.122 is contained in Chapter VI of the Constitution entitled 'New States'. Rather, it indicates that the Constitution contemplates that some Territories may, by a process of constitutional development, eventually achieve State status, and that Territorial status may in appropriate
circumstances be a preparation for eventual statehood. Certainly the grant of Self-Government to the Territory has simplified the task of achieving this goal in several important respects.

As to whether a new State should be 'admitted' or 'established', I have some difficulty with the view that the Territory as a Commonwealth Territory can only be 'established' and that the word 'admission' is limited to colonies. The preamble to the Constitution Act talks of the admission 'of other Australian colonies and possessions of the Queen'. Section 6 of that Act talks of 'colonies or territories as may be admitted or established by the Commonwealth as States'. Section 107 of the Constitution makes it clear that colonies might be admitted or established. It seems to me that the correct description of the process does not depend so much on the status of the entity being admitted or established, but upon the method used to grant statehood.

Where the process involves the initiative of a self-governing Territory framing and adopting its own new Constitution, and which either establishes new institutions or carries forward existing ones or a combination of both, it seems more appropriate to describe it as a process of admission. It is noteworthy that the quote previously referred to of Gibbs J in the First Territories Representation case used the word 'admitted' in relation to Territories becoming new States.

The concept of 'admission' in effect describes the process already outlined by the Chief Minister in which he has expressed his firm opposition to the imposition of statehood by the Commonwealth on the Territory. He has stated that the Constitution of the new State must be prepared and adopted by Territorians, although no doubt after consultation with other interested parties.

In any event, whether it is admitted or established, or both, the resultant new State's Constitution would in my view be protected by s.106 of the Constitution. That section provides:

The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State, (emphasis added).

There is a question under s.106 as to whether that section only protects pre-existing Constitutions, given the use of the word 'continue'.
Clearly at the founding of Federation this section was intended to continue from and after Federation the pre-existing Constitutions of the self-governing Australian colonies. The question is whether the section will extend to and protect a new State's Constitution which may only come into force upon the grant of statehood. The section may do so, but there are no clear judicial statements to this effect. Perhaps for this reason alone there is some merit in the suggestion of Senator Kilgariff, as referred to by Dr Jaensch, that the Constitution of the new State needs to be in place before the creation of the new State, even if only momentarily. There seems to be no legal reason why the Parliament could not support such an operation under the Territories power. The process already outlined by the Chief Minister will in any event entail the preparation by the Territory of a new State Constitution before the grant of statehood.

As to the constitutional position of a new State vis-à-vis the Commonwealth, there remains considerable 'doubt' as to the capacity of the Commonwealth to create a 'second-class' State in a constitutional sense, leaving aside the wider political desirability as regards the Federal system of even doing so. Mr Justice Toohey has taken the view that the wide discretionary power vested in the Parliament by s.121 of the Constitution to grant statehood would not enable it to override a number of express constitutional guarantees applicable to 'States' generally. I endorse that view, although I am aware of a contrary view on this point. The Judge's view derives some support from the comments of Williams J in ANA v Commonwealth (1945) 71 CLR 29 at 103, where he accepted that a Territory could become a new State and thereby acquire the protection of s.92 of the Constitution. Notwithstanding the wide discretionary power in s.121 it would seem a rather strained interpretation of that section that would allow it to be used to avoid entrenched constitutional rights expressed by reference to 'States' generally which are fundamental to the Federal system and the role of the States in that system. In connection with Mr Justice Toohey's reference to various High Court decisions on the question of the incapacity of the Commonwealth to discriminate against States or to interfere with their functions or threaten their existence, I would also refer to the recent decision of the High Court in the Queensland power dispute, reported in (1985) 159 CLR 192 (Queensland Electricity Commission v Commonwealth).

The Judge referred to the suggestion of Sawyer that as s.121 requires the terms and conditions of the grant of statehood to be imposed upon the admission or establishment of the new State, that these terms and conditions might be restricted to those necessary to facilitate, or which flow
from, the actual admission or establishment of the new State. He suggested that this restrictive interpretation is not easy to support. If it is in fact too restrictive a view, then some meaning must still be given to the word 'upon' in s.121. The logical meaning that suggests itself is that there must be a temporal relationship between the act of admission or establishment and the imposition of the terms and conditions. In other words, just as the act of admission or establishment is a once-only power to be exercised by the Parliament, so is the imposition of the terms and conditions. The Parliament cannot come back at a later time and legislate again under s.121 in respect of the same new State and the existing terms and conditions. The power has already been fully exercised.

This should not, however, prevent the imposition of terms and conditions at the time of the act of admission or establishment which provide in themselves a method of future adjustment. For example, it seems possible to provide, as a term or condition, for the extent of the representation of the new State in the Parliament in accordance with a fixed formula that would allow for later increases in the extent of that representation.

Mr Justice Toohey raised the wider issue of the constitutional validity of continuing Commonwealth legislative involvement after statehood in State-type matters. He stated that it is arguable that any attempt on the part of the Commonwealth to interfere in the federal distribution of powers would not be upheld by the High Court. With respect, I would endorse this view, even if the American doctrine of 'equal footing' is not found to be applicable in Australia. Leaving aside the few provisions in the Constitution expressed by reference to 'Original States', it is arguable that the Constitution recognises only one category of 'State'. It does not envisage the creation of an entity known as a 'State' which is constitutionally in quite a different position in relation to the Commonwealth from all the existing States. This view is supported by the definition of 'the States' in s.6 of the Constitution Act, extending to both original and new States. It is a view supported by Wynes (1976, 111-112) and other commentators, although there have been contrary views. It may not mean that a new State has to be set up in exactly the same way as existing States, nor that there cannot be special arrangements between the Commonwealth and the new State. However in terms of the constitutional relationship between the two, equality of treatment may be mandatory. Again the strength of this argument depends on the width of the discretion given to the Parliament under s.121 and the interplay between that section and the rest of the Constitution in its application to States generally.
Given these doubts, it seems unlikely that the Commonwealth would attempt to impose terms and conditions on the new State that gave it extended State-type powers and which were not acceptable to the majority of the residents of that new State. It would clearly be preferable if the terms and conditions of the grant of statehood could be negotiated before statehood between the Commonwealth and Territory Governments and be incorporated in some publicly available Memorandum of Agreement, subject of course to the subsequent legislative endorsement by the Parliament. Such an Agreement could also be reflected in the Constitution of the new State. The practice in the USA of having a Territory referendum after the passage of the Federal statehood legislation, but before the proclamation of statehood, has some merit in that it would ensure that the terms and conditions as finally incorporated in that legislation do in fact reflect the Memorandum of Agreement and are acceptable to Territorians.

I leave you with the thought that in strict legal theory it may be that statehood could be imposed by the Parliament on the Territory in terms not acceptable to the Territory, but such a course seems fraught with danger. Its implications for the Federal system as a whole would warrant careful consideration.
Appendix 1

EXTRACTS OF THE CONSTITUTION

Chapter V - The States

106. The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

107. Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by the Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

108. Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State.

109. When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

110. The provisions of this Constitution relating to the Governor of a State extend and apply to the Governor for the time being of the State, or other chief executive officer or administrator of the government of the State.

111. The Parliament of a State may surrender any part of the State to the Commonwealth; and upon such surrender, and the acceptance thereof by the Commonwealth, such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth.

112. After uniform duties of customs have been imposed, a State may levy on imports or exports, or on goods
passing into or out of the State, such charges as may be necessary for executing the inspection laws of the State; but the net produce of all charges so levied shall be for the use of the Commonwealth; and any such inspection laws may be annulled by the Parliament of the Commonwealth.

113. All fermented, distilled, or other intoxicating liquids passing into any State or remaining therein for use, consumption, sale, or storage, shall be subject to the laws of the State as if such liquids had been produced in the State.

114. A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State.

115. A State shall not coin money, nor make anything but gold and silver coin a legal tender in payment of debts.

116. The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

117. A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

118. Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State.

119. The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.

120. Every State shall make provision for the detention in its prisons of persons accused or convicted of offences against the laws of the Commonwealth, and for the punishment of persons convicted of such offences, and the Parliament of the Commonwealth may make laws to give effect to this provision.
Chapter VI - New States

121. The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit.

122. The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

123. The Parliament of the Commonwealth may, with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, increase, diminish, or otherwise alter the limits of the State, upon such terms and conditions as may be agreed on, and may, with the like consent, make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation to any State affected.

124. A new State may be formed by separation of territory from a State, but only with the consent of the Parliament thereof, and a new State may be formed by the union of two or more States or parts of States, but only with the consent of the Parliaments of the States affected.
Appendix 2

THE NORTHERN TERRITORY: ESTABLISHMENT AS A STATE

JOINT OPINION

Peter Durack and Maurice Byers

Our opinion has been sought upon the following questions:

(a) May the Northern Territory, consistently with the Constitution, be established as a new State of the Commonwealth?

(b) Whether the Constitution permits the creation of a new State which in its functions and powers differs substantially from existing States and which might be based upon a relationship with the Commonwealth different from that which prevails between the Commonwealth and the existing States?

It has been suggested that we should deal with the above two questions separately. In this Opinion we shall deal with question (a) above only.

We think that s.121 of the Constitution permits the establishment of the Territory as a new State of the Commonwealth and that no constitutional provision prevents it. We are aware that opinions to the contrary have been expressed. We shall first indicate the reasons persuading us that the course is constitutionally permissible, and thereafter deal with the contrary view.

By Letters Patent of 6 July 1863 the Queen annexed the Territory to the province of South Australia. The statutory warrant for this action had been given to the Crown by the Australian Colonies Act, 1861. At the date of the passing of the Commonwealth of Australia Constitution Act, the State of South Australia probably included the Northern Territory of South Australia annexed by the Letters Patent. The Territory is referred to in covering cl.6 of the Constitution as being included within the State of South Australia, the reason being the provisional nature of the annexation: Convention Debates (1897) Sydney, at 986.

On 7 December 1907 an Agreement was made between the Commonwealth of Australia and South Australia for the surrender by South Australia to the Commonwealth of the Territory upon the terms referred to in the Agreement. The Agreement was ratified by the Parliament of South Australia and the Parliament of the Commonwealth: see Northern
Territory Acceptance Act 1910, (Commonwealth) and the Northern Territory Surrender Act, 1907 (SA). The language of the Agreement and of the two statutes shows that the State and Commonwealth resorted respectively to s.111 as constitutional warrants for the surrender and acceptance of the Territory and s.122 for its government.

We turn now to the relevant constitutional provisions. Section 111 empowers the Parliament of a State to surrender any part of the State to the Commonwealth and provides that upon such surrender and the acceptance thereof by the Commonwealth such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth. Section 122 empowers the Parliament to make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth.

Section 121 is in the following terms:

121. The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit.

We think it fairly clear that s.111 was introduced into the Constitution to confer power on the States to surrender to the Commonwealth parts of that territory over which their Constitutions gave them legislative authority. But those Constitutions might not permit the surrender by them of any part of that area. We think that s.111 is at the least a State power pointing to the Commonwealth power contained in s.122 in the sense that the State power under s.111 is to surrender, while the Commonwealth power is to accept such a surrender under s.111 and thereafter to legislate for the government of the area surrendered under s.122: Paterson v O'Brien (1978) 138 CLR 276 at 281. So understood, the reference in s.111 to the 'exclusive jurisdiction' of the Commonwealth is at once natural and inevitable.

It may be, of course, that s.111 serves other purposes as well; but it is, we think, not open to serious question that it serves the purpose which we have just stated: see, for example, Quick and Garran, at 971 and 941-2; Wynes, 5th Ed (1976) at 133 and Lamsden v Lake (1958) 99 CLR 132 at 151; Spratt v Hermes (1965) 114 CLR 226 at 269-70, 282 and Commonwealth v Woodhill (1917) 23 CLR 482 at 487; Paterson v O'Brien (1978) 138 CLR 276 at 280-2.

We have already quoted the text of s.121 of the Constitution. It will be remembered that that section authorises the Parliament to establish new States and, upon such
establishment, to make or impose such terms and conditions including the extent of representation in either House of Parliament, as it thinks fit. The definition of 'The States' in covering cl.6 of the Constitution Act reads:

'The States' shall mean such of the colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia, including the northern territory of South Australia, as for the time being are parts of the Commonwealth, and such colonies or territories as may be admitted into or established by the Commonwealth as States; and each of such parts of the Commonwealth shall be called 'a State'.

The Territory ceased to be part of the State of South Australia in 1910. The definition's reference to admission and establishment, of course, looks forward to s.121 which, by empowering admission or establishment, involves that each new State shall be a part of the Commonwealth. The language of the section is thus apt to authorise legislation which establishes a Territory as a new State. This was the view of s.121 expressed by the early commentators on the Constitution: see Quick and Garran, at 969; Harrison Moore, The Constitution of the Commonwealth of Australia, 2nd Ed (1910) at 593.

A like opinion was expressed in 1929 by the Royal Commission on the Constitution: see the Report at 16. In Western Australia v Commonwealth (1975) 134 CLR 201 Gibbs J says: 'When the Constitution was framed it was, of course, contemplated that the Territories [he had previously mentioned the Northern Territory (of South Australia) as at Federation and that it was likely to become a Commonwealth Territory] might so develop in status that they might be allowed representation in the Parliament or might even be established as States and admitted to the Commonwealth' (at 84). Barwick CJ has more recently expressed the same view: Queensland v Commonwealth (1977) 139 CLR 585.

Once the conclusion is reached that a Territory may, under s.121, be admitted to statehood, no good reason exists to confine s.121 to Territories which the Commonwealth has accepted (s.122) but which a State has not surrendered (s.111). There is nothing in the language of s.111 which denies this, least of all perhaps the words 'exclusive jurisdiction', for they point only to the absence of State power over the surrendered area, as the remarks of Isaacs J of the same words in s.90 suggest: Nott Bros & Co v Barkley (1925) 36 CLR 20 at 29.

We do not regard the language of s.124 of the Constitution as in any respect opposed to the conclusion we have
mentioned above. That section is concerned with the separation of territory from a State and the union of two or more States or parts of States in each case with the consent of the Parliaments of the States affected. The necessity for the section is obvious enough, for the colonies which become States under the Constitution would, by their own constitutional instruments, have no power to cede part of their own territory nor to dismember themselves as States. It will be remembered that s.123 safeguards their territorial limits from action initiated by the Parliament (see Paterson v O'Brien supra at 281) and s.106 saves the Constitution of each State by providing that it shall, subject to the Commonwealth Constitution, continue as at the establishment of the Commonwealth, or until altered in accordance with the Constitution of the State. Sections 111, 123 and 124 allow the States and Commonwealth to override their Constitutions which s.106 maintains subject to those and other constitutional provisions and to the States' power of alteration. We would not regard s.124 as giving rise to an implication that s.121 should be limited in application to those circumstances which s.124 envisages.

We realise that Sir Garfield Barwick, when Attorney-General, expressed the view that there existed no constitutional warrant for the establishment of a Territory as a State. The note maintained of the reasons for that view seems to rely upon the assumption of a rule deducible from the Constitution that Territories might not become States by reason both of the provisions of s.111 and the absence of any section applying to them as s.124 applies to States. We have already indicated that we are unable, with respect, to accept that view. We would add that acceptance of the view attributed to Sir Garfield implies that the Territory might become a State if first the limits of South Australia were increased under and in accordance with s.123 and thereafter a new State formed pursuant to s.124 by the separation of (the same) territory therefrom. Whether Sir Garfield still entertains the opinion to which we have referred may now be doubtful, in view of his statement that 'the Constitution allowed of the formation of new States, if need be, out of dependent Territories and that by that means residents of the Territories would become part of the people of the Commonwealth, being members of a State': Queensland v Commonwealth (supra).

It has also been suggested, though not for many years, that the provisions of the Financial Agreement, read with s.105(A) of the Constitution, prevent the sub-division of an existing State and its admission as a new State. That view was much disputed but it does not, in any event, arise presently for consideration.
It is for the reasons indicated above that we expressed the view, at the outset of this Opinion, that the provisions of s.121 permit the establishment as a State of the Northern Territory and that no constitutional provision prevents this.

18 July 1978
Appendix 3

THE NORTHERN TERRITORY: ESTABLISHMENT AS A STATE
OPINION

Maurice Byers

I have been asked my opinion on the question:

Whether the Constitution would permit the creation
of a new State which in its function and powers
may differ substantially from existing States and
which might be based upon a relationship with the
Commonwealth different from that which prevails
between the Commonwealth and the existing States?

The question is intended to raise, first, whether the
representation of the new State in the Senate might differ
from the other States in number, and in the House of Repre-
sentatives be upon a basis other than that the number of its
members should be in proportion to the respective numbers of
its people and those of the other States; second, whether
its powers might be restricted in a manner different from
that of the existing States; and third, whether the Parlia-
ment might in the area of that restriction, retain legisla-
tive power.

My views have also been sought upon a suggestion made
by Dr Lumb in an article in the Australian Law Journal
entitled 'The Northern Territory and Statehood' and, finally,
upon a number of specific questions posed by the Depart-
ment of Aboriginal Affairs. I shall deal firstly with the
specific question I have set out above; thereafter with Dr
Lumb's suggestion and finally I shall set out and express my
opinion upon the particular questions raised by the Depart-
ment. I turn now to the first question.

Representation of the New State in the Houses

Section 121 authorises the Parliament to admit to the
Commonwealth or establish new States. It then provides that
upon such admission or establishment 'it may make or impose
such terms and conditions, including the extent of represen-
tation in either House of Parliament, as it thinks fit'.
Section 7 provides that the Senate shall be composed of
senators for each State, directly chosen by the people of
the State. The section goes on to provide — and I have left
out immaterial matter — that the Parliament may make laws
increasing or diminishing the number of senators for each State, but so that equal representation of the several original States shall be maintained and that no original State shall have less than six senators. Each senator is to be chosen for a term of six years. This provision is, of course, subject to s.15 of the Constitution.

Section 24 requires that the House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and that the number of such members shall be, as nearly as practicable, twice the number of senators. The section goes on to provide that the number of members chosen in the States shall be in proportion to the respective numbers of their people and shall, until the Parliament otherwise provides, be determined in accordance with its provisions. Those provisions require the ascertain-ment of a quota by dividing the number 'of the people of the Commonwealth' by twice the number of senators and then by dividing the population of each State by the quota so ascertained.

It is clear that the parity of membership in the Senate, for which s.7 provides, is only a parity between the several original States. That is the language of the relevant part of the section. It would therefore follow that no conflict with the text of the Constitution would arise should the Parliament choose, as s.121 indicates that it may, such number of senators for the new State as it saw fit, whether more, less than, or the same as the number for each existing State.

A conflict with the terms of s.24 would arise if the number chosen for the Representatives was not proportionate to the respective numbers of the people of all the States. Yet it is difficult to avoid the conclusion that the Parliament has committed to it a political power to choose, in the words of s.121, such number of members 'as it thinks fit'. I have shown that in relation to the Senate the exercise of the power in accordance with its terms involves no conflict with any constitutional provision. The question, therefore, is whether this power must in relation to the Representatives be treated as confined to a choice of such number as the Constitution would otherwise require. This seems to be the view of Barwick CJ. In Western Australia v Commonwealth (1975) 134 CLR 201 at 228-229, His Honour said:

To some extent s.24 will prescribe the representation of the residents of the new State who, because it is a State, become part of the people of the Commonwealth for the purpose of both sections. But there is scope for a limitation to be placed upon the number of members as well as upon the number of senators which the electors of
the new State may elect; and such a limitation might be regarded as affecting the extent of the representation. Thus, by determining the 'extent of representation', the numerical strength of the representation provided by the Constitution itself, may be determined by the Parliament at the point of, and as a term and condition of, the admission of the new State.

It is true, of course, that his Honour was there concerned to read down the provisions of s.122 of the Constitution by a course which required that the content of s.121 should also be diminished. The result, however, of this construction is a change in the language of the section. For a power to make or impose such term or condition relating to the extent of representation in either House of Parliament as it thinks fit, there is substituted one authorising the Parliament to impose a term and condition as it thinks fit relating to the extent or representation in one House only.

Once it is conceded that the provision authorises a choice of such number of senators as the Parliament thinks appropriate, then it necessarily follows that the language cannot be treated so as to limit the choice in relation to the Representatives. I think, therefore, that the Parliament may, pursuant to s.121, choose such number of senators and such number of members as it thinks is appropriate. The conflict between the sections should be resolved by treating as paramount that provision which deals specially with the subject matter; a conclusion which has the support of Quick and Garran (at 970) and Harrison Moore (1st Ed at 314).

Adoption of this view of s.121 involves that the second paragraph of s.24 would, after establishment of the new State, be restricted to an application to the original States. The first paragraph, concerned only with the nexus between the total numbers of the Houses, would remain unaffected and of continued application. But its presence tends to support the interpretation of s.121 which I have taken. For if the Parliament's power to determine the new State's numbers in the Representatives is confined to that which s.24 requires, the effect of the nexus provision would be to dictate the extent of its representation in the Senate also and thus render purposeless the section's express reference to the extent of representation in either House.

Two recent decisions of the High Court make it difficult to forecast what interpretation of s.121 will be adopted by a majority. Those decisions are Western Australia v Commonwealth (1975) 134 CLR 201 and Queensland v Commonwealth (1977) 139 CLR 585. Many of those who favoured a limited approach to s.122 said nothing which might suggest a conclusion adverse to that I have expressed in relation to
s.121. Nonetheless, the section was referred to during the course of argument in each case and is mentioned in a number of judgments, although it is correct to say that only the judgment of the Chief Justice, part of which is quoted above, favours an adverse interpretation of the section.

Restriction of New States' Powers

A brief reference to the analogous provisions of the Constitutions of the United States and Canada assists an understanding of the reasons why s.121 assumed the form it did and indirectly at least suggests one interpretation.

United States

Article IV s.3 gave Congress power to admit new States. It provided, so far as relevant, 'New States may be admitted by the Congress of this Union'. The Supreme Court construed the reference to 'this Union' as a 'Union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself': Coyle v Smith (1910) 221 US 559 at 567. It followed that restrictions imposed upon matters within State power were invalid and might be disregarded. Those within Federal power were treated as exercises of the relevant power and thus valid: Coyle v Smith, supra, at 568-570. This decision was delivered in 1910, but an examination of it and of some of the cases which are discussed in it establishes that the doctrines it lays down had been long accepted.

Canada

Section 146 of the British North America Act, 1867 empowered the Queen with the advice of the Privy Council on addresses from the Houses of the Parliament of Canada and of the respective Colonial and Provincial Legislatures seeking admission 'to admit these colonies or provinces, or any of them, into the union' and on such terms and conditions in each case as the Queen thinks fit to approve.

Section 2 of the British North America Act, 1871 empowered the Parliament of Canada from time to time to establish new Provinces in any territories forming part of the Dominion of Canada and provided that it might 'at the time of such establishment, make provision for the constitution and administration of any such Province and for the passing of laws for the peace, order and good government of such Province, and for its representation in the said Parliament'. These two provisions have been construed as authorising the establishment by the Parliament of Provinces
within the territory of Canada having Constitutions different from those of the original Provinces; Reference re section 17 of the Alberta Act [1927] SCR 367; Attorney-General (Saskatchewan) v Canadian Pacific Railway Co [1953] AC 594. The case first cited relied only on the power to make provision for the passing of laws for the peace, order and good government of the Province, whilst the second relied additionally on the fact that historically the later Provinces had differed constitutionally from the earlier and that the British North America Act recognised this. The 1871 Act was passed not only to confer express power to establish Provinces, but also to remove doubts occasioned by the fact that the Parliament had established a Province relying only on s.146 of the 1867 Act.

Section 121 owes something to all the above provisions yet differs markedly from each. I take it to be clear that the power to establish a new State would authorise a law providing what its Constitution should be even though the section does not, unlike the British North America Act, 1871, contain an explicit power to this effect. For the power to establish without more necessarily implies authority to frame those structures without which establishment as a State is impossible. The power implies everything necessary or convenient to make it effective. It would follow, unless the content of the section is diminished by other constitutional provisions, that a Constitution which excluded from State legislative power a particular subject matter or which granted authority over that subject matter to a Council constituted by appointees of the Governor-General, would be valid. No relevant restriction is afforded by s.121 itself: rather the reverse, for the reference to such terms and conditions as the Parliament should think fit indicates that the United States rule requiring equality of State powers inter se was intended to be displaced.

Neither s.107 nor s.108 can restrict so much of s.121 as relates to the establishment of a new State for each only applies to the admission of a colony. Such a restriction must be found, if at all, in implications drawn from the notion that all federations require an equality of State powers. Of course, the Canadian experience contradicts this, and if, as I think, one of the reasons for the reference in s.121 to terms and conditions is to make clear that equality could be displaced, so does s.121 itself (see Quick and Garran and Harrison Moore at the passages referred to above). It should also be borne in mind that the United States Constitution contained no power to establish new States.

The equality doctrine is inapplicable to such a power for it assumes States existing outside and independently of
the Constitution, and treats the plentitude of such State power (based on the notion of absolute sovereignty of the people of the State) as diminished by a delegation to the Federation of so much thereof as falls within the national power created by the Constitution, a delegation which can only occur upon admission. It can never occur where the new State owes its existence and hence its legislative power to a statute of the Parliament.

It is my view therefore that whereas here the Parliament will establish the new State, its Constitution may validly contain provisions denying it legislative competence over specific subject matters either for the time or subject to certain conditions even though those subject matters do not fall within the Parliament's own competence. Whether it might do so in relation to the admission of a new State does not arise. Upon that topic I express no opinion.

Commonwealth Exercise of Excepted Power

The last and most doubtful case is whether the Commonwealth Parliament might legislate in the area it has denied to the State although otherwise outside Federal power. It may do so upon matters within its powers and it may upon such subject matters restrict, under s.121, the competence of the State Parliament. So much might be done under the much narrower power granted to Congress by Article IV s.3: Coyle v Smith, supra. If the new State be denied power and Parliament does not have it, or may not obtain it, no one may legislate on the topic. Section 122 would have ceased to operate to feed Commonwealth legislative power upon establishment of the new State. Would s.121 authorise a law or the imposition of a condition whereby the Parliament, vis-a-vis the new State, might receive additional legislative competence?

In Coyle v Smith the Supreme Court said:

To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a Union of States unequal in power, as including States whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an Act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the Constitution alone, but in respect to new States, enlarged or restricted by the conditions imposed upon new States by its own legislation admitting them into the Union (at 567).
But s.121 requires one to maintain otherwise so that the result denied in the case of the United States is true for the Commonwealth. It is a necessary consequence of the denial of the operation in the Australian Constitution of the doctrine of equality.

Establish or Admit?: Dr Lumb's views

I deal now with Dr Lumb's suggestion. It is to the effect that those Territories which have received representative and responsible government may not be established as new States (that is, receive from the Parliament a Constitution giving them statehood or have it imposed upon them), but may be admitted only so that Commonwealth power in such a case does not extend to their establishment as a State (see 52 ALJ at 559).

It is no doubt correct that prior to admission some political organisms exist as States: New Zealand is an example (see 'The States' in covering cl.6 of the Constitution Act). Other colonies were envisaged as being in like situation, as the definition makes clear. But the Constitution contains nothing that suggests the Northern Territory was so considered. Indeed, the definition of 'The States' in covering cl.6 strongly implies otherwise. The Territories are, prior to admission, subject to Commonwealth legislative power unrestricted as to subject matter and remain so until they become States; colonies are not. The Territory may be clothed with a Constitution appropriate to statehood under s.122 or thereunder and as well under s.121. I do not think that in the case of a Territory one must read s.121 as if the words 'admit' and 'establish' expressed notions so opposed that the Parliament might not establish the Territory as a State and thereupon admit it to the Commonwealth (see Western Australia v Commonwealth (1975) 134 CLR 201 at 248). Dr Lumb's view implies that in point of power a situation may exist before admission of a Territory when the power under s.122 ceases to be exercisable. Indeed that idea is at the root of the statement that it is not the function of the Parliament to establish or create a State Constitution (52 ALJ at 559). A Constitution embodying representative and responsible government once given may be taken away or improved by Commonwealth legislation. I do not see any legal justification for Dr Lumb's statement, the substance of which I have stated above, nor for the view he expresses in his article (at 559).

Aboriginal Land Rights

I now set out and answer the particular questions of the Department of Aboriginal Affairs. The first question is:
Is it possible for the Aboriginal Land Rights (Northern Territory) Act 1976 ("the Land Rights Act") to continue as a valid law of the Commonwealth, beyond the point at which the Territory is admitted or established as a State under s.121 of the Constitution?

I would propose to indicate my answer to this on the assumption there is no restrictive provision in the Constitution of the new State.

The Land Rights Act is a law made under s.122 of the Constitution. The effect of s.111 upon s.122 is that the sole legislature which may pass laws for the Territory is the Parliament of the Commonwealth. It may do so by enacting the substance of the law or by setting up a subsidiary body in which it vests the capacity to pass laws for the government of the Territory. The Land Rights Act is an example of the former type of legislation. Upon the Territory becoming a State, the legislative authority to pass laws having effect in its territorial area will be divided between the new State and the Parliament of the Commonwealth, the latter as to those subject matters upon which it possesses legislative power. The result, therefore, will be that for an exclusive legislature there has been substituted two legislatures each of which may pass laws in relation to Aboriginal land rights. The Parliament may do so by reason of s.51 (xxvi) coupled with s.51 (xxxii) of the Constitution and the Parliament of the new State may do so because its authority, in the absence of some legislative restriction constitutionally imposed, would in this respect be concurrent with that of the Parliament but without the former's obligation to provide just terms. The Land Rights Act deals with land which is Crown land and thus involves no acquisition of property from third persons. It would seem to follow that upon the Territory becoming a State the constitutional powers contained in s.51(xxvi) would suffice to support the legislation.

The question whether or not such support is ever necessary only arises upon the basis that there are some types of legislative power the continued application of which the High Court has treated as essential to the operation of laws made under them. A majority of the Court took this view of the exclusive power contained in s.52 of the Constitution so that the acquisition of land as a Commonwealth place yielded the consequence that State laws theretofore operating in it ceased any longer to apply: R v Phillips (1970) 125 CLR 93. Whether that decision would in like circumstances be followed by the Court as presently constituted is an open question. But the reasoning of the majority in my view treats as crucial to its conclusion the
exclusive character of the Commonwealth power under s.52. See the report at 101-102, 105, 109, 120.

Since after the Territory becomes a State there exists a power which would support the law, the consequence even on the reasoning of the majority seems to be that the Land Rights Act would not cease to be in force merely by reason of the Territory becoming a State. Since s.109 would apply to this law (Lamshed v Lake (1958) 99 CLR 132) any law of the State inconsistent with it would, to that extent, be invalid. The result of this is that the new State could not amend the provision of the Act. The Parliament of the Commonwealth might do so by reason of s.51 (xxvi) and (xxx1) of the Constitution.

Commonwealth Controls

The next question is:

In relation to the Northern Territory, is the appropriate means to 'admit' or 'establish' the Territory as a new State, and as a consequence, what, if any, are the implications for the extent to which the Commonwealth may both control constitutional development towards statehood and impose terms and conditions on the new State?

I think it appears that I take the view that the Parliament may establish the Territory as a State. The power to give the Territory a Constitution derives from either s.122 and s.121 in combination or from s.121 alone. This matter was also referred to in the Joint Opinion given by the Attorney-General and myself on 18 July 1978. The authority of the Parliament in my view extends to the insertion and entrenching of provisions in the Constitution of the new State such that power is denied to it to enact certain types of legislation either totally or without the consent of the Parliament or the Governor-General or some person extraneous to the new constitutional authority. Parliament may also impose terms and conditions on the establishment or admission of the new State in the manner I have discussed in answering the first question. Again, power to repeal or amend Commonwealth laws applying in the Territory may be conferred on the new legislature either absolutely or subject to exceptions thereout of laws on stated subject matters. Power to amend the excepted class could be conferred, for example, upon the Governor-General in Council.

The third question is:

Can the Commonwealth, upon the admission or establishment of the Northern Territory as a
State, impose any of the following terms and conditions:

A. that land vested in Aboriginal Land Trusts not be resumed, compulsorily acquired or forfeited under any law of the (Northern Territory) State;

B. that the power of the Legislature of the State not extend to the making of laws in respect to the acquisition of land vested in an Aboriginal Land Trust otherwise than on just terms;

C. any other term or condition consistent with, but not extending beyond, the legislative powers of the Commonwealth that would enable the Commonwealth to ensure the continued operation of the Aboriginal Land Rights (Northern Territory) Act 1976?

The Parliament could restrict the power granted to the new State so that it might not compulsorily acquire or forfeit land vested in Aboriginal Land Trusts. It might also restrict that power so as to prevent it extending to the making of laws for the acquisition of Trust land except upon just terms. It would also follow that it might subject the State Constitution to a provision restricting the legislative powers of the new State as to prevent it repealing or affecting the operation of the Land Rights Act.

Enforcement

The fourth question is:

Would the Commonwealth be able to enforce any terms and conditions imposed upon the new State? If so, how?

The Commonwealth could enforce the terms and conditions imposed upon the new State by challenging the legal efficacy of laws passed in breach of such terms and conditions provided these terms and conditions were phrased as restrictions on the legislative power of the new State and entrenched in its Constitution.

The fifth question is as follows:

In the event of changes in land rights legislation by the new State, what would be the effect on a deed of grant that had taken effect in accordance with s.12(4) of the Act:
A. if the grant had been registered under the Real Property Act of the Northern Territory, as amended?

B. if the grant had not been so registered, and

(i) an application to the Registrar-General for registration of the grant had been made under s.12(5) of the Land Rights Act?

(ii) no such application had been made?

If its Constitution so permitted, the new State might pass a law acquiring property of the type described whether the land was registered under the Real Property Act or in the course of registration. In other words, the question would fall to be answered by a consideration of the powers granted to the new State in its Constitution. As I have already said, the Land Rights Act should, in the absence of a grant to the new legislature to repeal existing Common-wealth law, operate notwithstanding inconsistent State laws (see s.109 of the Constitution).

I answer the questions as above.

10 December 1980

SUPPLEMENTARY OPINION

Mr Dennis Rose* has suggested (and I agree) that some elaboration of my answer to the first question about Aboriginal land rights is desirable.

The effect of the principles I stated is as follows. Upon the Territory becoming a new State, the Land Rights Act will continue to apply within it in the form the Act had immediately prior to statehood. It is probable that the new Constitution will create a Crown in right of the new State and that land presently vested in the Crown in right of the Territory will be vested in the Crown in right of the State.

* Now Principal Advisor in constitutional law in the Attorney-General's Department, Canberra.
The Land Rights Act refers to land of the Crown in right of the Commonwealth (s.3(6)) and land of the Crown in right of the Territory (s.3A). After statehood the operation of the Act upon land of the Crown in right of the Commonwealth will continue unaffected. But its operation in respect of land of the Crown in right of the Territory will cease because there will no longer exist land answering that description. The past operation of the statute upon such land will not, of course, be displaced.

The Parliament will retain power to make the statute apply, by an amendment, to land of the Crown in right of the new State but only at the price of payment of just terms (s.51 (xxvi) and (xxx) of the Constitution). This last conclusion could be affected by terms and conditions under s.121 of the Constitution whereby claims for compensation in such case were surrendered by the new State.

12 March 1981
Appendix 4

NORTHERN TERRITORY STATEHOOD
OPINION

Colin Howard

I am asked to advise generally on the constitutional questions adverted to in the options paper forming annexure 'A' to the Brief and specifically on certain stated points. Since it appears to me that s.121 of the Constitution is capable of being sensibly interpreted in a manner which differs in significant respects from the usual assumptions about its meaning, I turn first to what I believe to be its correct interpretation. My understanding of the section departs from many of the usual assumptions about its meaning and effect, assumptions which, as it seems to me, flow from a dual failure. One is neglect of the wider constitutional structure with which the framers of the document intended it to be consonant. The other is neglect of the precise wording both of s.121 itself and of other relevant sections of the Constitution. In the case of s.121 one is singularly unconstrained by authority in seeking to arrive at its correct meaning. The High Court has had little to say about s.121, there never having been a new State, and its correct interpretation has never arisen directly for decision. There is therefore no reason for disregarding the meaning which in my opinion it clearly bears.

For ease of reference I reproduce the text of s.121:

The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit.

I am aware that commentators have given consideration to the question whether the distinction drawn in s.121 between admitting a new State and establishing a new State has significance for the interpretation of the section. In my view it is not significant except to the extent that it supports the view that new States may come into existence either from within Australia or, by extension of the national boundaries, from outside. The word 'establish' is perhaps more apt for the former situation and the word 'admit' for the latter, but taken together they seem to me clearly to mean that both situations are intended to be within the scope of the section. So far as the question may
be thought to bear upon whether s.121 permits the establishment or admission of the Northern Territory to statehood. I see no reason to disagree with the conclusion reached in the Durack/Byers Opinion of 18 July 1978 that it does [15 July in original, corrected, eds].

Equally, although I do not recall that anyone has raised the point, I do not regard the fact that s.121 refers to States in the plural and not the singular as implying that they can be established or admitted only in groups of not less than two; cf the similarly baseless singular versus plural argument which was rejected by the whole Court in Cormack v Cope (1974) 131 CLR 432.

Although the main weight of what is in my opinion the most cogent reading of s.121 rests upon the reference to terms and conditions, I note as a further preliminary that the general assumption that the word 'impose' means 'impose upon the prospective new State' is not necessarily correct. Whatever the expression 'terms and conditions' is ultimately held to mean, it is by no means a necessary conclusion that relevant terms and conditions apply only to the prospective new State. It may well be that under some circumstances terms and conditions of establishment or admission of a new State might have to be imposed upon the Commonwealth itself, and/or one or more of the existing States and/or, in the case of a new State from outside Australia, some other country altogether or international organization. In case it be thought that this reading of the section puts too much strain on the word 'impose', I mention that the whole of the relevant expression is 'make or impose'. This form of words, as in the case of 'admit ... or establish', suggests an intention to give the section a wider range of operation than one in which the Commonwealth is always necessarily the dominant party and in a position to compel acceptance of its point of view. As will be seen, this point has some bearing on what I believe to be the correct interpretation of the more prominent expression 'such terms and conditions ... as it thinks fit'.

The central question in the interpretation of s.121 has always been seen as the correct delimitation of the scope of the expression 'such terms and conditions ... as [the Parliament] thinks fit'. In a sense this is correct but in my view the proper understanding of terms and conditions in this context depends ultimately on what s.121 means by the word 'States'. The reason is that since the section contemplates that at the end of the process one finishes up with a new State, the reference to terms and conditions of its establishment or admission must be subordinate to that ultimate object. Terms and conditions cannot include any measure which would prevent the end product being reasonably described as a State. This point is in my view
fundamental to the correct understanding of the whole text of s.121.

The question is what the section must be taken to contemplate as the essential characteristic of a new body politic within the Federation if it is to be properly described as a new State. There are a number of indications in the general context, both in s.121 itself and in the other three sections which make up Chapter VI of the Constitution, that a close resemblance to the existing States is assumed. Or in other words that when s.121 refers to new States the word 'new' means 'additional' and not 'new types of'. One is that s.123 clearly assumes that all States will have parliaments and electors. In making this assumption it does not distinguish between new and original States. The same is true of s.124 and s.111 in Chapter V. By contrast s.122, by the expression 'may allow', equally clearly makes no such assumption about Territories. In s.121 itself the reference to the extent of representation in the Parliament appears to assume at the very least that there will be some representation, addressing itself to the extent of the representation and not to the basic fact of representation.

A similar precision in distinguishing expressly between different categories of States when, and only when, the constitutional intention is to draw such a distinction is found in ss.106-108 of Chapter V. Sections 107 and 108 both apply in their own terms only to States which were formerly colonies, not to States which were formerly something else, as for example separate States now united into one or States which were formerly parts of other States (s.124). The careful contrast with s.106, which expressly applies both to original States ('each State ... as at the establishment of the Commonwealth') and to States admitted or established later, is striking.

It can be argued therefore with cogency that terms and conditions cannot be made or imposed under s.121 which would have the effect of depriving a new State of an elected legislature of its own or of all representation in the Parliament. To at least this extent the power of the Commonwealth to make or impose terms and conditions under s.121 does not extend to according to the Commonwealth unfettered freedom, subject only to political considerations, to design the constitutional structure of the new State. So much seems clear enough and is unlikely to be controverted by the High Court. A new State must have at least an elected legislature, perhaps a directly elected legislature, and representation in each House of the Parliament, otherwise it is not a State within the meaning of s.121. The next question is what other characteristics it must have in order to meet the criteria of statehood for s.121 purposes.
To my mind there is no mystery about this. The overwhelming impression given by the constitution is that the word 'State' is intended to bear the same meaning throughout, the only difference between States being the distinction drawn in several places between original States and, by implication, new States. Such an interpretation disposes at once of any further need to consider what the word 'State' means in s.121 in particular, for it leads immediately to the conclusion that a new State must in all significant constitutional respects resemble the original States as closely as the case permits. This conclusion has an obvious and considerable impact on the expressions 'terms and conditions' and 'thinks fit'.

There is much to support this interpretation. Section 6 of the Constitution Act (covering cl.6) expressly includes former colonies and Territories which are admitted or established as States within its definition of 'The States'. A peculiarity of this definition is that since it does not use the expression 'new' States but refers only to colonies or Territories, it may be impossible under s.121 to admit as a new State any body politic which is no longer either a colony or an Australian Territory. This point need not be pursued since we are concerned on this occasion only with the Northern Territory, which is clearly within the statutory definition. Neither does it affect the correct interpretation of s.121 for the present purpose, for in seeking to delimit the original scope of the section it has to be remembered that at the time of its enactment New Zealand was still a colony and evidently within contemplation as a possible State, either upon the establishment of the Federation or later. The only distinction drawn in covering cl.6 between States is temporal, original States being those colonies which became States on the establishment of the Federation and all others necessarily new States established or admitted later.

It is unnecessary to take an excursion through every section of the Constitution in order to demonstrate that there is much in the Constitution itself to support the impression given by covering cl.6 that, except where the context expressly requires otherwise, the word 'State' is intended to bear the same meaning throughout. Perhaps the best example is furnished by the group of sections, ss.106-120, collected in Chapter V under the heading 'The States'. This miscellany is a particularly good guide to legislative intention in the present context because wherever it is desirable to draw a distinction between original States and new States in Chapter V the distinction is carefully and expressly drawn. The inference is strong that in the sections where no such distinction is drawn, no such distinction is intended. Sections 106-108 have been referred to above. In addition to what is there said it is to be
noted that ss.106-108 distinguish between States which are States from the outset and States which enter the Federation later. Section 109 and ss.111-120 draw no such distinction and thereby create a cogent inference that they apply with equal strength to new States as well as to the original States.

In my opinion this is conclusive against the common assumption that the subject matter of these sections is capable of being altered in its application to new States by reference to the terms and conditions power of s.121. Not only is the implication that ss.109 and 111-120 apply with equal strength to all States a logically cogent understanding of the relation between s.121 and Chapter V of the Constitution: it is also compelling as a matter of what I might call constitutional common sense. It is scarcely conceivable that a subordinate reference to terms and conditions in s.121 was intended to enable the Commonwealth to create new States to which ss.109 and 111-120 did not apply. It strains credulity to believe that these few words in s.121 were intended to form the basis, if the Commonwealth thought fit, for the introduction of such a degree of disunity into the Federation.

A further telling section to the same effect in Chapter V is s.110. This reads 'The provisions of this Constitution relating to the Governor of a State extend and apply to the Governor for the time being of the State, or other chief executive officer or administrator of the government of the State'. This clearly contemplates that a new State may be admitted to the Federation which by reason of its pre-existing Constitution (s.106) has a formal Head of State who is not technically a Governor in the sense in which the Governor of any of the present Australian States provides a direct link with the Crown. The section is no doubt apt also to cover the case of an original State which wishes to dispose of the Office of Governor but retain the powers conferred upon Governors by the Constitution. Nevertheless it applies at least equally well to the situation of a new State which does not have a Governor but an equivalent officer. In this context it adds significantly to the case for believing that a State for the purposes of s.121 must be as near as the case permits identical with a State for any other constitutional purpose.

The reason is that s.110 confers upon the chief executive of a new State the same powers as the Constitution confers upon the Governor of any State which has a Governor. The most obvious reference is to ss.12, 15 and 21, all of which refer to the role of the Governor of a State in relation to the State's representation in the Senate. The inference seems to me to be irresistible that s.110 thereby reinforces the argument that s.121 takes Senate representa-
tion for granted, seeking only to allow the Commonwealth to qualify it numerically. In so doing s.110 also adds yet further strength to the argument that where the constitutional intention is to distinguish between original States and other States it does so expressly. Since no such distinction is drawn in s.121, apart from the qualification relating to representation in the Australian Parliament, it follows that in all other respects a new State can be established under s.121 only if it either is or becomes as identical as the case permits with the original States. If this be correct, and the case for arguing that it is correct is strong, no term or condition can be imposed under s.121 which attempts to qualify the meaning of the word 'State' in s.121.

Yet another indication that where a distinction is intended between States the Constitution expressly says so lies in the character of the distinction drawn. In ss.7 and 95, for example, special arrangements are made for Queensland and Western Australia respectively. It is obvious in both cases that the express provision is being made to deal with a contemporary cause of concern (and cf s.125). The same applies to the guarantees extended expressly to the original States alone. They identify contemporary causes of concern to all the original States. They do not signify a constitutional implication that in the relevant respects the original States were intended to be in a permanently advantageous position over new States. The other guarantees are to be found in ss.7 (minimum 6 senators; cf s.9, Senate electoral laws to be 'uniform for all the States') and 24 (minimum 5 MHRs). In fact the s.24 guarantee, although expressed in general terms, was really a special provision for Western Australia and Tasmania, but this is of no consequence. The point is that the two general guarantees are confined in terms to the original States only because, whilst of particular contemporary concern to them, they would not necessarily be appropriate to all new States. An instance of inappropriateness is the Northern Territory's own case. It would be a considerable distortion of the House of Representatives to guarantee the Northern Territory 5 MHRs on its present population if it becomes a State. Hence the extent of representation is left to s.121. Once again, where a reason exists for distinguishing between States, the Constitution draws it carefully and expressly.

An illuminating test of the scope of the power to impose terms and conditions under s.121 is to ask whether terms and conditions can be imposed which arbitrarily lessen what would otherwise be the legislative powers of the new State. In this connection I refer to the Byers Opinion of 10 December 1980. I have arrived at a different conclusion from the Opinion on this point for two main reasons. One is that I think the answer depends upon a wider range of
considerations appearing upon the face of the Constitution itself than that Opinion takes into account. In particular I think that the reference in the Byers Opinion to a 'notion that all federations require an equality of State powers' does less than justice to what appears to me to be the very strong implication throughout the Constitution that the unqualified word 'State' in s.121 bears, unless the context expressly requires otherwise, the same meaning as elsewhere in the Constitution. This contention does not require an assumption about all federations implying equality of State powers, or indeed any other assumption. Secondly, I think that the assertion in the Byers Opinion that no relevant restriction is afforded by s.121 itself gives too little consideration to the express statement in the section that the terms and conditions may extend to the extent of representation in the Parliament. The former point having been argued already, I turn to the latter.

The essential words of s.121 now under consideration are the following: 'may ... make or impose such terms and conditions, including the extent of representation ... as [the Parliament] thinks fit'. The general assumption hitherto has been that this reference to representation implies that the expression 'terms and conditions' can include basic features of the constitution of a new State. This conclusion is thought to follow from the fact that in the Australian Federation representation in the two houses of the Parliament is a fundamental matter in itself. The argument, as I understand it, is that since s.121 goes out of its way to make clear that the terms and conditions power extends even to so fundamental a feature of statehood as Federal representation, it necessarily implies that any other feature of statehood as we normally understand it, whether fundamental or not, can be similarly altered by terms and conditions. Another way of putting the point is to say that s.121 is usually read as if the reference to representation illustrates the sorts of terms and conditions which can be imposed, not so much adding anything to them as making sure that the inclusion of representation is put beyond doubt.

This I believe to be a mistaken reading of the section both because it leads to a conclusion which appears to be denied everywhere else in the Constitution and because, in addition to wider considerations, it is not grammatically persuasive to read the section in this sense at all. On the contrary, it is perfectly possible and far more reasonable to read the phrase 'including the extent of representation' as inserting into the expression 'terms and conditions', which immediately precedes it, a particular form of term and condition which would not otherwise be included. This makes the reference to representation entirely consistent with all the other considerations so far mentioned in this advice which lead to the conclusion that unless otherwise expressly
provided a new State must be on terms of complete equality with the original States. It does so by making clear that terms and conditions which restrict, or indeed enlarge, what would otherwise would be the new State's representation in the Parliament are an express exception to the general rule and not an illustration of its scope.

This being so, the effect of the express reference to the extent of representation is to strengthen the implication to be gathered from the use of the word 'State' in the Constitution generally that the expression 'terms and conditions' bears a restricted meaning which does not include anything as fundamental as an alteration of the legislative powers of the new State by comparison with those of the original States. As a general proposition my view of the scope of 'terms and conditions' is that the expression is intended to do no more than make clear that the Parliament has power to require, and if necessary legislate for, such adjustment as may be necessary, particularly by way of financial accommodation to fit the prospective new State into the current operation of the Federation with the minimum disruption of established arrangements.

This is not to say that terms and conditions under appropriate circumstances cannot include basic changes. The hypothetical of New Zealand applying for entry to the Australian Federation as a new State affords an illuminating example. Quite apart from such matters as transitional financial arrangements, and leaving aside the interesting possibility arising from covering cl.6 that New Zealand, no longer being a colony, may be outside the power to admit as a new State, it is obvious that considerable adjustments would have to be made to the present Constitution of New Zealand for it to undergo the transformation from being an independent country to a State of the Australian Federation. Having regard to the concluding words of s.106 of the Constitution I have no doubt that the terms and conditions could and would include the necessary preliminary alterations to the New Zealand Constitution or the preparation of an entirely new one.

That particular point is remote from the Territory case but illustrates the general proposition that although the expression 'terms and conditions', properly read, is apt to encompass whatever is necessary or desirable to be done to bring about as close resemblance as possible between the new State and the original States, this in no way implies an arbitrary power to impose or insist on constitutional changes which do not increase but on the contrary diminish that resemblance. To turn the power to such a use, as for example by according to the new State less legislative power than is enjoyed by the existing States, is to exceed the purpose of the power and therefore the scope of the power
itself. This is in my opinion a far more cogent interpretation of the terms and conditions power than any which attributes to the Commonwealth virtually unrestricted capacity to design the new State and deprive it of whatever legislative power the Commonwealth sees fit. I conclude therefore that s.121 does not empower the Commonwealth to reduce the legislative powers of a new State to anything less than the legislative powers enjoyed by the original States.

It is worth mentioning in passing that this reading of s.121 also makes sense of the otherwise slightly puzzling words in the section which say that terms and conditions may be made or imposed 'upon' the admission or establishment of the new State. Strictly speaking it can be said that this makes no sense, for once the admission or establishment of the new State has taken place it must be too late to start imposing conditions. But if one reads the word 'upon' not in its temporal sense but as intended to go together with the words 'make or impose', the intended meaning of the section on this point becomes much clearer. It means 'and the Parliament may make or impose such terms as it thinks fit as conditions of admission or establishment'. This is not to alter the wording of the section but to make clear by paraphrase what the meaning of the section actually is.

In the immediate context of the Northern Territory it is helpful also to bear in mind that the foregoing interpretation of terms and conditions is less obvious when dealing with the creation of a new State out of territory which is already part of Australia than it is when dealing with the possible admission, as in the New Zealand example, of a body politic from outside Australia. Because a Federal Territory has necessarily, throughout its existence, enjoyed a far lesser degree of freedom to run its own affairs than any original State, that habit of mind tends to persist and to be translated into an assumption that if it becomes a State, the Parliament has complete freedom to design or specify what sort of a State it is going to be. Such a reading of s.121, quite apart from the extensive conflict which it introduces with the rest of the Constitution, is even less obvious or likely if one is considering the admission of a body politic from outside Australia which has never previously been subject to control by the Parliament.

Finally, before I turn to the specific questions asked in the Brief it is useful also to consider what may have been the motive for expressly conferring upon the Parliament the power to restrict or extend what would otherwise be the normal size of the new State's representation in that Parliament. Having regard to the very different attitudes from nowadays which were taken towards parliamentary representation and the franchise at the turn of the century,
it seems probable that the intention was protective of predominant Australian values on these matters. The most obvious possibility is that apprehension was felt about non-whites, or people who had no property qualification, or women, enjoying the same voting rights as white male Australians who did have a property qualification. On the racial point uncertainty may well have been felt about the implications of an application for admission as a new State by New Zealand having regard to its substantial Maori population and their rights of citizenship in that country. It will be recalled that similar motivations explain the express references in the original Constitution, now deleted by amendment in 1967, to Aborigines. The former s.127 provided that 'Aboriginal natives' should not be counted when calculating the population of the Commonwealth or of any State (cf s.25). Formerly also the Federal legislative power of s.51(xxvi) to legislate with respect to the people of any race for whom it was deemed necessary to make special laws did not include the 'Aboriginal race'. There is no reason to doubt that the express reference in s.121 to representation in the Parliament as a term or condition which might be imposed upon a new State had any other origin than apprehensions of these kinds. If this is correct it supplies yet another reason why one should not read into the reference to representation the far-reaching consequences usually attributed to it at the present day.

I turn now to the specific questions asked of me in the Brief. The first is: Is s.121 of the Constitution qualified by s.24* and if so in what relevant respects?

This question cannot be answered altogether in isolation from the Senate representation governed primarily by s.7 of the Constitution. Viewing the two together I find myself in agreement with the views expressed in the Byers Opinion of 10 December 1980. I am of opinion therefore that s.121 requires that there be a minimum representation of one senator and one MHR but empowers the Parliament to increase this representation to any extent it sees fit in either House. There is no doubt an implied limitation on increasing the representation of a new State to a figure grossly out of proportion to the representation of the other States, but as a practical matter this may be disregarded. Although in my view s.121 overrides the quota provisions of s.24, my understanding is that the Government of the Northern Territory has accepted the appropriateness of the s.24 quota as a condition of statehood. Since, as I understand it, the Territory is conceding also the inappropriateness of the guarantee of a minimum of five MHRs which s.24 extends to the original States, no further question seems to arise under this head in relation to s.24. My answer to the question put is therefore that s.121 of the Constitution is not qualified by s.24.
What is the likelihood of a Court challenge based on the relationship between ss.121 and 24 succeeding if statehood is granted pursuant to s.121?

I again refer to the Byers Opinion of 10 December 1980. The tenor of the relevant part of the Opinion is that six years ago it was difficult to forecast what interpretation of s.121 would receive at least majority acceptance in the High Court. It is still difficult because the Court has never had occasion to give thorough consideration to the scope of the section and the personnel of the Court has changed significantly since the few passing remarks made in the Territory Senators cases in 1975 and 1977 (Western Australia v Commonwealth (1975) 134 CLR 201 and Queensland v Commonwealth (1977) 139 CLR 585) were handed down. My view is that the conclusion reached both in the Byers Opinion and by me in answer to the previous question rests upon fairly obvious and straightforward reasoning which is likely to commend itself at least to a majority of the High Court.

Would the penultimate paragraph of s.128 of the Constitution require a majority of electors in each State to carry a constitutional amendment granting statehood to the Northern Territory?

This is an altogether different question from anything taken under consideration previously in this advice. In effect it asks whether a proposed amendment to the Constitution which provides for parliamentary representation of a new State is an alteration which diminishes the proportionate representation of each of the other States in either House of the Parliament, or at least affects the provisions of the Constitution in relation thereto. Once again something may turn on the resolution of a grammatical point which is best explained by different reference to the text of the penultimate paragraph of s.128. The relevant text is as follows:

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approved the proposed law.

The grammatical conundrum is whether the words 'or in any manner affecting the provisions of the Constitution in relation thereto' refer back only to altering the limits of
a State or refer back also to changing proportionate representation. As a matter of grammar either reading of the paragraph is equally cogent. The answer must therefore depend on wider considerations.

The first question is what is meant by an alteration which diminishes proportionate representation in either House or the minimum number of MHRs. Of itself there is no apparent reason for complicating the meaning of these two references, which are clearly intended to be taken together as related subjects. The minimum number of MHRs seems to be unmistakably a reference back to the last sentence of s.24, which guarantees each original State a minimum of five members. This being so, the reference to proportionate representation, so far as it applies to the House of Representatives, seems equally clearly to be a reference to the quota provisions of s.24. Similarly the reference to proportionate representation, so far as it applies to the Senate, is a reference back to the equal representation of not less than six senators guaranteed to the original States in the third paragraph of s.7. On this reading the reason why the reference in this paragraph of s.128 is to 'State' and not to 'original State' is that it allows for the possibility that any of these representation provisions might be extended by constitutional amendment to a new State, which ought then to enjoy the same degree of protection from amendment pursuant to s.128 as the original States.

The alternative interpretation is that any provision by constitutional amendment for the representation of a new State in the Parliament necessarily diminishes the proportionate representation of all the other States. I find this most unpersuasive. It does not correlate at all with the accompanying reference to diminishing the minimum number of MHRs. Neither does it co-ordinate with the power of the Parliament to provide for the representation of new States, under s.121, and of Territories, under s.122, by ordinary legislation without any such constitutional objection. I am therefore of opinion that a proposed constitutional amendment providing for representation of a new State in both Houses of the Parliament which does not purport to alter the guarantees given to the original States in ss.7 and 24 is not a proposed amendment which requires to be passed by a majority of voters in each State.

The next question is whether such a proposed amendment is one which in any manner affects, as opposed to diminishes, the relevant provisions of the Constitution. In view of the grammatical ambiguity of this part of the penultimate paragraph of s.128 it is as well to act on the assumption that it refers back to the passages affecting representation as well as to altering the limits of a State.
On this basis the question is whether a proposed amendment providing for representation of a new State in the Parliament in any manner affects the provisions for proportionate representation of the States in either House or the minimum number of MHRs otherwise than by diminishing them.

Since I have concluded already that quite the most probable meaning of the references to diminishing representation is that they are not to be expressly diminished by amendment without the requisite majorities, the only other way in which they can be affected seems to be by increasing them. Just as a new State amendment of the kind in contemplation does not in my view diminish that representation, a fortiori it does not increase them. I am unable to think of any other way in which it could be said to affect them. My answer to the question posed is therefore that the penultimate paragraph of s.128 does not require a majority of electors in every State to approve a proposed amendment of the kind in contemplation.

Can any mechanism be devised whereby, notwithstanding the refusal of the High Court to give advisory opinions, areas of constitutional doubt in the present context might be resolved by a High Court decision?

The simplest method of achieving this end would be for the Parliament to pass an Act providing for the admission of the Northern Territory to statehood, including such terms and conditions as might be agreed upon between the Territory and the Commonwealth, and as might be insisted upon by the Commonwealth in the absence of agreement, and include in the Act a provision that it is to come into effect on a date to be proclaimed. The matter would be assisted if agreement were reached between the Territory and the Commonwealth also that in view of the many constitutional doubts surrounding admission to statehood it would be desirable for as many of the doubts as possible to be authoritatively settled, and to arrange matters accordingly. If such an agreement were arrived at, it appearing to be in the interests of all parties to co-operate, the Commonwealth could then delay proclaiming the coming into operation of the Act until such time as the Territory, joined by interested States, could issue a writ in the original jurisdiction of the High Court claiming appropriate declarations of invalidity.

My authority for suggesting this course of action is Attorney-General for Victoria v Commonwealth (1962) 107 CLR 529. In that case Victoria sued the Commonwealth for declarations that ss.89-94 of the Marriage Act 1961 were invalid. At the date when the writ was issued out of the High Court, which was 18 August 1961, these sections had not been proclaimed into operation. Nevertheless the High Court
entertained the action on the basis advanced by Victoria that the matters raised were of such far-reaching public importance that an early resolution of their validity was in the public interest. Precisely the same considerations seem to me to be applicable in the present case. It would clearly be in the interests of everyone concerned to settle points of doubt before the Act came into force rather than invite the expense and confusion of invalidation, wholly or in part, after it had purportedly come into effect. I see therefore no reason why the Commonwealth, and no doubt some or all of the States, should not co-operate in the matter. In the case of the Commonwealth co-operation might be carried so far as to expressly include some provisions for the very purpose of having their validity challenged before the High Court. Whatever the resolution of the matter in relation to provisions included for this reason, they could always, if the parties saw fit, be amended or removed after the result of the litigation were known.

The alternative of seeking to pursue an amendment of the Constitution which would confer power to give advisory opinions, either generally or in restricted situations, upon the High Court or other Federal courts, is in my view not worth pursuing. There would probably be significant judicial opposition to it and it needs comparatively little opposition, especially on technical matters, to ensure the defeat of an amendment. It might well also provide a convenient peg on which to hang opposition to statehood for the Northern Territory for political reasons.

Are there any other relevant legal considerations or available options?

The only other point which occurs to me at the time of writing this advice is that there is probably no advantage to the Territory in seeking to pursue the achievement of statehood by way of constitutional amendment. The hazards of constitutional amendment are notorious. It seems to me unlikely that there would be in the foreseeable future such unanimity of political opinion in favour of the Northern Territory's being admitted to statehood that the amendment would receive the degree of all party support which seems nowadays to be essential. There is the further consideration that such an amendment can be proposed only by the Parliament, which means for practical purposes the Australian Government for the time being. If the Government were unwilling to grant statehood on terms and conditions acceptable to the Territory under s.121, it seems unlikely that it would propose instead a constitutional amendment which by definition would be opposed by the Territory itself. As a matter of law the Territory can probably be converted into a State whether it likes it or not under
either s.121 or s.128 but the question is of only theoretical interest. So far as I am aware therefore the only practical option is to pursue s.121 and hope for cooperation in seeking to resolve serious doubts about its meaning by bringing an action for declarations in the High Court before any proposed statute comes into operation.

I so advise.

31 October 1986

* Section 24 of the Constitution is as follows:

The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.

The number of members chosen in the several States shall be in proportion to the respective numbers of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner:-

(i) A quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of the senators:

(ii) The number of members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.

But notwithstanding anything in this section, five members at least shall be chosen in each Original State.
Appendix 5

THE NORTHERN TERRITORY AND STATEHOOD

Daryl Lumb


On 1 July 1978 the Northern Territory of Australia took a significant step towards statehood within the Australian Federation with the attainment of a large measure of responsible government. This was accomplished through the transfer to a local Territorial Executive responsible to the Legislative Assembly of a wide range of State-type functions and with control over its own finances (1). The transfer of State-type functions is intended by the Federal Government to be completed in 1979 with the transfer of the residue of functions (2).

The attainment of responsible government does not, of course, automatically entitle the Territory to become a State of the Commonwealth of Australia. It does point, however, to a condition of political autonomy which, in the normal course of events, will be transformed into statehood. However, the actual attainment of statehood is dependent on action being taken by the Parliament under s.121 of the Constitution. That section provides:

The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit.

On admission or establishment the Territory becomes a State of the Commonwealth of Australia with a new Constitution which under s.106 'shall continue until altered in accordance with the Constitution of the State'.

There is nothing in either section which prescribes the method by which the transition from Territory to State is achieved nor the method by which the new Constitution of the new State will be determined. Nor is it clear whether a Territory is 'admitted' or 'established'. It is an uncertain question whether these words in s.121, read in the light of s.106, designate alternative methods of 'State creation' with 'admission' referring to the incorporation into the Commonwealth of an autonomous political community and 'establishment' referring to the creation by the Commonwealth of a State out of a Territory which has not achieved
such autonomy. If such a distinction exists, the wording of s.106 suggests that the Commonwealth on 'establishing' a new State 'establishes' its Constitution, while in 'admitting' a new State, it admits a political entity with a Constitution already formed.

In such a case it is to be expected that the processes of constitutional evolution deriving from responsible government will bring a Territory to statehood with a locally-determined Constitution which is subject to ratification and to the imposition of 'terms and conditions' by the Parliament, but not to any substantial modification of that document, at least without the consent of the Territory's law-making authority.

Before further exploring this question, it will be useful to outline the constitutional evolution of the Territory to determine whether there are any pre-ordained patterns in that development which may affect the nature of the statehood which, in the ordinary course of events, it will ultimately attain.

History of Constitutional Development

The history of the Territory is unique in the sense that it involved, so to speak, a constitutional retrogression (3): it was severed from the State of South Australia and created a Federal Territory ten years after Federation (4). It also had the distinction of being a part of two separate colonies in the nineteenth century: of New South Wales until 1863 and of South Australia thereafter.

The constitutional evolution of the Territory had two facets, first in terms of legislation enacted by the Parliament under the initial part of s.122 of the Constitution as laws for the government of a Territory, second, in terms of its association with the Federal system under the latter part of s.122 by way of legislation giving representation in the Parliament to Territory residents.

Internal Developments

In 1888 provision was made for two members in the South Australian Legislative Assembly and for representation in an Upper House electorate (5). Under the provisions of the Northern Territory (Administration) Act 1910 provision was made for the government of the Territory by an Administrator appointed by the Governor-General. Subordinate legislation for the Territory was to take the form of Ordinances made by the Governor-General (6). For portion of the Second World War the northern part of the Territory was under military
administration. In 1947, amendments to the Northern Territory (Administration) Act provided for the establishment of a Legislative Council (of seven official and six elected members) which had the power to make Ordinances (subject to the assent of the Administrator) for the peace, order and good government of the Territory (7). In 1959 the membership was altered to eight elected, six official and three non-official members (8). In that year also an Administrator's Council was set up to act as an advisory body to the Administrator (9). In 1968 the status of non-official member was abolished and the Council was increased to consist of eleven elected and six official members (10).

In 1974 a Legislative Assembly was constituted for the first time, in place of the Legislative Council, to consist of nineteen elected members, and the Administrator's Council was restructured to consist of five elected members (11). In 1976 further reforms were made with the formation of an Executive Council of the Northern Territory to advise the Administrator on matters relating to the administration of the Territory (12). The function of the executive members who comprised the Council and who might be described as embryo Ministers of the Crown was inter alia to formulate policies and administer laws within their 'portfolios' (13). The implicit assumption was that in appointing such members the state of the House would be recognised and that the Leader of the majority party would become the 'Chief' executive member.

The enactment of the Northern Territory (Self-Government) Act 1978 ushered in the era of responsible government for the Territory. Under s.31 of the Act it was provided that:

...the duties, powers, functions and authorities of the Administrator, the Executive Council and the Ministers of the Territory imposed or conferred by or under this Part extend to the execution and maintenance of this Act and the laws of the Territory and to the exercise of the prerogatives of the Crown so far as they relate to those duties, powers, functions and authorities.

Section 32 established the office of Administrator, while s.33 created an Executive Council to advise the Administrator on the government of the Territory in relation to matters in respect of which the Ministers of the Territory were invested with authority pursuant to s.35. The number of Ministerial offices were to be determined by the Administrator from time to time (s.34). The areas of executive authority attached to the offices were to be determined by regulations made by the Governor-General (s.35). While s.36 vested in the Administrator the power of making and termin-
ating appointments to such offices, it was understood that, in the light of the doctrine of responsible government which underlay the constitutional framework, the Ministers of the Government of the Territory would be appointed from the majority party in the Legislative Assembly.

Association with the Federal System

In the years that elapsed since the transfer of the Territory to the Commonwealth in 1911, there had been a gradual development in the extent and nature of the representation in the Parliament which had been accorded to the residents of the Territory by legislation passed under the second limb of s.122. In 1922 provision was made for a member representing the Territory, but without voting rights, in the House of Representatives (14). In 1936 the member acquired the right to vote on matters relating to Ordinances for the Territory (15). In 1959 this right was extended to voting on Bills or matters relating solely to the Territory (16). Finally in 1968 the member was granted full voting rights (17).

The most interesting questions in this context were raised by the Senate (Representation of Territories) Act 1973 (18) under which the Parliament created two senators with full voting rights (19) for each of the two internal Territories, the Northern Territory and the Australian Capital Territory. The term of a Territory senator was, however, tied to the life of the House of Representatives and therefore could not exceed three years (20) (as compared with a six-year term for State senators). The legislation was twice challenged - in 1975 (21) and 1977 (22) - on both occasions unsuccessfully. However, a majority (23) of the Justices in the second case were of the opinion that the federal nature of the Constitution, as particularly expressed in relation to Senate composition by s.7 of the Constitution, stood in the way of allowing the creation, under the second limb of s.122, of Territorial senators with full voting rights. However, the principle of stare decisis, inter alia, caused two (24) of the Justices, who in the 1975 case had found the legislation invalid, to follow the earlier majority decision. The end result was that, by a majority of five to two (25), s.122 was applied in such a way as to provide for a different type of senator for a Territory - one whose term was tied to that of the House of Representatives (and elected at the same time as members of that House) rather than to the term of his State Senate colleagues. Also, in the second case, the majority of the Justices upheld the validity of the Commonwealth legislation granting full voting rights to the members representing the two Territories in the House of Representatives (a matter not raised in the earlier case) (26).
The effect of these decisions was that pursuant to legislation enacted under the Territories power (s.122) the Territory could be associated with the Federal system by way of full voting representation in the two Houses with (at least) two senators (27) and one member of the House of Representatives.

Some uncertainty has existed as to the extent to which Chapter III of the Constitution (the Judicature chapter) applied to the Territories (28). Certainly, the Judges of the Territory Supreme Courts are not Justices within the meaning of s.72 of the Constitution (29) and therefore are not entitled to a term of office prescribed for Federal Justices by legislation passed pursuant to that section as amended by constitutional referendum in 1977 (30). Since that successful referendum on the tenure of Federal Justices (31), this issue is not likely to be of great moment.

There is some doubt also as to whether original jurisdiction can be conferred on the High Court outside the parameters of s.75 and s.76 by legislation enacted pursuant to s.122. Likewise, doubts have been expressed as to whether the various rights and liberties vested in residents of the States by various clauses in the Constitution apply to Territories (32). Teori Tau v Commonwealth (33) gave recognition to the power of acquisition of land in a Territory untrammelled by the requirements of 'just terms' prescribed by s.51 (xxxiv) of the Constitution although it was suggested in that case that the guarantee of religious freedom in s.116 did apply to the Territories (34). However, it appears that the right under s.80 of the Constitution to trial by jury for indictable offences does not apply (35). Therefore, the enjoyment of the complete range of rights and liberties guaranteed by the Constitution by the residents of the Territories must await statehood unless such rights are bestowed earlier by Commonwealth or Territorial laws (35a).

While the Territory is moving towards plenary statehood the full legislative power of the Parliament continues. If this power were exercised on a day-to-day basis the enlargement of the areas of responsibility of the local legislature would be stunted. Consequently, the method by which the enlargement can take place is for the Commonwealth to promote the law-making power of the local legislature in relation to State-type powers: this will entail a policy of abstention by the Parliament in exercising a legislative power in these areas. Ministerial Statements have indicated an acceptance of such a policy, except in regard to legislation relating to the Supreme Court, and legislation affecting uranium mining and related matters (36).
Admission to Statehood

The sections regulating the admission of a Territory to statehood have already been set out. It is apparent from those sections that no steps are prescribed for the Territory in its constitutional movement to statehood nor is anything said about the manner in which the Constitution of the new State is to be formed. The new State is to be 'admitted to the Commonwealth' or 'established' by the Parliament on such terms and conditions as the Parliament lays down.

Section 106 provides that the Constitution of the new State shall continue as at its admission. This wording suggests that, at least as far as the admission of a State is concerned, there will be a pre-existing Constitution already agreed upon or created by certain processes which have taken place, and that the Parliament in admitting the new State will ratify that Constitution but will not bring it into being.

However, it is necessary to answer the question raised at the beginning of this article. Are there any differences between 'admission' and 'establishment'? If establishment refers to the creation of a new State (and its Constitution) by the Parliament then that Parliament is invested with the major responsibility for determining the content of the new State's Constitution (37). Dictionary definitions do not assist in clarifying any such distinction. Establishment may connote 'fixing', 'settling' and 'instituting' or 'ratifying' and 'confirming' (38).

Quick and Garran contrast the two methods by confining 'admission' to the entry into the Commonwealth of external political communities, while asserting that 'establishment' refers to the creation of new States from Territories or out of existing States forming part of the Commonwealth (39). They list three types of colonies which may be admitted: (1) colonies known as the Australasian colonies which included the original States and New Zealand; (2) other British colonies in the Pacific (for example, Fiji); and (3) colonies which might have been formed out of the colonies belonging to the previous two categories (for example, by partition) (40). The major Pacific Ocean colonies have achieved independent status or associated status with another country since 1900, and are members of the Commonwealth of Nations. There is no legal obstacle to the admission of any of these countries; they must, however, accept the Constitution and comply with the terms and conditions imposed by the Parliament.

In relation to 'establishment', Quick and Garran consider that this word refers to the formation of new
States out of Federal territory or States already in existence (for example, by partition) (41). They state (42):

...there is no actual affirmation that new States may be formed out of Federal territory. It may be assumed, however, as unquestionable that while some of the Territories may permanently remain in a dependent condition subject to the dominion and exclusive jurisdiction of the Commonwealth, others, when sufficiently developed and not required or appropriated for Federal purposes, will be organized into new States having the special privileges of State Government with State representation in the Federal Parliament.

At the Melbourne session of the Federal Constitutional Convention (1898) there was some discussion (44) on the wording of the initial draft of the existing s.121 (then proposed cl.114) (45). In an interchange of views on the meaning of admission and establishment, Mr Glynn, expressing the opinion that the right of admission of existing colonies seemed 'to be confined to the colonies as they now stand', asked the question (46):

'If Queensland is divided into three colonies, can those three colonies come in?' To this Mr Isaacs retorted: 'The clause provides that new States may be established from time to time'. Mr Glynn: 'Does that not apply to new States within the territorial jurisdiction of the Commonwealth?'
Sir John Forrest interjected: 'No, you can take in New Guinea if you like'. Mr Barton, the Leader of the Convention, stated that if an existing colony were subdivided, the divided colonies would come in under the provision allowing the Parliament to establish new States. The admission phrase on the other hand was designedly used so as to enable it to apply only to those colonies which might at first enter the Federation, and with their existing autonomy, and the remainder of the clause (ie the establishment portion) is intended to apply to the other colonies'.

However, Mr Higgins took issue with this interpretation and a further exchange of views occurred (47):

Mr Higgins: As attention is riveted on those words, I will do what I have not done as yet throughout the Convention, namely, direct the notice of the Drafting Committee to the way in which this clause is drawn. I cannot see why the word 'establish' is used there, and I would
suggest to the Drafting Committee, very respectfully, that if Queensland were divided into three colonies before the people of that part of Australia applied for admission to the Federation, it would be quite a false statement to say that the Federal Commonwealth establishes those three colonies.

Mr Isaacs: No, the clause speaks of establishing them as new States, not as colonies.

Mr Higgins: I only want to take care that there shall be no mystical distinction urged hereafter as between 'establish' and 'admit'. Those three colonies would be established by the Imperial Parliament. I think that the true wording of the clause is that the Federal Parliament may admit any existing colonies or any new States hereafter created.

Mr Symon: Why not say 'establish' or 'admit'?

Mr Higgins: Yes; I cannot see the force of the distinction that is drawn between 'establish' and 'admit' in this connection. There is a force in our ordinary parlance. However, I will not move an amendment, because the drafting of the Bill is in the hands of very competent persons, and but for the fact that these words are being specially dealt with, I would not have risen to say that the word 'establish' here is not the correct word to use.

The question that the words 'may from time to time establish new States' stand part of the clause was resolved in the affirmative.

The differences between the Barton and Higgins interpretations is a subtle one. The Barton view (48) appeared to confine 'admission' to the existing Australian colonies which had developed to a status which might be described as 'responsible and representative government'. If, however, a colony is subdivided, the existing autonomy is dissolved: consequently a partitioned or severed area would come in under the establishment limb. It appears to be implicit in this view that a part of an existing State which has become a Territory (such as the Northern Territory) would be established by the Federal Parliament as a new State. This is the view of Quick and Garran (49). The view of Higgins, however, denied that there was any mystical distinction between admission and establishment. It can be assumed that he would have regarded Federal territory as coming into the Federation under either portion of the clause. No
constitutional consequence would depend on the distinction.

However, it is the view of this writer that the distinction is an important one. Moreover, the expressed view of Quick and Garran and the implicit view of Barton in relating to the creation of new States out of Federal Territories would appear not to be correct: it is more appropriate to describe at least those Territories which have attained responsible and representative government as being 'admitted' to the Commonwealth as new States rather than as being 'established'.

The importance of the distinction is, as has already been pointed out, reflected in the wording of s.106 of the Constitution which contains an implication that a political community with a Constitution already formed (that is a Territory which has attained a degree of autonomy) is admitted with that Constitution which continues as at the admission. The formation of the Constitution therefore predates the admission of the Territory as a State. Thus a constitutional structure of autonomy is already imprinted on the territory of the political entity which is admitted. The function of the Parliament is to ratify such a Constitution (which could include a right to request amendments if the Parliament is not satisfied with the content of the Constitution) and to approve admission on terms and conditions. It is not the function of the Parliament to establish or create a State Constitution. If this view is correct the word 'establishment' would in practice be limited to the formation under s.124 of new States out of existing States. In such a case the entities concerned, that is, the partitioned areas, would not have their own Constitutions and therefore it would be necessary for the Parliament to establish a Constitution (50).

American Practice

The view expressed here - that it is apposite to describe the process by which a Territory becomes a State as 'admission' - accords with American practice, although the comparable section of the United States Constitution does not contain the word 'establishment'. The relevant section - Article IV, s.3(1) - provides:

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States or Parts of States, without the consent of the Legislatures of the States concerned as well as of the Congress.
A major area, from which new States were to be created to join the thirteen original States of the American Federation, was the area of land known as the North West Territory (that is, the lands north and west of the Ohio) (51). The North West Ordinance of 1787 provided for the organisation of territorial government in this area based on progress in population. It contained provisions relating to the establishment of gubernatorial rule as an initial step; later bicameral legislatures were to be established. It also set out fundamental articles of compact. The fifth of these articles provided that there should be formed in the Territory not less than three or more than five States and that 'whenever any of the said States shall contain 60,000 free inhabitants, such State shall (and may before) be admitted by its delegates into Congress on an equal footing with the original States in all respects whatever, and shall be at liberty to form a permanent Constitution and State government, provided it shall be republican, and in conformity to these articles of compact' (52).

Willoughby (53) referred to the usual practice by which Territories were admitted to statehood in these terms:

The people of a Territory petition Congress to grant them statehood. If that body is favourably disposed, a so called 'enabling act' is passed, authorizing the framing of a State Constitution, prescribing the manner in which it shall be framed, and laying down certain requirements that must be met. All these conditions having been met, a resolution reciting this fact is passed by the Congress, and the Territory declared a State and admitted as such into the Union. In some cases the final step in the process has been a proclamation issued by the President in obedience to the direction of Congress.

This was the usual and regular process. In not a few instances (54):

however, the inhabitants of the Territories have met in conventions and framed Constitutions without first obtaining the authorization of Congress. The acceptance, however, by that body, of the instrument framed has been considered sufficient to validate the proceeding.

The most recent examples of admission to statehood have been Alaska and Hawaii, (both admitted in 1959). In both cases the steps involved were as follows. The Territorial legislature made provision for the holding of a Constitutional Convention to prepare a Constitution for the new State and for the submission of the Constitution to the
people of the Territory. The Constitution as thus prepared was adopted by vote of the people which was taken at election time. Congress later enacted a Statehood Act under which the State Constitution was found to be in conformity with the United States Constitution and accepted and ratified. The State was declared to be a State of the Union and was declared admitted into the Union on an equal footing with the States on a date to be proclaimed. Each of the Statehood Acts contained terms and conditions relating to the admission (55).

A Constitution for the Northern Territory of Australia

The status of the Territory is, as has been pointed out, unusual in that for several years after Federation it was part of an original State. Its detachment from South Australia brought it under the paramount power of the Parliament. It is clear from the decision of the High Court in Berwick Ltd v Deputy Commissioner of Taxation (56) that the Territories are part of the Commonwealth. They are not, however, completely 'fused' with the Commonwealth in its political sense: that fusion will come with the attainment of statehood. It is therefore proper to interpret the phrase 'admit to the Commonwealth' in s.121 as including the admission of a Territory into the Federation of the States. It is not inappropriate to describe the process by which the Territory will attain statehood as a process whereby the Territory, after having attained responsible government, thereupon sets in train the machinery under which a State Constitution is framed, after which the Territory seeks approval of this Constitution by the Parliament and admission to the Commonwealth. This process would conform to the implicit assumption in s.106 than an admitted State comes in with a Constitution already framed, although such a Constitution is subject to approval by the Parliament under s.121.

The internal steps to be taken in the framing of the Constitution are not prescribed. The steps followed by the Australian colonies in the 1890s which culminated in Federation, comprised the holding of a Constitutional Convention (pursuant to enabling Acts passed in the colonies) consisting of delegates from the colonies, and referenda in the individual colonies to approve the draft Constitution (57). Certain changes were made by the United Kingdom Parliament before the draft Bill was enacted (58).

The processes of Convention and referendum, while highly desirable, are not of course mandatory. The Territory Legislature could, in the absence of Federal legislation, determine the method whereby the State Constitution was to be framed. If the Convention and referendum method were not
adopted, a legislative Select Committee or a consultative process are other processes which could be used, but whatever method is adopted, it would be necessary, in order for the Constitution to gain acceptance, for it to reflect a basic consensus among the residents of the Territory.

Amendment of the Constitution

Section 106 provides that the Constitution of the State shall continue as at the admission of the State 'until altered in accordance with the Constitution of the State'. Presumably, the Constitution Act of the new State will contain an amending procedure indicating the manner in which constitutional alterations are to be made. Depending on whether rigidity or flexibility is aimed at, the Constitution will contain 'manner and form' provisions. Section 106 will have the effect of immediately entrenching these provisions. Therefore, if a referendum procedure is prescribed as a method of altering the new State's Constitution, s.106 will give effect to that requirement so that the new State's Parliament must comply with it. On the other hand, if a simple majority process is prescribed as the amendment procedure, that too would become the requisite method of change until altered. Under the powers of constitutional change which are recognised as applying to State Constitutions a restructuring of a State Parliament for legislative purposes may occur (59). Consequently a simple majority procedure may be utilised in such a way as to introduce rigidity into the new State's constitutional amendment procedure. Such a constituent (restructuring) power is derived from a general power to make laws for the peace, order and good government of the territory of the new State, as the Colonial Laws Validity Act, 1865 (Imp) would not apply to a new State (60).

Terms and Conditions

The nature of the terms and conditions which the Parliament may impose in relation to the admission of a new State is somewhat obscure. Certainly s.121 permits the Parliament to determine the number of senators and members of the House of Representatives for the new State, and the requirement of equality of original State representation in the Senate will not apply. Therefore, there is no constitutional obligation on the Parliament to make provision for ten senators for the new State. Also, Quick and Garran suggest that 'the principle of proportional representation in the House of Representatives, though expressed without qualification in s.24, might, under this section, be varied in the case of new States' (61).
Among the conditions which have been imposed in relation to the admission of Territories as States in the United States are conditions requiring recognition of equality of citizens, requiring the cession of territory, and regulating the transmission of, or succession to, public property (62). The Statehood Acts of Alaska and Hawaii contain conditions to the effect that the Constitutions of the new States shall be republican in form and not be contrary to the Constitution of the United States and to the principles of the Declaration of Independence (63).

Quick and Garran give as examples of conditions which might be imposed under s.121, the condition that the Constitution shall contain a reasonable rule of suffrage and contain no provision contrary to the recognised usages and policy of the other States (64), but the concept of 'policy' is a vague one and local policies differ.

Presumably, if a condition is not incorporated into the new State's Constitution Act but remains in the Statehood Act and is subsequently breached, then certain consequences could follow. While a State could not be deprived of statehood, it is possible that the Commonwealth Government could sue the State in the High Court for breaching a condition given constitutional force by s.121. The High Court would then be faced with the problem of determining whether a breach of condition was of a political nature for which no legal remedy was available, or whether the breach entailed legal consequences for which a grant of an injunction might be appropriate.

It would appear that two basic Acts will be required for the admission of the Territory to statehood: (a) a Constitution Act of the Territory Legislature emanating from the local indigenous processes, whether with or without participation of the residents at a Convention or by way of referendum; (b) the Admission or Statehood Act of the Parliament ratifying the Constitution and containing conditions (if any) which the Parliament wishes to impose. Federal legislation enacted in relation to matters such as uranium and Aboriginal land rights could be continued in operation, either by force of the Statehood Act or of separate Acts, if that pre-admission legislation applied to the Territory directly in its Territorial condition (that is, as legislation operating under s.122). However the continuation of such legislation with the new State in this way would depend on whether such matters came within the ambit of the heads of legislative power contained in the different placita of s.51 of the Constitution, or within the scope of other provisions of the Constitution conferring legislative powers on the Parliament.
Footnotes


3. While the same may be said of the Australian Capital Territory, the formation of that Territory for the purposes of the Seat of Government under s.125 differentiates that Territory from the Northern Territory.

4. Three major steps were involved: its surrender by the South Australian Parliament pursuant to the Northern Territory Surrender Act, 1907 (SA); its acceptance by the Federal Parliament under s.111 of the Constitution pursuant to the Northern Territory Acceptance Act 1910; and provision for its government by the Northern Territory (Administration) Act 1910. The Territory was formed on 1 January 1911. Section 5 of the Northern Territory (Self-Government) Act 1978 established the Territory as a body politic under the Crown by the name of the Northern Territory of Australia.

5. Northern Territory Representation Act, 1888 (SA) s.3.


7. Act No 39, s.4.

8. Act No 28, s.8.

9. Act No 28, s.18.

10. Act No 47, s.3.

11. Act No 30, ss.5, 12.

12. Act No 66, s.6.

13. Act No 66, s.7.


15. Act No 65, s.2.

16. Act No 27, s.3.

17. Act No 11, s.4.
18. This was one of the Acts passed at the joint sitting of the Houses of the Federal Parliament in 1974.

19. Section 5.


21. Western Australia v Commonwealth (1975) 134 CLR 201.


26. In Attorney-General for New South Wales (at the relation of McKellar) v Commonwealth (1977) 139 CLR 527, the Court had upheld the validity of ss.1A and 10 of the Representation Act 1973, which excluded the Territory senators and the people of a Territory for the purpose of determining 'nexus' and population and therefore the number of members of the House of Representatives in the States under s.24 of the Constitution.

27. Gibbs J indicated that he was prepared to examine the validity of any legislation which increased the number of senators: (1977) 139 CLR at 601.


30. Constitution Alteration (Retirement of Judges) 1977. A maximum age of seventy years is stipulated, subject to the determination of a lesser age by Federal Parliament which shall not be under sixty-five years of age. The tenure of Family Court Justices has been prescribed as a term ending at sixty-five years of age: Family Law Amendment Act 1977. The age limit does not affect the tenure of Justices appointed before the alteration was made.

31. The practice has been adopted by the Government of appointing several persons as Justices of the Federal
Court and Judges of a Territory Supreme Court with the same tenure of both offices, ie, seventy years of age.

32. See Wynes Legislative, Executive and Judicial Powers in Australia (5th ed, 1976), pp 115-117.


34. Ibid, at 570.

35. R v Bernasconi (1915) 19 CLR 629.

35a. In actual fact the Self-Government Act, ss.49 and 50, extend in substance the freedoms guaranteed by s.51(xxxi) (acquisition on just terms) and s.92 (free trade between the Territory and the States) to the Territory.


37. Irrespective of the question whether it takes account of local opinion in the area to be established as a new State.


39. Annotated Constitution of the Australian Commonwealth (1901), pp 968-969. The phrase 'part of the Commonwealth' must be understood as comprising both the continent of Australia (including its States and internal Territories), adjacent islands forming part of either, and external Territories. See Berwick Ltd v Deputy Commissioner of Taxation (1976) 133 CLR 603 at 608. See also Spratt v Hermes (1965) 114 CLR 226, at 247 (Barwick CJ), at 270 (Menzies J). Cf the view of Kitto J, ibid, at 250 et seq. However, 'the Commonwealth' in its institutional sense as used in s.121 appears to have a narrow meaning - the Federated States. Thus a Territory acquired by the Commonwealth under s.122 is not admitted to the Commonwealth in this institutional sense.

40. Annotated Constitution, at p 968.

41. Ibid, at p 969.

42. Ibid, at p 969.

43. That is, Covering Cl.6, which includes in the definition of 'States' such colonies or Territories as may be admitted into or established by the Commonwealth as
States. It is the opinion of the writer, however, that this definition does not compel an interpretation of s.121 which characterises the grant of statehood to Self-Governing Commonwealth Territories as 'establishment'.

44. *Convention Debates* (Melbourne Session) at 694-695.

45. The wording of proposed cl.114 was as follows: 'The Parliament may from time to time admit to the Commonwealth the existing colonies of [here name the colonies which have not adopted the Constitution] and may from time to time establish new States, and may upon such admission or establishment impose such terms and conditions, including the extent of representation in either House of Parliament, as it thinks fit.'


47. Ibid, at p 696.

48. The view of course was directed to the predecessor clause of s.121, but the reasoning would appear to apply to the terms 'admission and establishment' as used in the present s.121.

49. Op cit, at p 969.

50. Covering cl.4 of the Constitution refers to the 'establishment' of the Commonwealth. The word 'establishment' in this context is appropriate as it refers to the creation of a new 'nation State' by the federation of the colonies; see Quick and Garran, op cit, pp 343-344. Section 5 of the Self-Government Act provides that 'the Northern Territory of Australia is hereby established as a body politic under the Crown by the name of the Northern Territory of Australia'. Here again the word is appropriate to describe the change in constitutional status effected by an Act in relation to a Territory over which the Parliament has paramount power under s.122.


52. Ibid, at p 198-199.


54. Ibid, at p 404.

55. See 48 *United States Code Annotated* Prec # 21, 491.
56. (1976) 133 CLR 603. See also n39, ante.

57. See Quick and Garran, Annotated Constitution of the Commonwealth of Australia (1901), pp 150 et seq.

58. For the discussions surrounding these amendments see Quick and Garran, op cit, pp 228 et seq.


60. A new State is, of course, not a colony within the meaning of s.1 of the Colonial Laws Validity Act, 1865 (Imp).

61. Annotated Constitution, op cit, at p 970.

62. Ibid.


64. Op cit, at p 970.
Appendix 6

THE NORTHERN TERRITORY: CONSTITUTIONAL STATUS PRESENT AND FUTURE

Geoffrey Sawer
[from Herr and Loveday, eds, 1981]

The Northern Territory is still in legal theory simply a Federal Territory, wholly subject to the authority of the Parliament of the Commonwealth of Australia, which has provided for its government chiefly, though not entirely, by exercising the power given by s.122 of the Constitution (which is cl.9 of the Commonwealth of Australia Constitution Act, 1900, which in turn is the basic norm of the Australian constitutional system). Section 122 so far as relevant provides: 'the Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth'. The Territory was annexed to South Australia by prerogative act of the Crown in 1863, and was ceded to the Commonwealth by South Australian statute and accepted by the Commonwealth by Commonwealth statute in 1907, those statutes being made under s.111 of the Constitution. Until the High Court decided Paterson v O'Brien (1978) 138 CLR 276, there was some doubt as to whether the cession was valid, because it had not been ratified by the South Australian electors as s.123 of the Constitution may be thought to require when (as here) the cession altered the boundaries of the ceding State. However, the High Court then held unanimously that s.123 does not apply to territory cessions under s.111. Hence it is beyond question that the Northern Territory was validly constituted a Federal Territory and is validly governed as such.

Self-Government

Politically, the Territory after a long course of evolution comparable with that of the original Australian colonies between 1824 and 1855, has now acquired a high degree of autonomy in the exercise of local Self-Government on Westminster parliamentary principles, pursuant to the terms of the Northern Territory (Self-Government) Act 1978, a statute of the Parliament. This creates a unicameral parliament, the Legislative Assembly, and endows it (s.6) with power in terms reminiscent of the State Constitutions: 'Subject to this Act, the Legislative Assembly has power, with the assent of the Administrator or the Governor-General, as provided by this Act, to make laws for the peace, order and good government of the Territory'. It is likely that the courts will treat this provision, as they have similar expressions in State Constitutions, as requiring only a territorial connection between a law and the
Territory, and will not allow the question whether the law is in fact likely to serve either peace, order or good government to be canvassed as an objection to its validity (1). The Act provides in s.31 for the exercise of executive power in terms reminiscent of the Federal rather than the State Constitutions: 'The duties, powers, functions and authorities of the Administrator, the Executive Council and the Ministers of the Territory imposed or conferred by or under this Part extend to the execution and maintenance of this Act and the laws of the Territory and to the exercise of the prerogatives of the Crown so far as they relate to those duties, powers, functions and authorities'. The Administrator is appointed by the Governor-General (s.32), and appoints Ministers: following the Constitution (s.64), though not in such clear words, it is probable that the Administrator must choose Ministers from the members of the Assembly (ss.35, 36) so that 'responsible government' is written in. Like some State Constitutions, this one makes no specific reference to the exercise of judicial power, nor does it guarantee the independence of Territory judges. However, since 1978 the Commonwealth has repealed the Northern Territory (Supreme Court) Acts, and the Assembly has under its general power enacted laws which provide for the administration of justice at all levels, and for the security and independence of Territory Supreme Court Judges in the usual Anglo-Australia terms (Supreme Court Act (NT), ss.40, 41). There is no Bill of Rights, but the Commonwealth requirement of just terms for government acquisition of property has been restated (s.50), and as under the preceding regimes an equivalent of s.92 of the Constitution makes trade, commerce and intercourse between the Territory and the rest of Australia 'absolutely free', with the same drastic consequences as the parent provision achieves in the area of the States (s.51)(2).

The political intention, fully realised in the behaviour of the Territory Government and many features of its treatment by the Commonwealth and the States, is that the Territory should be considered as an incipient new State rather than a precocious Territory. To a constitutional lawyer and historian, one of the most interesting and unique features of this situation is the place of the Crown in the 1978 system. In the Act, s.5 recites: 'The Northern Territory of Australia is hereby established as a body politic under the Crown by the name of the Northern Territory of Australia' (emphasis added). I have already quoted the reference to Crown prerogatives in connection with the executive power: s.31. Generally speaking, in every context where one would expect the constitutional and legal concept of 'the Crown' to appear in relation to government administration in self-governing offshoots of British rule which recognise the Queen as such, that concept appears here. The great difference from other examples, however, is that so far as I know they have hitherto always been the product either of a direct exercise of the Royal
prerogative to grant self-governing institutions (these mainly in the distant past) or of a direct exercise of the power of the United Kingdom Parliament to legislate for that purpose. I do not know of another example of the creation of such a body politic by, so to speak, subinfeudation from a parliamentary authority (here the Commonwealth) itself the creation of the UK Parliament. It was not essential to 'monarchise' the Territory in this fashion, and there might have been some practical advantages if instead it had acquired Self-Government as a type of statutory corporation. However, it seems likely that the course adopted fitted better with the views of a majority of the electors, and was thought more consonant with a future course leading to establishment as a State equal in constitutional status with the existing (and all original) States. Other and more political indications of the new status include the admission of the Territory Chief Minister to meetings of the Commonwealth-State Premiers Conference, and the admission of the Territory as a claimant Government for the purposes of the Commonwealth Grants Commission.

Entrenching the Constitution

Nevertheless, it needs to be repeated that the Territory is still wholly dependent for its formal status on the continuing will of the Parliament; no attempt was made by the Commonwealth to entrench the Self-Government Act, as by requiring a referendum of Territory voters for its repeal or amendment along the lines of the Trethewan case clauses producing such entrenchment in the Constitutions of New South Wales, South Australia, Western Australia and Queensland (3), and the accepted view of constitutionalists is that the Commonwealth cannot validly adopt such provisions in relation to sections of the Constitution such as s.122. It is not inconceivable that an ALP Government might wish to abridge or even abolish the grant of Self-Government, and quite likely that such a Government would hesitate to take the further step of establishing a new State. Apart from these questions, the Self-Government Act itself embodies in specific provisions a degree of potential control from Canberra closely similar to the degree of control over the States (and even the Commonwealth itself) by Westminster originally embodied in their Constitutions. The Administrator is still to some extent subject to directions from Canberra (s.32(3)). The Administrator may withhold assent from Bills, and in some cases may reserve them for the Governor-General's assent (ss.7, 8). The Governor-General may also disallow Acts within six months of their making (s.9). The structure of Self-Government depends on Commonwealth regulations specifying the subject matters brought under control of Territory Ministers (ss.55, 35, 7(2)). These, like the Act itself, may be amended or repealed by Canberra. In the case of similar powers of the Crown under the State and Federal Constitutions, a long course of
conduct has established conventions (reinforced in the Commonwealth case by the Statute of Westminster, 1931 [UK]) which ensure that such powers will be exercised only on the advice of Australian Governments, and any attempt in London to disregard such conventions would be followed by repudiation of the provisions in Australia. In the Territory's case, however, the provisions retaining a quasi-colonial relation with Canberra are too recent for any such convention to have been established, and for reasons I have explained elsewhere (4) it is much more difficult to establish in Australia conventions having the effect of qualifying powers given by modern statutes. Self-Government in the Territory is sustained wholly by political forces; they are powerful and likely to become more powerful, and any wholesale repudiation of this development is very unlikely, but the lack of constitutional entrenchment at least, as a practical matter, leaves open the possibility of modifications in detail of the settlement of 1978. It should also be noticed that the Self-Government Act differs in one important detail from the State Constitutions; it does not confer on the Legislative Assembly the power to amend its own Constitution. Hence if an amendment is desired, the Parliament would have to be persuaded to enact it.

The New State

The constitutional validity of the 1978 settlement is beyond reasonable doubt. In Berwick Ltd v Deputy Commissioner of Taxation (1976) 133 CLR 603, a High Court of five justices approved the opinion of Mason J on a question arising from Norfolk Island, in which he said:

The power conferred by s.122 is a plenary power capable of exercise in relation to Territories of varying size and importance which are at different stages of political and economic development. It is sufficiently wide to enable the passing of laws providing for the direct administration of a Territory by the Australian Government without separate Territorial administrative institutions or a separate fiscus; yet on the other hand it is wide enough to enable Parliament to endow a Territory with separate political, representative and administrative institutions, having control of its own fiscus.

Assuming that the Territory continues a course towards new statehood, are there any substantial constitutional problems in its achieving that status? One might think not, because the relevant provision of the Constitution (s.121) is at first reading clear; a corresponding provision of the US Constitution (Article IV s.3(1)) has frequently been applied and to some extent judicially interpreted, so that the absence in Australia of experience in such matters may
not be important. Nevertheless, there are some differences in the wording of the two provisions and in the basic fundamental assumptions of the two systems which need to be observed. Section 121 reads: 'The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit'. The US Article IV s.3(1) reads: 'New States may be admitted by the Congress into this Union' — and continues with special provisions concerning States created in the territory of existing States; there are similar provisions, not here relevant, in the Constitution: s.124.

US Comparisons

Thus the Australian provision makes a distinction, not made by the American, between 'admission' and 'establishment'. The significance of the distinction appears from covering cl.6 of the Constitution Act — an interpretation clause. 'States' is defined as including 'such colonies or territories as may be admitted into or established by the Commonwealth as States'; and it is fairly clear on ordinary principles of serial reference that colonies outside Australia, that is British colonies, are to be 'admitted', while territories, that is Commonwealth Territories, are to be 'established'. It was anticipated in 1900 that New Zealand and Fiji might be candidates for 'admission'. They would at admission have possessed Constitutions of either British prerogative or statutory origin, which may be relevant to a consideration of the more important point, namely the scope of the Parliament's express power to impose terms and conditions on (in this case) the establishment of a new State. The US provision makes no reference to such a power. The US Supreme Court has nevertheless interpreted the provision as permitting the Congress some power to impose terms. First, it is well established that Congress cannot be compelled to admit a claimant for statehood; it can simply refuse to admit unless some condition for which it stipulates is complied with by whatever means is available to the claimant. In the American context, a common way of compliance is the insertion of a required provision in the Constitution which a Constitutional Convention in the claimant Territory is likely to have prepared, or be engaged in preparing, or which is being considered at a referendum of the 'people' of the claimant Territory. But second, the Supreme Court has also held that the Congress can validly impose conditions, not by incorporation in the proposed Constitution, but by an Act of Congress having superior force by reason of the supremacy clause of the US Constitution — Article VI s.2. But since this power has been implied by the Court in the absence of express provision, it has been easy for the Court to provide also, by judicial legislation, some bounds to this power.
The leading case is *Coyle v Smith* (1910) 221 US 559, in which an Act of Congress requiring the then new State of Oklahoma to establish its capital in a named city was held invalid, and the establishment of the capital by the State Legislature in a different city held valid. This was on a general principle supported by much previous authority that new States must have the same basic constitutional position as existing States, including substantial autonomy in determining the structure of their own government.

It is pretty certain that the High Court would accept the first US Supreme Court proposition, and hold that no claimant for membership of the Federation, whether by 'admission' or 'establishment', can compel the Parliament to take appropriate action; this accords with our general public law conceptions without any American aid. Whether, however, the High Court would adopt the second American view, and impose limitations on the emphatic express power to 'establish' and to 'impose terms and conditions' of admission or establishment, is doubtful. It is more difficult to set limits to express powers than to implied powers, and although the High Court is not and never has been a so liberally-minded tribunal as its journalistic critics contend, it does and in my view should pay some attention to the language in which our union is expressed—more attention than the Supreme Court pays to its very differently worded and much older basic instrument.

There is, too, the basic difference in constitutional assumptions mentioned above. The American system is based upon the sovereignty of 'the people'. This is given specific applications, particularly important in the present connection. Owing to the virtual disappearance of any further possibility of admitting new States—unless Canada disintegrates—modern American constitutional texts pay little attention to the admission of new States. Hence one needs to consult old texts, such as Colley's *Constitutional Limitations*, 8th ed (1927) Vol 1 Chap 3, and most particularly J A Jameson's *Constitutional Conventions*, 4th ed (1887), passim. The latter rare book was probably consulted by our constitutional fathers, since what I believe to be the only original copy in this country was presented to the Melbourne University Library by Theodore Fink, the wealthy Melbourne solicitor who was a confidante of liberal politicians at the turn of the century. A photocopy is in the Law Library at the ANU. From these sources, we find that the Congress of the USA never claimed to be an originator or 'basic norm' in relation to the constitutions of new States; it performed at most the then necessary function of setting up the administrative arrangements by which qualified electors could be identified and could choose a Constitutional Convention, to draft a Constitution and submit it for approval to the same electors. During that procedure it was necessary to obtain the assurance of Congress that it would pass an Act admitting the new State
to the Union, but the matters to be negotiated were usually financial and administrative, questions inevitably arising if (as in the vast majority of cases) the new State had been for a long period a Federal Territory and had passed through successive stages of administration under Governors appointed from Washington, as the Northern Territory has done under Federal Administrators. As Coyle v Smith shows, the Federal authorities acted at their peril if they tried to meddle with constitutional questions usually left to the Territory electors and their Conventions. As Jameson shows, in days when the franchise was habitually very restricted, the main responsibility of the authority preparing the way for new statehood was the identification of 'the people'; today such an authority would have very little leeway on such questions, since the Supreme Court now asserts a supremacy in the field which was denied until Baker v Carr (1962) 369 US 186. Another consequence of the stress on people's sovereignty was the rule that failing any specific provision in a State Constitution, there was an implied power to amend the Constitution by a law enacted by the legislature and approved by the people at a referendum, or by legislative appointment of a Constitutional Convention to consider amendments, plus electoral approval. These presumptions as to sovereignty were further strengthened by the existence and universal applicability of the Bill of Rights, in particular equal protection of the laws.

The Australian system is based not on popular but on parliamentary sovereignty; there is a faint suggestion of a popular basis in the referendum requirement of the amending process of the Constitution - s.128 - but initiation and final say even under that provision is with Parliament. It is highly unlikely that a Constitution-amending power would be implied, and there is no Bill of Rights. If the founders did consider the American situation, or read Jameson, it was not in order to adopt American assumptions or rules but to make more explicit provisions governing new States, and it is likely that the High Court would, on Engineers case (5) principles, rely heavily on the text. So far as assumptions play a part, they would be those of the parliamentary system, one of which is that a statute lays down general principles of indefinite duration, another that any statute may be amended or repealed, and another that 'parliament' as an organic whole can take action only in one way - by enacting a statute. These would lead to a broad rather than narrow interpretation of the terms 'admit', 'establish', 'make', 'impose', 'terms and conditions', 'as it thinks fit'.

The Federal Balance

Nevertheless, the language and context of s.121 does place limits on Parliament's power. 'Upon such admission or establishment' is likely to be given a temporal as well as
subject-matter significance. Though power is to be exercised only at or about the time of admission or establishment; it is not a continuing power. To some extent, the Constitution regulates the position in the Federation of all States, original or new, and it is unlikely that s.121 could be used to set aside such provisions in the case of new States; for example, whatever representatives a new State is given in the Senate or House of Representatives under its 'terms and conditions', those representatives must have the rights and privileges conferred on all senators and members, and they must be chosen in accordance with Commonwealth laws uniform for all States, or in the absence of such laws by laws of the new State (see Parts II and III of Chapter 1 of the Constitution). It is unlikely that the High Court would allow the terms and conditions to displace as to the new State the distribution of legislative power between the Commonwealth and the States provided by ss.51, 61, 71 and 109. Provisions such as the free trade guarantee (s.92) and the fiscal restrictions or facilities (ss.90,91 and 96) would apply. As indicated above, it might seem possible to restrict the 'terms and conditions' to matters directly connected with the act of admitting or establishing, such as liability for existing debts, employment of transferred officials and such questions. But this very restricted interpretation is inconsistent with the one specific example the section gives of a permissible term - extent or representation in the Parliament, a constitutional matter of indefinite duration in its effects. But even if 'terms and conditions' were read restrictively, there remains the fundamental problem of the initial source of validity for the Constitution of the new State, which at least in the case of an ex-Federal Territory can only be the Parliament itself. Putting this difficulty another way, the most powerful source of Commonwealth authority in relation to a new State of the Northern Territory may not be the 'terms and conditions' part of s.121, but the implications of the phrase 'establish new States' as applied to such an area. 'Establishment' implies not only admission, but also the creation of the body politic which is admitted, and this must extend to endowing that State with a constitutional structure, containing within itself implications for its future operation.

Commonwealth Choices

The point of these tortuous thoughts is best seen by considering what a Federal Government might wish to achieve if and when the Territory becomes the State of Northern Australia. A Liberal-Country Party Government, especially if addicted to what Mr Fraser calls 'new (and is actually 'old') federalism', would encounter few problems. It would provide Northern Australia with a Governor instead of an Administrator, possibly appointed by the Queen if the new State so wished though appointment from Canberra on Darwin
suggestion might be acceptable. The various ways in which Canberra can now vary the legislative and executive authority of the Darwin Government by regulation would be repealed, as would the possibilities of reservation for and disallowance by Canberra of Darwin's legislation. The Northern Australian legislature would be given power to amend its own Constitution, possibly by special majority. Thus the 'peace, order and good government' competence of the Northern Australia legislature would have full play as in the present States, though, one hopes, without even the paper provision for reservation and disallowance in London still in the State Constitution Acts.

But if an ALP Government were in power in Canberra, with the centralising preferences of such Governments, there could be a demand for the preservation of greater Federal control over the new State than over existing States. Such a Government might be willing to grant new statehood, for electoral reasons or to pre-empt such a grant by another Government on different terms. Probably the first thought of such a Government would be to reserve powers over specific topics for Canberra; for example, a wider and clearer power as to Aboriginals than flows from the present s.51(xxvi), and authority as to Crown lands and minerals. But this sort of direct interference with the present distribution of substantive powers might not be held valid by the High Court. The better course for such a Federal Government might be to keep some of the colonial-type controls over the new State in the Self-Government Act, and in the existing State Constitutions, but with the intention that they should, even if rarely, be capable of use. For example, Darwin's power of constitutional amendment might be made subject to approval by resolution of the Federal Houses. The power of the Governor-General to disallow Darwin legislation, generally or in particular classes, might be retained. It may seem strange that this should be valid, whereas direct redistribution of substantive powers might not be. It is fairly certain that the US Supreme Court would hold such measures invalid, because of their general doctrine that the States must be substantially equal in status. But if the High Court justices adopt no such doctrine - and as explained above the basic assumptions for such a doctrine do not exist here - then they will be looking for more 'textual' considerations. The majority who considered that Federal Territories should not have voting representation in the Senate were certainly influenced by a general view of Federation, but they had to have a textual consideration as well, and there is no question that on the point in issue in the Territory Representation cases there is an inconsistency between the sections concerning the Federal legislature in Chapter 1 of the Constitution and s.122, due simply to bad drafting (6). But on the issues dealt with in this paragraph, there are no such textual reasons for cutting down either the implications of 'establishment' or those of 'impose such terms and conditions' in
The only reference to amendment of State Constitutions is in s.106, which preserves State Constitutions until altered in accordance with their own terms; the requirement of Federal approval would be such a term. All the State Constitutions have disallowance provisions; they are now inoperative, but it could not be said that in 1901 they had no significance and yet they were not thought to be inconsistent with the position of the States in the Federation. The additional consideration here is that the disallowance would be by another member of the Federation, but having regard to the special position of the Commonwealth and the emphatic words of s.121, this may not be thought decisive. Even a provision preserving a Federally-appointed 'Administrator', instead of installing a Governor, and exercising control through him on the Canadian provincial model, might well be valid; s.110 of the Constitution provides that the references to State Governors include any 'other chief executive officer or administrator'.

A last point: supposing that a Canberra Government was prepared to grant new statehood only on terms which the Territory Government was not prepared to accept, could Canberra nevertheless compel the Territory to become a new State on those terms? I think yes. It may well be that no such power of compulsion could be exercised in relation to New Zealand, Fiji, etc. But the position of the Territory is different; a combination of the power to provide for the government of Territories (s.122) and the new States power (s.121), and the international law position of the Territory as subject to Australian sovereignty, supports this conclusion. The politics of the matter might well be otherwise.

Footnotes

1. The expression does imply territorial restrictions on competence, and the leading cases on the principle cited in the text also deals with that aspect of the matter, eg Broken Hill South v Commissioner of Taxation (NSW) (1937) 56 CLR 337.

2. Lambshed v Lake (1958) 99 CLR 132.


Appendix 7

ASPECTS OF NORTHERN TERRITORY LAW:
BACKBONE OR SOME SKELETONS IN THE CONSTITUTIONAL CUPBOARD

Douglas Whalan

[from Rhys Jones (ed): Northern Australia Options and Implications, RSPacS, Australian National University, Canberra, 1980]

Introduction

My small contribution is concerned with three aspects of Northern Territory law. Firstly, I consider the constitutional options open for the Territory - a return to South Australia, a developing version of Self-Government, and possible statehood within the Australian Federation or independence from Australia. Secondly, I consider the present constitutional position of the Territory following on the coming into operation of the Northern Territory (Self-Government) Act 1978. Thirdly, I take a very brief look at the existing body of substantive law in force in the Territory. These three aspects all form part of the possible pattern for future developments in the Territory. I speak principally of legal and constitutional matters, but these must have an impact upon, and must be very closely linked with, other aspects in a developing and changing legal, political and social situation in the Territory.

Several areas could be chosen to illustrate, but I choose the resources and environmental one as being the one that is best known to me. In resources matters, and especially in relation to exports, we have seen recently that there can be very significant policy differences between Federal and State Governments even when the same political parties are in power in the Federal and State spheres. The potential for difference is naturally even greater when the Federal and State Governments are of opposing political philosophies. If there were Governments of different political complexions in power in the Territory and in Canberra, the existing state of the legislative interfaces could be of crucial importance. I emphasise that I am speaking of theoretical possibilities. But I argue that, as there are political shifts in either jurisdiction, there will naturally be changes in policy emphases. As these occur there must be differing pressure points both within the two jurisdictions and also different policy approaches by the two Governments. The existing constitutional state of play could bear vitally on the question of which Government could ultimately have its policy implemented.
We could easily imagine a clash of wishes in relation to minerals policy if there were changes of Government. I give a theoretical illustration. A Federal Government might wish to press on strongly with mineral development (1) and a Territory Government may wish to exercise restraint. Or the roles may be reversed, with a strong developmentally oriented Territory Government and a more cautious centrally Government.

When the argument is between the Federal Government and a State Government, there is a whole armoury of powers in the Constitution which can be used in the resolution of the conflict, although the ambit of these powers have certainly not yet been clearly delineated (Whalan 1977). The further towards statehood the Territory goes, the less control the Federal Government can have; the political and constitutional battle in a particular instance could be won or lost depending upon how far the Territory was along the road to statehood at any given time. My thesis on this point is that, up until the present time, the Commonwealth Government may have conceded a certain amount of political power to the Territory, but it has not transferred a great deal of ultimate constitutional and legal power. Of course, I recognise that once authority is conceded it is politically difficult to retract it, but the ultimate authority is the constitutionally legal one.

Although the area of mining is a publicly prominent issue at present, there are many other areas even within the resources sphere in which the state of constitutional development and power could be of vital significance in determining a particular issue.

The same considerations apply across the whole constitutional spectrum. I believe that awareness of potential problems is clearly indicated in the way in which the Self-Government Act reserves power to the Commonwealth in relation to industrial disputes and terms and conditions of employment in the Territory (2).

I shall argue further that the existing 'constitutional documents' (3) contain other problems, or the seeds of problems, which should be solved before there is a chance of them becoming serious practical issues.

**Constitutional Options for the Northern Territory**

Legally, I doubt if the Commonwealth would give the Territory back to South Australia; but I suggest that, notwithstanding the passing of the Self-Government Act, it is legally possible (as opposed to what may be politically possible) for the Commonwealth to do anything short of this. It is suggested that it would be legally possible to unwind the present state of Self-Government. Of course, instead of
going back, the Commonwealth can go forward to create a new State in the Territory and, once created, it would seem that that would be constitutionally difficult, if not impossible, to undo. It would also be possible to go forward to independence as occurred with Papua New Guinea; and, if that happened, it, too, could not be undone.

a) Back to South Australia?

The Northern Territory became a Commonwealth Territory by the surrender of the Northern Territory of South Australia to the Commonwealth by an agreement of 7 December 1907 between the State of South Australia and the Commonwealth Parliament; by the Northern Territory Surrender Act, 1907 (SA) and by the Northern Territory Acceptance Act 1910. This surrender and acceptance occurred under the provisions of s.111 of the Constitution which state:

The Parliament of a State may surrender any part of the State to the Commonwealth; and upon such surrender, and the acceptance thereof by the Commonwealth, such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth.

Although there was, in fact, a Commonwealth statute of acceptance in the case of the Territory, recently the High Court has held in Paterson v O'Brien (4) that the Parliament need not be involved in an acceptance under s.111. The court specifically stated 'that that acceptance can be effected by an executive act of the Commonwealth' (5).

It is a principle of our constitutional law that no Parliament can bind its successors. As the acceptance of the Territory by the Commonwealth was done by statute, it might have been thought that a present Parliament could repeal the Northern Territory Acceptance Act 1910. However, it is submitted that the Parliament cannot make an effective repeal of that Act. It is suggested that this is so on the basis that the provisions in s.111 of the Constitution are effective only for acceptance and that the Parliament (if Parliament is, in fact, used as it was in this case) has exhausted its power under s.111 at this point.

b) Continuing Commonwealth Control

As s.111 states, once the Northern Territory became a Commonwealth Territory, it became 'subject to the exclusive jurisdiction of the Commonwealth'. The Commonwealth then exercises legislative authority under s.122 of the Constitution which provides:

The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory
placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

Acting under this power, the Commonwealth has passed a considerable amount of Commonwealth legislation, including the basic Northern Territory (Administration) Act 1910, which has been amended and modified over the years as the Territory has gradually developed. Finally, in 1978, in the preamble to the Self-Government Act, the Parliament declared:

AND WHEREAS the Parliament considers it desirable, by reason of the political and economic development of the Northern Territory, to confer self-government on the Territory, and for that purpose to provide, among other things, for the establishment of separate political, representative and administrative institutions in the Territory and to give the Territory control over its own Treasury.

But, interestingly enough, the 1978 Act repealed the previous Northern Territory (Administration) Acts. There seems to me, to be no legal reason at all why the Parliament could not repeal all, or any part, of the present Self-Government Act if it became politically expedient for a Commonwealth Government of any political persuasion so to do. I am emphasising that I am talking of theoretical possibilities rather than practical politics. But, occasionally, the law does obtrude when politics or politicians demand its help.

C) Can Statehood, Once Conferred, Be Recalled?

All political Parties in the Federal Parliament have said that they believe that the ultimate goal for the Territory is Statehood. This would be achieved under s.121 of the Constitution which provides:

The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit.

Unlike the provisions of s.111 of the Constitution which the High Court decided in Paterson v O'Brien would permit the acceptance of a surrender of part of a State by the Executive as well as by the Parliament, s.121 requires that a new State may only be established by the Parliament.
Once that had been done by legislation, it would seem that the Parliament would have exhausted its power under s.121 and would not have power either to repeal or to amend the constituting legislation. Thus the Parliament would have power to establish the Territory as a new State and to impose terms and conditions for such establishment; but, having acted, the Parliament could not have another bite at that particular constitutional cherry.

The Northern Territory (Self-Government) Act 1978

I now consider aspects of the Northern Territory (Self-Government) Act 1978. I shall argue that there are some parts of the 1978 Act that could bear re-examination.

a) Historical Background

The Self-Government Act and the Northern Territory (Self-Government) Regulations made under the Act are the latest in a long line of 'constitutional documents' for the Territory.

Part of New South Wales from 1825 to 1863, when it was annexed to South Australia, the Territory's people were first enfranchised in 1888 by giving them two members in the South Australian Legislative Assembly and representation in a Legislative Council electorate (6).

After Federation, the State vote was retained and, in addition, Territorians voted in Federal elections as part of a South Australian Federal House of Representatives electorate.

But a large political step backwards was taken when the Territory became a Commonwealth Territory under the 1910 legislation. From then until after World War II there was not even an elected body to advise the Administrator, although Federally since 1923 there had been a Northern Territory member of the House of Representatives without voting rights. The Federal member was given limited voting rights in 1959 and they became full rights in 1968. Senate representation by two senators was given to the Territory by the Senate (Representation of Territories) Act 1973.

In 1947 a Northern Territory Legislative Council with a minority of elected members was formed and this minority of elected members was continued in the 1959 changes. In 1968 there was a majority of elected members for the first time, but some official members remained until the completely elected Legislative Assembly was constituted in 1974. The 1976 amendments saw the concept of an Executive Council introduced and the 1978 amendments gave Territorians further powers.
b) The New Body Politic of the 'Northern Territory of Australia'

Section 5 of the Self-Government Act establishes the Northern Territory of Australia as a distinct body politic under the Crown for the first time.

Section 13, which continues the Legislative Assembly in existence, contains a mixture of leaving some decisions to be made by the statutes of the Territory itself and making other decisions, which seem to be local political ones, for the Territory. For the first time, the Commonwealth leaves the decision as to the number of members of the Legislative Assembly and their method of election to be settled by Territory Acts. But the Commonwealth does not permit the Legislative Assembly to decide the percentage of tolerance in the numbers of electors in an electorate; s.13 allows a substantial tolerance of 20 per cent above or below the mathematical quota. Again, the qualifications of electors are to be Federally fixed (7) as are the qualifications (8) and disqualifications (9) for election to membership of the Legislative Assembly. It is noteworthy that the maximum life of the Legislative Assembly is set at four years (10). The period was previously three years (11) and this change makes the Territory an oddity among Australian legislatures.

I now turn to deal with the legislative and executive powers of this new political entity of the Northern Territory of Australia.

c) Legislative Powers

The heart of the legislative authority that is conferred by the Parliament on the Northern Territory Legislative Assembly is s.6 of the Act which provides as follows:

Subject to this Act the Legislative Assembly has power with the assent of the Administrator or the Governor-General, as provided by this Act, to make laws for the peace, order and good government of the Territory.

There are two points to note about this section. Firstly, it is not a new provision. These powers existed previously and, indeed, such powers even existed in the days of the old Legislative Council (12). So the new Act does not seem to have extended the legislative competence of the Legislative Assembly in any respect.

Secondly, it is suggested that s.6 may well confer on the Legislative Assembly greater legislative power than presently resides in the States of the Commonwealth. This section does far more than confer State-type legislative authority. It confers on the Assembly complete plenary powers to legislate.
I take an illustration. Part V of the Self-Government Act confers very extensive financial powers on the Territory and under those powers a separate Treasury for the Territory is set up. These powers are totally appropriate to Self-Government and, of course all six States have similar powers. But, under the wide legislative power given to the Territory, it is perceived that it would be possible for the Territory to legislate to coin its own currency (13). The States do not have such power because s.115 of the Constitution expressly provides:

A State shall not coin money nor make anything but gold and silver coin a legal tender in payments of debts.

Again, I am talking theory and not practice but, as we all know, it is not unknown for political entities around the world to make a great deal of their funds from the minting of coins or from their postage stamp concessions. So the illustration I give is not such an absurd one.

I give another illustration. It seems that it could well be possible for the Territory under the present plenary power to impose a customs duty. In this case, too, the inhibitions that exist in relation to the States do not appear to me to be applicable to prevent the Legislative Assembly so providing.

There are many other illustrations that one could give. Perhaps one of the more spectacular that one could imagine in theory would be the raising of a separate army by the Territory (14). Section 114 of the Constitution provides (in part) that a 'State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force...'. The Territory is not forbidden to raise and maintain its own naval or military forces. It seems reasonable to wonder whether such powers should be vested in the Territory when they do not exist in relation to the States if the hope is eventually to create a new State in the Northern Territory. Such powers may well be appropriate ones to confer on an area being prepared for independence (as happened in the case of Papua New Guinea), but they are not, in my opinion, appropriate if the hope is that the Territory is to become a part of our present Federation. If statehood is to come, I perceive that there would need to be a step backwards taken by the Territory in relation to legislative authority at some time (15).

Oddly enough, having not imbedded coinage, customs or army raising (and there are other illustrations) prohibitions in the present Territory constitutional documents, the Parliament has provided in s.49 of the Act, in terms reminiscent of s.92 of the Constitution, that 't]rade, commerce and intercourse between the Territory and States, whether by means of internal carriage or ocean navigation
shall be absolutely free' (16). Lawyers may not be unhappy to find s.92 alive and well in the Territory!

Again, it is not an occurrence about which a mere lawyer should complain (but I do!), but I note the omission of a section equivalent to s.118 of the Constitution which ensures that '[f]ull faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State'.

I leave aside the difficulties and doubts that have been raised about s.118 which particularly revolve around the question of whether it deals only with evidentiary matters or substantive law matters. But we can say that s.118 largely ensures automatic reciprocal recognition of the common law, statutes and subordinate legislation, court judgements and orders of all kinds and such public records as certificates of births, death and marriages. It is thus, a very important, practical provision in the administration of justice. However, it perhaps is not a crucial omission from the Self-Government Act, and indeed, the decision may have been quite deliberate. For there is a statutory provision in s.118 of the State and Territorial Laws and Records Recognition Act 1901 which effects many of the things that s.118 of the Constitution was intended to cover.

As a corollary to my argument about the plenary legislative power given to the Legislative Assembly, I suggest that it might have been useful to spell out in Commonwealth legislation that, if the Commonwealth does enact certain legislation then the Commonwealth is to have precedence over any legislation enacted on a similar topic by the Legislative Assembly. It may well be that, if the Territory endeavoured to legislate on a particular matter in a way that was repugnant to the Commonwealth legislation, then it would have to yield to the Commonwealth legislation, but my feeling is that it would be better to spell this position out. Or, it could be argued very plausibly that it would be better to endeavour to spell out the reverse position. This could be so, particularly if a situation of bi-legalism were to be developed in the Northern Territory over the next few years. If this were to happen, a situation could evolve in which it would be less appropriate for Commonwealth legislation to override. In any event, I suggest that it would have been better to spell the position out in order to provide for a resolution of the possible Commonwealth-Territory conflict.

Of course, all that I have said up to now, does assume that the Legislative Assembly succeeds in finally completing the legislative process in relation to the illustrations that I mention. It is my thesis that it would be perfectly permissible for the Legislative Assembly to pass such statutes, but I recognise that there is a part of the legislative process that could inhibit the power of the Assembly.
Indeed, the legislative endeavours of the Assembly are subject to more restraints than those of the States.

There are means in the Act under which there may be curbs placed on the legislation of the Legislative Assembly. There is very little that is new in these provisions; in this respect, too, the new Act adds little to Self-Government.

Section 7 of the Act permits the Administrator to assent to, or withhold assent to, a proposed law dealing with matters on which the Territory has executive authority, and it allows him to assent, withhold assent or reserve for the Governor-General's pleasure matters for which there is not executive authority. Alternatively, in both cases, amendments may be suggested by the Administrator. This would be fine, except for a combination of three matters. First, as I shall argue, unlike the extensive legislative powers that are given to the Legislative Assembly, the matters over which the Northern Territory Executive Council has executive powers are removable feasts. Secondly, s.32 provides that the Administrator holds office during the Governor-General's pleasure, whose pleasure or displeasure would be subject to the advice of the Governor-General's Federal Ministers. Thirdly, for those matters over which the Northern Territory Executive Council does not have executive authority, the Administrator 'shall exercise and perform all powers and functions that belong to his office... in accordance with such instructions as are given to him by the Minister' (17). That is, he is subject to the instructions of the Federal Minister who could instruct the withholding of assent.

A second hurdle could also need to be jumped in relation to some legislation. For, if the Administrator withholds assent for the Governor-General's pleasure, s.8 permits the Governor-General either to assent, withhold assent or return the proposed law to the Administrator with amendments for the consideration of the Legislative Assembly. In this situation, too, the Governor-General would be subject to the advice of the Federal Ministers.

Furthermore, s.9 of the Act provides that, even if the Administrator has assented to a proposed law, the Governor-General has an overriding authority, to be exercised within six months after the Administrator's assent, to disallow the law or recommend amendments to it to the Administrator. On the exercise of these powers, too, the Governor-General would be subject to the advice of his Federal Ministers.

As I said before, these powers, in very nearly the same form, existed in the law that was replaced by the Self-Government Act so little has changed in this area.
No doubt anyone answering me can say that, although little has changed in the law, practice has changed and will continue to change as these inhibitory powers gradually cease to operate and, by convention, fall into disuse. This has been the usual British de-colonising pattern, it can be argued. Quite so; but when, at a crisis point, convention clashes with the strictly legal position, it is the strict law that has primacy.

Although I have argued that the legislative powers of the Legislative Assembly are extremely wide, some specific limitations have been built into the Act.

Section 50, which has two limbs to it, is one such provision. Sub-section 50(1) provides that 'the power of the Legislative Assembly conferred by s.6 in relation to the making of laws does not extend to the making of laws with respect to the acquisition of property otherwise than on just terms'. This sub-section ensures that if property is acquired by the Territory, it can only be acquired on the basis of adequate compensation. Although there is a provision in s.51(xxxi) of the Constitution which requires the Commonwealth to acquire property on 'just terms' from any State or person, there is no such requirement for 'just terms' in any of the individual State Constitutions. Thus, the inclusion of this provision in the Northern Territory embryonic Constitution is to be applauded.

Sub-section 50(2) provides, again in terms akin to those in s.51(xxxi) of the Constitution, that if there is an acquisition of property in the Territory by the Commonwealth, then that acquisition shall only be made on just terms. Such a provision does not bind the Commonwealth in the same ways as the constitutional provision. Nevertheless, it is a very welcome statutory expression of intention because the High Court has said in Teori Tau v Commonwealth (18) that the just terms provisions of the Constitution did not apply to the acquisition of property in a Territory.

Further limitations are imposed upon the Legislative Assembly by s.53 which provides that the Conciliation and Arbitration Act 1904 is to apply to industrial disputes in the Territory. Furthermore, the power of the Legislative Assembly does not extend to the making of a law to confer on any court, tribunal, person or any other authority a power to hear and determine 'disputes, claims or matters relating to terms and conditions of employment'. These provisions do impose very strict limitations upon the power of the Legislative Assembly in relation to industrial and some contractual matters.

d) Executive Powers

An indirect way of effectively reducing the power of the Territory legislature is to restrict the executive
authority given to the Territory Executive in the manner in
decisions. Already very full executive powers have been
vested in the Northern Territory Executive Council and more
are scheduled to be conferred. But there is a distinctly
different approach to the granting of executive authority
when compared with the very wide legislative jurisdiction
that I have argued has been conferred on the Legislative
Assembly.

Sub-section 33(1) of the Self-Government Act provides
that there is to be an Executive Council for the Northern
Territory to advise the Administrator in the government of
the Territory in relation to the matters in respect of which
the Ministers of the Territory have executive authority
under s.35. Section 35 of the Act provides simply that the
regulations made under the Act 'may specify the matters in
respect of which the Ministers of the Territory are to be
given executive authority'. By s.55, it is the Governor-
General who makes these regulations (on the advice of his
Federal Ministers), so the transfer of the executive
authority is very clearly vested in the Commonwealth
Government.

It is very interesting to note that, having conferred
what I believe to be plenary legislative powers, the giving
of executive authority is very much a piecemeal operation.
Put in extreme terms, it could be argued that the
Commonwealth has said to the Territory: 'You can make any law you
like in the Legislative Assembly in the Northern Territory,
but you cannot necessarily implement that law because we
have not given you the executive authority to do so'. Given
the way executive authority has been transferred in
practice, that is too extreme.

The alternative approach in granting Self-Government
would have been to follow the philosophy of the Constitution
in relation to the dispersal of legislative authority
between the States and the Commonwealth. If this had been
done, s.35 would have stipulated that, unless powers were
expressly reserved to the Commonwealth, they passed to the
Territory. This would have given a very clear indication to
the people of the Territory of the extent to which the
Commonwealth Government still claimed rights to govern them.
Of course, even with this approach, all would not be static;
as the Regulations could be changed from time to time, the
Commonwealth claim could be a moving one - at the instance
of the Commonwealth. However, having once clearly made
reservations, it would be politically, as opposed to
legally, difficult to withdraw an authority once it had been
given.

Furthermore, this approach, in my opinion, could have
reduced the possibility of doubts arising as to whether the
Commonwealth or the Territory had executive authority in a
particular matter. This would be so, simply because the list of reservations would be very much simpler to draw up and to interpret than a list positively granting powers to the Territory.

I think that this argument can be sustained when one looks at the list of matters upon which executive authority has been conferred by the Regulations that were made to come into operation on 1 July 1978. For I believe that there are many potential problems with the list of executive powers given to the Territory by the Northern Territory (Self-Government) Regulations. I give only two or three illustrations. 'Industry', 'labour relations' and 'industrial safety' are listed as passing to the Northern Territory Executive Council and it may be very difficult to decide when these cease to be Territory matters and come within the expressly reserved Commonwealth powers in s.53 concerning industrial disputes and matters relating to terms and conditions of employment which I considered above. Again, 'the maintenance of law and order and the administration of justice (including legal aid and correctional services)' are listed; but there could be a demarcation problem in squaring this with a specific reservation, which is made in the Regulations, of matters relating to the 'the legal profession, the sheriff or juries'. Surely, there is at least a potential overlap there. As a final illustration, I note that 'private law' is listed. I confess that I do not know what that means or what the boundaries of that phrase are. Certainly, legal developments of the last thirty years, in particular, have rendered such a phrase almost useless as a definition. My confusion is added to when I note that the next item of the list includes 'trusts', and further on there is an item 'sales and leases of goods, supply of services [incidentally how does this square-off with the reservation in relation to terms and conditions of employment?] and security interests in or over goods'. Probably most lawyers would have put these matters very much under the heading 'private law' in the days when that phrase may have had more meaning that it does today. Perhaps I have given enough illustrations to demonstrate that very great problems do arise when an endeavour is made to dissemble disparately rather than reserve specifically.

Nevertheless, although I argue strongly (19) that it would have been preferable, more logical and less likely to lead to problems, to adopt the 'reservation to the Commonwealth' approach to the dispensishment of executive authority to the Territory, I can see that there may be some practical argument for conferring executive authority in the manner the legislation is done. It is a step by step approach and the Commonwealth may well have believed that there were very good practical reasons for the transfer of authority to be effected in this manner. In his Statement of 14 September 1977, the then responsible Federal Minister, Mr Adermann, indicated that there were many matters that
would be transferred as from 1 July 1978 and others that would be transferred at the latest by 1 July 1979. Thus the step by step approach (with some steps taken being very much larger than others), was the quite deliberate policy approach decided upon by the Commonwealth. Furthermore, although it is no answer to my arguments in principle, nor to my specific criticisms as to the practical problems that could arise in trying to interpret the lists in the Regulations, I think that it is worth noting that the transfer of executive authority does in fact seem to be running ahead of the schedule that Mr Adermann outlined in September 1977. For instance, mining and minerals and surface transportation (but not other transportation) have been transferred ahead of time. The areas of health and education are major areas that eventually will go to the Territory but have not yet done so.

Two very important areas in the realm of Self-Government, and for which special provisions were made in the Self-Government Act, are finance and land and other property. Executive powers in relation to both areas have been given to the Territory (20).

Part V of the Self-Government Act gives very extensive Treasury powers to the Territory. By ss.44 and 45, the public moneys of the Territory are available to defray the expenditure of the Territory; the receipt, expenditure, issuance and control of these moneys is to be regulated and authorised by Territory legislation; and such moneys may be invested in accordance with Territory legislative requirements. Provided that there is an appropriation for the purpose, the Commonwealth Minister of State for Finance may act on behalf of the Commonwealth in lending moneys to the Territory on such terms and conditions as he determines (21). But there is a very tight Commonwealth rein on Territory borrowing, as s.47(1) provides that the Territory or any statutory authority in the Territory may only borrow in amounts and upon terms and conditions approved by the Treasurer of the Commonwealth. These restrictions are probably quite reasonable as the Territory is, and is likely to remain for some time, a beneficiary of Commonwealth funds in meeting its expenditure.

Subject to some exceptions, s.69 provides that all interests of the Commonwealth in land or minerals in the Territory are, by that section, vested in the Northern Territory of Australia as from 1 July 1978. In addition, if anyone held an interest in land (for example, a lease) from the Commonwealth, that interest has, since 1 July 1978, been held from the Territory body politic. These provisions had the effect of vesting in the Territory virtually the whole of the Territory interests. Further, r.4 of the Northern Territory (Self-Government) Regulations confers executive authority in relation to land matters upon the Northern Territory Executive. The conferral of these estates and
powers is an integral and very important step in the Self-Government process and ensures that land law and administration are now largely localised. There are some small and decreasing exceptions, but there are two significant derogations from this: one is temporary and the other is general.

Section 70 of the Act, which came into force on the date of assent to the Act, 22 June 1978, permits the Commonwealth Minister to recommend to the Governor-General that any interest in land vested by s.69 be re-acquired without compensation to the Territory for public purpose. At first glance this provision looks as if the Commonwealth giveth on the one hand by s.69 and, potentially, taketh away on the other hand by s.70. But this derogation is very considerably softened by the fact that the power expires on 21 June 1979.

However, there is one very significant further exception. All minerals owned by the Commonwealth in the Territory were vested in the Territory on 1 July 1978 'other than prescribed substances within the meaning of the Atomic Energy Act 1953 and the regulations made under that Act and in force immediately' prior to 1 July 1978. Thus the uranium province minerals are still owned by the Commonwealth Government. Furthermore, in the Regulations giving the Northern Territory Executive authority over land mining and minerals, it is specifically provided that this granting of authority does not relate to any authority in relation to the 'mining of uranium or other prescribed substances within the meaning of the Atomic Energy Act 1953'. Thus the Territory legislature and Executive have no authority at all in relation to uranium. This authority remains completely within Commonwealth jurisdiction and competence; this position greatly strengthens the Commonwealth's position in working out a national nuclear policy.

**Existing Laws in Force in the Northern Territory**

Sub-section 57(1) of the Self-Government Act provides:

Subject to this Act, on and after the commencing date [in the case of this provision it is 1 July 1978], all existing laws of the Territory have the same operation as they would have had if this Act has not been enacted, subject to alteration or repeal by or under enactment.

This is an essential part of the constitutional transition because it ensures that the existing corpus of law in force in the Territory continues to apply under the new constitutional arrangements.

In summary, and without going into some nice refinements, which are most intriguing but which would distort the
paper if discussed in full here, it would seem that this existing body of law would principally consist of English common law at the South Australian date of reception of the common law, 28 December 1836, together with South Australian law (including alterations to the received English law) until 1910, and the laws affecting the Territory enacted since then whether by the Commonwealth or by the local legislative process in its various guises. These existing bodies of law will apply until they are altered or repealed by a statute of the Legislative Assembly that has been duly assented to. Furthermore, it is still open to the Parliament to legislate for the Territory under the Territories power in s.122 of the Constitution.

Hence the Territory does start off with a very formidable body of law. Although the situation is complicated by the fact that there is an admixture of English law, South Australian law, Commonwealth law and previously existing Territory law, fortunately a very considerable amount of the ordinary law has been reduced to Ordinances of the previous-ly existing Territory legislature. As is the case with the Australian Capital Territory, no doubt there will be many doubts, difficulties and gaps which it will be necessary for the Legislative Assembly to consider; but, I suggest that there is a substantial base upon which to build a body of law that is especially suitable for the society that is emerging in the Northern Territory of Australia.

Conclusion

There is no doubt that the recent changes in the constitutional position of the Territory, which were effected by the Northern Territory (Self-Government) Act 1978 and the Regulations so far made under it, have moved the Territory a considerable way along the road towards statehood, or independence, as compared with the previous position. The giving of the all-important controls over finances and land go a long way towards some freedom, if not autonomy. But, whatever may be the political position, legally the position still is that the Parliament has complete control over the future of the Territory. Furthermore, the Administrator of the Northern Territory, the Commonwealth Minister responsible for the Territory and the Governor-General can still exercise very considerable control over the legislative and executive activities of Territorians. This is so, despite the fact that the Legislative Assembly seems to have been given much fuller powers than the Australian States possess. Specific legislative restraints such as those related to conciliation and arbitration, contracts of employment, borrowing by the Territory and control of nuclear minerals are probably seen by the Federal Government as being not at all unreasonable reservations on the authority of the Territory in present circumstances. Again, there are some very praiseworthy aspects of the new constitutional
documents, such as the insistence on compensation being afforded under the 'just terms' doctrine. But, if the aim is for statehood at some time in the future, it does seem to me that some aspects of the Northern Territory (Self-Government) Act 1978 and the Regulations need some reconsideration by the Parliament. In particular, the plenary legislative power and the ill-drafted provisions of r.4 stand out. If some of these issues are not solved both legally and politically, then some of the nascent difficulties might justify the title of this paper which suggests that there are some constitutional skeletons in the cupboard. These could mar the smooth development of the legal and political relationships between the emerging Northern Territory body politic and the Commonwealth.

Notes

1. Development of the 'Uranium Province' is not presently an issue, for, as I note later, the ownership of 'prescribed substances' under the Atomic Energy Act 1953 is specifically retained by the Commonwealth by s.69(4) of the Northern Territory (Self-Government) Act 1978.

2. Section 53 of the Northern Territory (Self-Government) Act 1978 is considered in a little more detail later.


5. Id, at 280-1.


8. Id, s.20.

9. Id, s.21.

10. Id, s.17(2).

11. Northern Territory (Administration) Act 1910, s.4G.

12. Northern Territory (Administration) Act 1910, s.4U.

13. An argument against the present suggestion could be mounted on the basis that Northern Territory legislation might be regarded as repugnant to s.22 of the Currency Act 1965 which forbids the making or issuance of other than official coins.
14. As with the currency question a repugnance argument could also be mounted by the Commonwealth based upon the Defence Act 1903, s.118.

15. There is a counter-argument to the one advanced here which would tend to suggest that, in terms of s.122 of the Constitution, the Northern Territory Legislative Assembly only has the powers conferred on it by the Commonwealth legislation and, thus, the Assembly is subject to the Parliament. This is true. But my argument is that s.6 of the present Act does confer a very full power which is fully underwritten by s.122 of the Constitution. Thus, it would require a further exercise of legislative power under s.122 to withdraw the authority of the Northern Territory Legislative Assembly. Or, additionally, there could be an exercise of the Commonwealth's power under s.51 of the Constitution to cut down the legislation of the Legislative Assembly.

16. The constitutional validity of the predecessor to s.49, s.10 of the Northern Territory (Administration) Act 1910 was upheld in Lamshed v Lake (1958) 99 CLR 132.

17. Northern Territory (Self-Government) Act 1978, s.32 (3).


19. And I would have argued it even more strongly at the time of the passing of the Northern Territory (Self-Government) Act 1978.

20. Northern Territory (Self-Government) Regulations, r.4.

21. Northern Territory (Self-Government) Act, s.46.
Appendix 8

THE CONSTITUTIONAL STATUS OF THE SELF-GOVERNING NORTHERN TERRITORY

Graham Nicholson


The purpose of this article is primarily to assess some significant aspects of the constitutional status of the Northern Territory as a self-governing community. A secondary purpose is to familiarise readers with the constitutional developments that have occurred in recent years in respect of the Territory. These developments almost certainly have implications extending beyond Commonwealth-Territory relations and may well impinge upon the future course of Australian federalism.

The Territory's Constitutional Links

Under s.122 of the Constitution, the Commonwealth has plenary power to make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth(1). This includes power to allow the representation of such territory in either House of the Parliament to the extent and on the terms which the Parliament thinks fit(2).

The Northern Territory was formerly a part of the State of South Australia(3) and was surrendered by that State and accepted by the Commonwealth from the beginning of 1911(4). This surrender and acceptance was made pursuant to s.111 of the Constitution. The validity of such surrender and acceptance appears now to be beyond question as a result of the High Court decision in Paterson v O'Brien cited in ante, in which the High Court unanimously rejected the suggestion that the exercise of the powers under s.111 was subject to compliance with s.123, such that the surrender must be approved by a majority of the electors of the State. Consequently, the status of the Territory as a Commonwealth Territory is beyond challenge. This status has not been altered by the recent grant of Self-Government(5).

The Commonwealth proceeded as from 1911 to administer the Territory on the basis that it had total authority over the Territory in all the three traditional arms of government. The primary legislative instrument for this purpose was the Northern Territory (Administration) Act 1910. In
1947 a Legislative Council for the Territory was established with a minority of elected members(6). This was later expanded to a majority of elected members. This in turn was subsequently replaced by the fully-elected Legislative Assembly for the Territory of 19 members in 1974(7). However, the Commonwealth remained firmly in control of the legislative process by the exercise, or threat of the exercise, of its power of veto over Territory legislation, and indirectly by maintaining its monopoly over financial and administrative matters.

The first moves towards local participation in the executive arm of government came with the creation of a number of statutory bodies under Territory law. In 1959, an Administrator's Council of six was established, including two elected members of the Legislative Council(8). This was subsequently increased to three elected members in 1968, and in 1974 it became a body totally comprised of elected members plus the Administrator(9). However, it was only an advisory body to the Administrator, who continued as a Commonwealth servant, and the Commonwealth did not part with its control of the executive functions of government.

The Report of the Joint Parliamentary Committee on the Constitutional Development of the Northern Territory in 1974 advocated a substantial transfer of powers to the Legislative Assembly(10), and the Committee maintained this view in a supplementary Report in 1975 after Cyclone Tracy(11). As an interim step in that direction, the office of 'Executive Member' was created in 1976, with the Administrator's Council being replaced by the Executive Council. Only members of the Legislative Assembly were eligible for appointment to the new office and to the Executive Council. Included in the functions of an Executive Member was that of assisting the Administrator in the administration of the government of the Territory, the performance of functions under specified Territory laws and the direction of the activities of the small Territory Public Service(12). Under these arrangements, a number of Territory laws of a local nature were amended to confer statutory functions on Executive Members.

These arrangements were, however, limited in scope and it is clear that insofar as there was some local participation in the executive side of the government of the Territory, this was exercised as part of the executive authority of and on behalf of the Commonwealth. Further, it could not be said that the changes introduced any comprehensive system of ministerial responsibility to the Legislative Assembly.

As to the judicial arrangements for the Territory, the Commonwealth had reversed earlier arrangements for the
creation of a Territory Supreme Court under Territory law(13), by the enactment by the Parliament of the Northern Territory Supreme Court Act 1961. The administration of justice in the Territory remained firmly in Commonwealth hands up to Self-Government, and to some extent even after that.

The Effect of the Northern Territory (Self-Government) Act 1978

The position in relation to all three traditional arms of government changed substantially with the passage by the Parliament of the Northern Territory (Self-Government) Act 1978, and the repeal of the Northern Territory (Administration) Act 1910. The former Act remains in force. For all purposes relevant to this article it took effect from 1 July 1978. That Act falls short of a grant of statehood to the Territory. It does, however, constitute a substantial grant of local autonomy to the Territory to be exercised through the institutions and offices established by the Act. Because of the particular way in which the executive authority of the new body politic and its Ministers is defined (discussed further below), the scope of the grant has been increased even further since 1 July 1978. Thus, for example, as a result of amendments to the Northern Territory (Self-Government) Regulations in 1979, responsibility for Territory courts and the administration of justice has passed to the Territory. This was complemented in turn by the repeal of the Northern Territory Supreme Court Act 1961, by amendments to the Judiciary Act 1903 and by the enactment of a Supreme Court Act by the Territory Legislative Assembly(14).

The intent of the Northern Territory (Self-Government) Act 1978 is spelt out in the recitals to the Act where it states that:

... the Parliament considers it desirable by reason of the political and economic development of the Northern Territory, to confer self-government on the Territory, and for that purpose to provide, among other things, for the establishment of separate political, representative and administrative institutions in the Territory and to give the Territory control over its own Treasury.

Clearly it was intended that a substantial measure of local control should be conferred on the Territory such that it should be governed separately from the Commonwealth. Yet, as has been noted above, the Territory continues to have the status of a Commonwealth Territory. The question for
consideration is whether this intention is compatible as a matter of law with this status.

There is no clear indication in the Constitution as to the requirements for the existence of a Commonwealth Territory. The one common thread is that it has to be subject to the jurisdiction of the Commonwealth in all matters amenable to government control. It does not follow that it must be administered in all respects directly by the Commonwealth. By reference to United States analogies, Quick and Garran assert that Territories can be granted municipal institutions and territorial legislatures(15). Sir William Harrison Moore may be a little more restrictive in that, short of statehood, he only mentioned Territory government as a dependency with a subordinate Government subject to the paramount authority of the Commonwealth(16).

A much wider view was put by Professor Lumb to Standing Committee 'B' of the 1975 Australian Constitutional Convention to the effect that s.122 of the Constitution is wide enough to confer on a Territory a constitutional system under which there is vested in the Territorial institutions partial or complete powers of self-government in all the three traditional arms(17). This seems consistent with the view that the constitutional position of a Territory at any given time is, in appropriate cases, determined by the progress it has made towards attainment of full statehood(18), such that different Territories may at any given time be at different stages of constitutional development.

In the case of the Northern Territory it has achieved the status of a Territory consequent upon action taken under s.111 of the Constitution. That section provides that upon the surrender and acceptance, the Territory concerned becomes 'subject to the exclusive jurisdiction of the Commonwealth'. The meaning of this phrase has received little judicial consideration. It was said in Kean v Commonwealth(19) that it would be inconsistent for the Parliament of the State or the Commonwealth to legislate in such a way as to restrict the exercise by the Commonwealth of exclusive jurisdiction over the new Territory. This indicates support for the view that the Commonwealth acquires exclusive jurisdiction over the new Territory in all the traditional arms of government, namely, legislative, executive and judicial, and that it cannot divest itself of such jurisdiction unless the status of the Territory is changed, for example, by becoming a new State.

On the other hand, the word 'exclusive' in the section may only mean exclusive of the States, and in particular, exclusive of the State surrendering the Territory(20). It does not follow that only the Commonwealth itself, either
directly or by delegation, may exercise its powers in relation to the new Territory. It is consistent with the exclusive powers of the Commonwealth under s.111 for the Commonwealth to establish new institutions to carry out specified functions in the Territory in all or any of the three traditional arms of government, a view that found support with Mason J in Berwick Ltd v Deputy Commissioner of Taxation where he said with the concurrence of Barwick CJ, McTiernan and Murphy JJ(21):

The power conferred by s.122 is a plenary power capable of exercise in relation to Territories of varying size and importance which are at different stages of political and economic development ... it is wide enough to enable Parliament to endow a Territory with separate political, representative and administrative institutions, having control of its own fiscus.

Such an endowment does not amount to a divesting of the Commonwealth's exclusive jurisdiction as long as the Commonwealth's plenary powers under s.122 remain(22). Whether these plenary powers will be exercised by the Commonwealth in the future in relation to the Territory is a matter that will be determined by convention (see below). The endowment totally depends for its support upon the enactment of legislation by the Parliament and in legal theory at least it could be withdrawn by that same body(23).

Features of the Northern Territory (Self-Government) Act 1978

The Northern Territory (Self-Government) Act 1978 has a number of noteworthy features, which are considered below.

1. A Northern Territory Crown

First, s.5 of the Act provides that the Northern Territory of Australia is established as a body politic under the Crown by the name of the Northern Territory of Australia. This provision is supplemented by a reference to the prerogatives of the Crown in s.31 and to the Crown in the right of the Territory in s.51(24). Professor Sawer has written that he is not aware of any other instances where, apart from the direct exercise of the Royal prerogative, a Parliament other than that of the United Kingdom has taken the step of establishing a separate body politic under the Crown(25) although it is now clearly established that separate arms can legally be created(26). The Constitution envisages this, at least insofar as it enables the Parliament to bring into existence new States under s.121 within the monarchical system operating in Australia. It
can be argued that the plenary nature of s.122 referred to above is wide enough to encompass the creation by the Parliament of a separate territorial body politic under the Crown in its own right, possibly as apart of the gradual advance of a Territory towards statehood(27). Further, it can be strongly argued that s.5, read with the other provisions of the Northern Territory (Self-Government) Act 1978, is clearly intended to do more than create a new statutory entity 'under the (Commonwealth) Crown'. Certainly these were the views adopted by Toohey J in his then capacity as Aboriginal Land Commissioner in his reasons for decision dated 24 July 1979 on the Kenbi (Cox Peninsula) Land Claim, where, in discussing the constitutional position of the Administrator of the Territory, he said:

Counsel for the claimants submitted that there are differences between the Administrator on the one hand and the Governor-General and the Governors of the States on the other. Those differences were said to be such that whatever protection the latter enjoy from the scrutiny of the Courts in respect of their actions, whether legislative or executive, no such protection extends to the former. It was said that the position of the Administrator since the passing of the Self-Government Act is not materially different from that before 1978. It was further said that the Self-Government Act did not create a sovereign State and that the Administrator does not hold sovereign rights or rights from the Crown so that decisions of the Courts, withholding scrutiny from the acts of a Governor-General or Governor, have no application to him.

In my view this is not so. It is true that the Self-Government Act did not purport to create a sovereign State as distinct from conferring Self-Government upon the Territory. And it is true that the Administrator is not appointed by the Queen but by the Governor-General. But in all relevant respects it seems to me that his position is the same as that of Governors.

For all purposes material to this hearing, the Administrator is the representative of the Crown and, if it be necessary to take a further step, the Crown in right of the Territory. That, I think, emerges sufficiently from the terms of the Self-Government Act and its expressed object of conferring Self-Government upon the Northern Territory. In particular I refer to the establishment of the Northern Territory of Australia as a body politic under the Crown, the legislative
power of the Legislative Assembly, the power vested in the Administrator of assenting, withholding assent or reserving proposed laws together with his general function of administering the Government of the Territory and to the provision in s.31 of the Act that the duties, powers, functions and authorities of the Administrator extend to the exercise of the prerogatives of the Crown so far as they relate to those matters.

The concept of the Crown in the right of the Commonwealth and the Crown in right of a State has emerged over a number of years, whatever its precise juristic basis. The relevant judicial decisions are collected in Wynes: Legislative Executive and Judicial Powers in Australia, 5th ed, pp.390-392.

This finding was considered subsequently by the High Court in R v Toohey; Ex parte Northern Land Council, where Wilson J(28), with the concurrence of Aickin J(29), held that the Administrator was the representative of the Crown in right of the Northern Territory. Gibbs CJ was of the opposite view on this aspect, but was prepared to approach the question on the basis found by the majority comprising Wilson and Aickin JJ(30). Wilson J noted that the Northern Territory (Self-Government) Act 1978 effected an important change in the political character of the Territory and went on to consider the effect of s.5 of that Act. The relevant portion of his judgment is worth reproducing at some length(31):

This section is of fundamental and far-reaching importance. It brings into being a new self-governing polity under the Crown. Of necessity, it required the appointment of a representative of the Crown in right of that polity, to administer the government thereof and perform the traditional vice-regal functions. Section 6 invests the Legislative Assembly with power to make laws for the peace, order and good government of the Territory, a power which in my opinion, subject to the limits provided by the Act, is a plenary power of the same quality as, for example, that enjoyed by the legislatures of the States. The constitution of the Territory as a self-governing community is no less efficacious because it emanates from a statute of the Parliament of the Commonwealth than was the constitution of the Australian colonies as self-governing communities in the nineteenth century by virtue of an Imperial statute: cf. Hodge v The Queen [1883] 9 AC 117; Powell v Apollo Candle Company [1885] 10 AC 282. In my opinion, the Self-Government Act is a valid exercise of the
power conferred on the Parliament by s.122 of the Constitution. The fact that the Administrator is appointed by the Governor-General and holds office at his pleasure does not deny his character as representative of the Crown in right of the Territory: Liquidators of the Maritime Bank of Canada v Receiver General of New Brunswick [1892] AC 437; R v Carroll [1948] 2 DLR 705. The status of the new polity is borne out by the provisions of the Self-Government Act, which, contrary to the submission of the applicant, differs significantly from the earlier Administration Act. The Administrator no longer administers the Government of the Territory 'on behalf of the Commonwealth'; that Government is henceforth administered in its own right by the Administrator (s.32). There is no longer any general subjection of the Administrator to the instructions of the Commonwealth Minister; henceforth such instructions are of force only in relation to the exercise of the powers and functions of the Administrator that fall outside ss.34 and 36 which cover decisions touching the size of the ministry and the participation of members of the Legislative Council [sic] in that ministry, and in relation to matters which fall outside those in respect of which the Ministers of the Territory are to have executive authority (ss. 32 and 35). The range of matters which have been specified pursuant to s.35 is extensive. The effect of the section is such as to limit the possible impact of ministerial instructions to a small compass. Mr Sher stressed the fact that the Administrator is still required to take an oath of service to the Crown, but in my opinion this does not determine his relationship to the Crown. Furthermore, while there are provisions which emphasise a continuing role for the Governor-General in relation to the assent to Bills, and to their disallowance (ss.8 and 9), and which maintain a special relationship between the Territory and certain specified laws of the Commonwealth (see, for example, ss.53 and 54), and while it remains true that the Parliament retains the power to repeal or amend the enactment, none of these things destroy the analogy in the present situation with the relationship that existed between the United Kingdom Government and Parliament and the Australian colonies in the nineteenth century. The creation of a new polity under the Crown, with its own Crown representative, remains a fact.

It follows from these views that a new 'government' has been created in and for the Territory, the term embracing
both collectively and individually the Ministers of the Territory acting on behalf of the new body politic under the Crown, both through the Executive Council and otherwise (32).

Gibbs CJ also considered the relevant sections of the Act (including ss. 5, 31 and 51) in some detail and, significantly, did not suggest that they were invalid in any way. He noted that the Territory, although granted Self-Government, remained a Territory of the Commonwealth and that the Governor-General was the representative of the Queen within the Commonwealth. If the Parliament had the power under s. 122 to appoint an officer to be the Queen's representative within the Territory (which he did not decide) it was to be expected that an intention to exercise such power would be expressed in clear words (33). It follows on his view that insofar as the Territory is exercising any of its powers of Self-Government by virtue of its status under the Crown, it is the Crown in right of the Commonwealth that is being invoked and not a new Territory Crown. Clearly, this view was not shared by Wilson and Aickin JJ who supported the legislation as creating a new body politic under the Crown in its own right. The other Justices did not specifically deal with the nature of Self-Government or the status of the Administrator.

The resolution of this issue could have important consequences in relation to the exercise of the Royal prerogatives and the extent to which legislation binds the Crown and its officers. If the Northern Territory Crown is in fact only a newly-created part of the Commonwealth Crown, it would seem to follow that the grant of executive authority flowing to the Territory is part of the Commonwealth's executive power derived from s. 61 of the Constitution by way of delegation (34). By way of comparison, it seems clear that the source of legislative authority flowing to the Territory Legislative Assembly derives from s. 122 of the Constitution and not from the various specific heads of Commonwealth legislative power, for example, those in s. 51. If, on the other hand, the Northern Territory Crown is a new arm of the Crown in its own right separate from the Commonwealth Crown, it follows that it must have its own grant of executive power separate from that of the Commonwealth, and that the source of the new power also derives from s. 122 of the Constitution and not s. 61. The Northern Territory (Self-Government) Act 1978, being a law validly made under the plenary powers of s. 122, has not only created a new arm of the Crown but also the executive power that goes with it. On this view, the grant of executive power to the Territory does not in any way limit the executive power of the Commonwealth within the latter's own area of operation. Rather, the two heads of executive power, Commonwealth and Territory, run concurrently but separately, the one being limited to Commonwealth matters including those matters
arising under Commonwealth legislation, and the other being limited to transferred matters and including those matters arising under local laws dealing with transferred matters.

On whichever view is adopted, it now seems to be firmly established that the creation of a new body politic under the Crown as part of the grant of Self-Government to the Territory is constitutionally valid. Put another way, a new self-governing legal entity has been created for the Northern Territory with its own grant of powers in Territory matters, the legislation being designed to enable the Territory to govern itself through this new legal entity and its institutions and officers rather than by way of continued Commonwealth administration(35).

2. Legislative and Executive Powers

The second noteworthy aspect of the grant of Self-Government is that the general grant of plenary legislative powers to the unicameral Legislative Assembly(36) has been combined with a grant of executive authority by reference to a list of specific subject-matters prescribed by Regulations under s.35 of the Northern Territory (Self-Government) Act 1978(37). This may be compared with the system in reverse applicable to the Commonwealth of Australia under the Constitution, whereby the grant of legislative power is detailed by reference to specifically enumerated subjects whereas the grant of executive authority is described in general terms(38). It may also be compared with the position in the States, where the State legislatures have plenary grants of legislative power(39) subject to the limitations imposed by the Constitution, combined with non-specific grants of executive authority subject to certain limitations flowing from their colonial origins.

It is not clear whether, as a matter of law, a grant of executive power must run concurrently with a grant of legislative power, although it is said in the Commonwealth context that the Federal executive power is not likely to be construed as extending beyond the constitutional responsibilities allocated to the Commonwealth, and is constrained by the federal nature of the Constitution, including the distribution of legislative powers between the Commonwealth and State Parliaments(40). It is arguable that the Commonwealth Parliament does have power under s.122 of the Constitution to provide for a system of Territorial legislative and executive powers which do not correspond, although the desirability of doing so may be open to question from the point of view of responsible government. It would seem axiomatic under a Westminster system of responsible government that if a legislature has power to make laws on a certain subject, that there should also be Ministers responsible to the legislature to implement and administer
those laws. In the case of the Territory, any difficulties as a result of the disparity between legislative and executive powers have been ameliorated by several factors.

First, the Territory now has a very substantial grant of executive authority as a result of the making of the Northern Territory (Self-Government) Regulations and subsequent amendments thereto, leaving very few 'State-type' matters that are not now subject to local control. The main areas still excluded are the mining of uranium and other prescribed substances within the meaning of the Atomic Energy Act 1953 and Regulations thereunder, rights in respect of Aboriginal land under the Aboriginal Land Rights (Northern Territory) Act 1976(41), and some instances where Commonwealth legislation in 'State-type' matters continues to apply in the Territory, and by so doing, confers executive powers on the Governor-General, Commonwealth Ministers and officials(42). As noted above, it is said that the range of matters which have been specified as within the Territory executive authority is extensive, and its effect is to limit the possible impact of instructions from a Commonwealth Minister to the Administrator to a small compass(43).

In addition, the Commonwealth has reserved to itself a power of reservation for the Governor-General's pleasure of any proposed law passed by the Legislative Assembly which does not make provision only for or in relation to a matter specified by regulation under s.35 of the Northern Territory (Self Government) Act 1978 (44). This power, combined with a general power of disallowance remaining with the Governor-General(45), ensures that the Commonwealth retains real control over Territory laws, particularly those dealing in whole or part with non-transferred matters. Whether the powers of disallowance should be exercised in the case of wholly transferred matters will depend upon the development of conventions consistent with the self-governing status of the Territory.

Further, the Act gives the relevant Commonwealth Minister power to instruct the Administrator on any non-transferred matter(46). Some useful flexibility has been achieved under the Northern Territory (Self-Government) Regulations by the use of inter-governmental arrangements whereby Territory Ministers can exercise executive powers in non-transferred matters in accordance with the terms of those arrangements.

In the last resort, there remains the power of the Parliament to legislate so as to remove any difficulties that may arise in the few remaining areas where disparity still exists between legislative and executive powers.
3. Continuing Commonwealth Control

A further noteworthy feature of the grant of Self-Government is that, in addition to those controls mentioned above, the Commonwealth has reserved to itself a number of other controls of a substantial nature over the Territory.

The most obvious of these controls flows from the fact that the very basis of the constitutional charter under which the Territory exists and operates remains largely under direct Commonwealth control; that is, the Northern Territory (Self-Government) Act 1978 and Regulations thereunder. There are some aspects that are left in the control of the Legislative Assembly by that Act; for example, the fixing of the number of members of the Legislative Assembly(47), the quorum in the Legislative Assembly(48), and the control of Territory moneys(49). However, in the main, these are limited matters and the broad framework of Self-Government remains in the hands of the Commonwealth Government and the Parliament. This precludes any Territory changes to its constitutional structure, and possibly even the taking of any prospective legal steps in anticipation of such changes, although no doubt it would not prevent the Territory from undertaking preliminary measures with a view to seeking Commonwealth action to effect such changes(50). This is to be contrasted with the position in the Commonwealth and the States (and the position formerly applying to the State predecessors, the self-governing Australian colonies), under which they may initiate and proceed with constitutional changes in accordance with their own constitutions.

Included in the matters dealt with in the Northern Territory (Self-Government) Act 1978 and remaining under Commonwealth control are the most important of the electoral provisions applying to the Legislative Assembly. The 1974 recommendation of the Joint Parliamentary Committee on the Constitutional Development of the Northern Territory that there be single member electorates and that Aborigines participate only in the open electorates(51), has been incorporated in the Act(52). Further, the Act provides for an electorate quota system with a tolerance either way of 20 per cent(53), although it does not spell out any redistribution requirements. The Act also specifies the qualifications of both electors and candidates, the electoral and parliamentary functions of the Administrator, the term of the Legislative Assembly (four years) and the provisions for resignations and by-elections(54). Most other electoral matters are left to the Legislative Assembly.

The Commonwealth continues to retain controls over the Territory by other methods. A number of Commonwealth Acts have special application in the Northern Territory beyond
that in the States, for example, the National Parks and Wildlife Conservation Act 1975, under which two large national parks have been established at Kakadu and Uluru, the Aboriginal Land Rights (Northern Territory) Act 1976, under which large areas of land in the Northern Territory have been converted into Aboriginal freehold land in trust in perpetuity, and provision is made for claims to be put forward as to other Crown land, and the Atomic Energy Act 1953 which, together with s.69 of the Northern Territory (Self-Government) Act 1978, maintains Commonwealth ownership and substantial control of uranium and other prescribed substances in the Territory. In respect of these Acts it is probable that, as Commonwealth laws, they are still capable of overriding the effect of inconsistent Territory laws, even in transferred matters, and notwithstanding the grant of Self-Government(55). To some extent the Commonwealth has, in new laws passed since Self-Government, adopted the practice of treating the Territory in substantially the same way as the States in transferred matters, but it cannot yet be said that this has become a universal practice such that a convention could be said to have arisen(56).

Further, the Northern Territory (Self-Government) Act 1978 contains a number of controls on specific subjects. It provides for a denial of legislative power as to most industrial matters(57), thus preserving the Commonwealth industrial system in its special application to the Territory. The Act also enabled the Commonwealth to acquire back from the Territory any land in the Territory without compensation within one year of Self-Government(58), and this power was used to acquire a large area of land in the Alligator Rivers Region, that area remaining in many respects a Commonwealth enclave in the Territory(59). The Act also maintains Commonwealth control over any borrowing by the Territory(60).

4. Ministerial Responsibility

A fourth noteworthy feature of the self-governing Northern Territory is the manner in which the Westminster system of collective ministerial responsibility to the legislature has been entrenched in the constitutional charter. Under s.34 of the Northern Territory (Self-Government) Act 1978, the Administrator determines the number of offices of Ministers of the Territory and their respective designations. Under s.36, the Administrator may appoint a member of the Legislative Assembly to a ministerial office so created, there being no power to make appointments other than from among the Legislative Assembly members. By virtue of s.37, such an appointment may come to an end following resignation from or disqualification for membership of the Legislative Assembly, termination by the Administrator, resignation acceptable to the Administrator,
and upon the first meeting of the Legislative Assembly following the general election that takes place after the appointment. The Executive Council of the Northern Territory comprises all the Ministers of the Territory but no one else(61).

As a consequence of these provisions, only members of the Legislative Assembly can be appointed and hold office as Ministers of the Territory, and membership of the Executive Council is limited to those Ministers. The only period during which a Minister may continue in office without being a member of the Legislative Assembly is between the date of the general election and the first meeting of the Legislative Assembly after that election (assuming the Minister is not re-elected). This position may be compared with that in the Commonwealth and the States, where the provisions as to collective ministerial responsibility to the legislature are still largely based on convention. In this regard, it might be said that the Territory is less reliant upon conventions than elsewhere in Australia, although obviously there is considerable room for the operation of conventions in other matters, such as in the exercise of the Administrator's powers in the choice of Ministers from among the members of the Legislative Assembly and their dismissal, the issuing of writs for elections(62) and in the appointment of times for sessions of the Legislative Assembly and its prorogation(63).

5. Constitutional Guarantees

Finally, another noteworthy aspect of the grant of Self-Government relates to the inclusion of some constitutional guarantees in the Northern Territory (Self-Government) Act 1978 and the omission of others that do apply in the States. In this regard, it is generally considered that most of the constitutional guarantees in the Constitution are not applicable to Territories(64). The Northern Territory (Self-Government) Act 1978 adopts provisions similar to some of these constitutional guarantees. Thus s.49 provides for freedom of trade, commerce and intercourse between the Territory and the States(65). Section 50(2) provides that the acquisition of property, which, if in a State, would be an acquisition to which s.51 (xxx1) of the Constitution would apply, shall not be made otherwise than on just terms.

An additional guarantee, not found in the Constitution, is contained in s.50(1) which provides that the power of the Legislative Assembly to make laws does not extend to the making of laws with respect to the acquisition of property otherwise than on just terms, thus imposing a restriction not found in the case of State Parliaments(66). The power of acquisition by the Territory is further restricted by
s.67 of the Aboriginal Land Rights (Northern Territory) Act 1976, which prevents any compulsory acquisition of Aboriginal land under Territory laws.

Notwithstanding the above provisions, the residents of the Territory remain deprived of the constitutional guarantees of most of the residents of Australia, such as they may be. Proposals made at earlier Constitutional Conventions for a referendum to remedy this position have so far not resulted in any action(67). This position would be rectified if the Territory became a new State, in which event it would seem that constitutional guarantees applicable to existing States would also apply to the new State except insofar as those guarantees are expressed by reference to 'Original' States.

Conclusions

The nature of the grant of Self-Government to the Northern Territory has yet to be comprehensively assessed, largely because of its comparatively recent origins. The grant constitutes an extensive and comprehensive, but not complete, form of self-government. Its basic constitutional validity has now been established, although the various constitutional and legal implications of the grant have not yet been fully determined. Most Territorians would probably support the view that in broad terms, and with Commonwealth financial support, the grant has provided a reasonable framework for the government of the Territory and that it constitutes an improvement on the previous Commonwealth administration. In this regard, it provides support for the view that autonomy in local and regional matters will often be preferred to centralised governmental control in such matters, and that local and regional participation and consultation in the business of government is of great importance. As to the future, the possible grant of statehood will obviously be a factor of importance, as will the extent to which the Commonwealth in the interim accords to the Territory substantially the same treatment as a State, such that conventions and practices are allowed to develop. The Territory will continue to be of interest from a constitutional point of view, with implications that may affect the development of Australian federalism as the latter responds to the evolving national and international scene.

NOTES

1. As to the plenary nature of s.122, see Buchanan v Commonwealth (1913) 16 CLR 315; R v Bernasconi (1915) 19 CLR 629; Lamshe d v Lake (1958) 99 CLR 132; Spratt v Hermes (1965) 114 CLR 226.
2. A power that has been held to permit the admission of Territorial members of the Federal Parliament with full voting rights, following the decisions in *Western Australia v Commonwealth* (1975) 134 CLR 201 and *Queensland v Commonwealth* (1977) 139 CLR 585.

3. The Northern Territory was formerly part of New South Wales and was annexed to the Province of South Australia by Imperial Letters Patent of July 1863. It became part of the State of South Australia upon Federation by specific reference in the definition of 'the States' in covering cl.6 of the Commonwealth of Australia Constitution Act (Imp). A summary of the position is to be found in the Opinion in 1909 of R.R. (later Sir Robert) Garran, Secretary of the Commonwealth Attorney-General's Department, in *Opinions of the Attorneys-General of the Commonwealth of Australia*, Vol I, 1901-1914, No 341 at p435. It has been argued that because the 1863 Letters Patent were expressed to be revocable that the Territory was not fully incorporated with the State (see K.T. Borrow, "'The Northern Territory of Australia', "Northern Australia" and "Alexandra Land" (1862-1900)' in 28 ALJ 148). This view cannot now be supported in view of the decision in *Paterson v O'Brien* (1978) 138 CLR 276, a decision based on s.111 of the Constitution (see also the note in 52 ALJ 169). That section permits the Parliament of a State to surrender any part of that State to the Commonwealth, thus making it clear that the Northern Territory was part of the State of South Australia.

4. The Northern Territory Surrender Act, 1907 (SA) and the Northern Territory Acceptance Act 1910.

5. *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 184 per Gibbs CJ, and at 228 per Murphy J.

6. **Northern Territory (Administration) Act 1947.**

7. **Northern Territory (Administration) Act 1974.**

8. **Northern Territory (Administration) Act 1959.**

9. **Northern Territory (Administration) Act 1974.**


12. **Northern Territory (Administration) Act Amendment Act 1976.**

13. **Supreme Court Ordinance 1911 (NT).**
14. See the Northern Territory (Self-Government) Regulations as amended by SR No 205 of 1979, the Northern Territory Supreme Court (Repeal) Act 1979, the Judiciary Amendment Act 1979 and the Supreme Court Act (NT). Territory appeals continue to be governed by Commonwealth legislation: see the Federal Court of Australia Act 1976 although note the amendments to that Act by the Statute Law (Miscellaneous Provisions) Act (No 1) 1985, to be proclaimed.


19. (1963) 5 FLR 432 at 437 per Bridge J.

20. See Nott Bros & Co Ltd v Barkley (1925) 36 CLR 20 at 29, Golden-Brown v Hunt (1972) 19 FLR 438 at 444 per Fox J.


22. Compare Cobb & Co Ltd v Kropp (1966) 40 ALJR 177, PC, and note R v Toohey; Ex parte Northern Land Council (1981) 151 CLR 170 at 280 per Wilson J.

23. It may be contrary to convention for the Commonwealth to withdraw any powers of Self-Government granted to a Territory. The Attorney-General's Department, in its submission to the Joint Parliamentary Committee on the Constitutional Development of the Northern Territory in 1974 said that such a withdrawal had not happened in Australia's history, that it would be politically unthinkable for the Australian Parliament to undo what a previous Parliament had enacted in respect to the constitutional development of its Territories and that it would only be done in times of revolt or disorder (see First Report, Parliamentary Paper No 281, at p8). A C Castles, 'The Northern Territory of Australia', in
A P Blaustein and P M Blaustein (eds), Constitutions of Dependencies and Special Sovereignties (Oct 1986), Vol I, goes further and suggests in relation to the Northern Territory that where the grant of legislative authority is accompanied by a concomitant grant of local executive power over prescribed subject-matters, the grant may conceivably be construed as one which cannot be revoked. Certainly any substantial retraction of the grant would cause serious practical problems. [The original text cited an earlier edition of Blaustein, June 1980 Vol III, eds.]

24. Note that a number of other recent Commonwealth Acts also refer to the 'Crown in right of the Territory' to distinguish it from the Crown in right of the Commonwealth: eg, Aboriginal Land Rights (Northern Territory) Act 1976, s.3(6); Human Rights Commission Act 1981, s.5; Copyright Act 1968, s.10.

25. See 'The Northern Territory: Constitutional Status, Present and Future' in Small is Beautiful, Parliament in the Northern Territory, Working Paper No 3 (1981, ANU), p93. However, under the British North America Act, 1871, s.2, the Canadian Parliament in 1905 legislatively established the Provinces of Alberta and Saskatchewan, these Provinces having their own Crown representatives appointed by the Governor-General in Council under the British North America Act, 1871: see C L Wiktor and G Tanguay, Constitutions of Canada (June 1978), Vol 1, for details of the legislation.


27. See per Kriewaldt J in Namatjira v Raabe (1958) NTJ 608 at 616, and cf Namatjira v Raabe (1959) 100 CLR 664.

28. (1981) 151 CLR 170 at 278-280. Some support for this view is also derived from R v Secretary of State; Ex parte Bhurosah [1968] 1 QB 266, cited by Lord Denning MR in R v Secretary of State for Foreign and Commonwealth Affairs; Ex parte Indian Association of Alberta [1982] 1 QB 892 at 917, to support the proposition that the Crown is separate and divisible for each self-governing Dominion, Province or Territory.
29. Ibid, at 266. See also Attorney-General (NT) v Kearney (1985) 158 CLR 500 per Gibbs CJ, Wilson and Dawson JJ.

30. Ibid, at 186. See also FAI Insurances Ltd v Winneke (1982) 151 CLR 342 at 364 per Mason J and at 379 per Aickin J, and Kearney, ante, per Gibbs CJ, Wilson and Dawson JJ.

31. At 279-280.


34. It is to be noted that the Commonwealth's executive power under s.61 of the Constitution, including the prerogative, runs in the Territories and, subject to any legislative provision made to the contrary, is not Federally restrained in its application thereto: see Johnson v Kent (1975) 132 CLR 164 at 169 per Barwick CJ. The Commonwealth's executive power may also be supplemented by Royal allocation of powers and functions to the Governor-General under s.2 of the Constitution (see reference in n38, post), by laws made pursuant to s.51(xxxix) of the Constitution and also, possibly, in relation to Territories, by laws made pursuant to s.122. In the case of Commonwealth laws made under s.122, insofar as those laws confer specific executive powers on the Crown or Commonwealth officers, it is still correct to regard these powers as part of the Commonwealth's general executive powers under s.61.


36. Northern Territory (Self-Government) Act 1978, s.6, which confers a power, subject to the Act, for the Legislative Assembly to make laws for the peace, order and good government of the Territory, which, in relation to its predecessor the Legislative Council, has been held to be a plenary grant of power in Namatjira v Raabe (1958) NTJ 608, Kean v Commonwealth (1963) 5 FLR 432; R v Lampe; Ex parte Maddalozzo (1963) 5 FLR 160 at 170 and Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141 and has similarly been interpreted in relation to the Legislative Assembly in R v Toohey; Ex
37. See r.4 of the Northern Territory (Self-Government) Regulations.

38. Constitution, s.61, although note s.2 of the Constitution. As to the latter, see L Zines (ed), Commentaries on the Australian Constitution (1977), Chs 1-2.


41. See r.4(2) of the Northern Territory (Self-Government) Regulations. However, even these matters can come within Territory executive authority where the Commonwealth Act so provides (r.4(5)(b)); under agreements or arrangements with the Commonwealth or the States (r.4(5)(f)); or where these excluded matters are only affected incidentally (r.4(5)(h) and (6)).

42. For example, the National Parks and Wildlife Conservation Act 1975. Note that this and some other Commonwealth Acts can themselves by their terms also be a source of additional Territory executive power when read with r.4(5) of the Northern Territory (Self-Government) Regulations.

43. R v Toohey; Ex parte Northern Land Council (1981) 151 CLR 170 at 280 per Wilson J.

44. See s.7(2).

45. See s.9.

46. See s.32(3).

47. Section 13(2).

48. Section 23.

49. Sections 44-45.
50. Compare, for example, the legislative and administrative actions taken in Alaska and Hawaii to prepare draft constitutions and submit proposals for grants of statehood.


52. Section 13.

53. Section 13(5).

54. Sections 14, 20 and 21.

55. Leaving aside the position of self-governing Territories, it is clear that Commonwealth laws will override Territory laws where the two conflict, although it is not clear whether the test is exactly the same as between Commonwealth and States under s.109 of the Constitution: see Federal Capital Commission v Laristan Building & Investment Co Pty Ltd (1929) 42 CLR 582 at 588 per Dixon J; Webster v McIntosh (1980) 32 ALR 603; R v Kearney; Ex parte Japanangka (1983) 158 CLR 395 at 418 per Brennan J; and University of Wollongong v Metwally (1984) 158 CLR 447 at 464 per Mason J. The test is one of repugnancy, and flows from the view that the grant of legislative power to the legislature of a Territory does not include the power to make laws that are repugnant to the laws of the parent legislature.

56. As to the need for such a convention, see the 1974 Report of the Joint Parliament Committee on the Constitutional Development of the Northern Territory at para 60(c), and also see para 5.4 of the 1980 paper by Dr Cheryl Saunders and Mr Ewart Smith for Standing Committee 'D' of the Australian Constitutional Convention identifying the conventions associated with the Constitution (on this paper see the note in 55 ALJ 57).

57. Section 53.

58. Section 70.

59. Although it is probably not a Commonwealth 'place' for the purposes of s.52(i) of the Constitution: see Pryce v King (1985) 37 NTR 19.

60. Section 47.

61. Section 33.

62. Section 15. See also s.17. Note that there is no express power of dissolution.
64. Examples of the constitutional guarantees applying in the States which may not apply to Territories are the discrimination and preference provisions in s.51(ii) and s.99, acquisition of property on just terms in s.51(xxi), trial by jury in s.80 (but see per Murphy J in Li Chia Hsing v Rankin (1978) 141 CLR 182 (at 202), freedom of trade, commerce and intercourse in s.92, freedom of religion in s.116 (although there is some dispute in relation to this section as to whether it applies in Territories: see Wynes, op cit, no 26, ante, at p120 and Attorney-General (Vic) (Ex rel Black) v Commonwealth (1981) 146 CLR 559 at 593-594 per Gibbs J and at 669-670 per Wilson J) and the rights of residents in States in s.117. A discussion of the above is beyond the scope of this article, but see the paper by Professor Lumb referred to in n 17, ante.

65. See previously the Northern Territory (Administration) Act 1910, s.10, and see Lamshed v Lake (1958) 99 CLR 132.

66 See previously the Northern Territory (Administration) Act 1910, s.9(2).

67. Although note the Constitutional Alteration (Referendums) 1977, passed in accordance with s.128 of the Constitution, and resulting in the granting of votes in future referendums to electors of Territories having representation in the House of Representatives. Thus Territorians at least now have a say as to proposed Constitutional changes that may affect them.
Appendix 9

THE STATE OF THE NORTHERN TERRITORY

Bernie Kilgariff

When Self-Government was conferred upon the Northern Territory on 1 July 1978, the move was seen as one which would be the first along the road to eventual statehood for the Territory.

Speaking during the 1975 election campaign the then Prime Minister Mr Malcolm Fraser said:

This week the Liberal and National Country Parties set 1980 as the goal for achieving statehood for the Northern Territory (Electoral talk, 23 November 1975).

But even though statehood was to be the long-term outcome, the grant of Territorial Self-Government itself was regarded as a significant event.

The Territory legislature, under the Northern Territory (Self-Government) Act 1978, was given control of most State-like functions, and of particular significance was its new-found responsibility for its own Treasury.

This development meant that the Territory was able to set its own priorities, rather than communicate its wishes to a southern administration, and rely on the beneficence of the Commonwealth.

However, in the discussions leading up to the grant of Self-Government, both the Territory and Commonwealth Governments recognised that the provision by the Commonwealth of an assurance of financial support for the Territory would be essential to any transfer of powers and responsibilities.

As a result, negotiations between the two Governments took place, culminating in the adoption of the Memorandum of Understanding in Respect of Financial Arrangements between the Commonwealth and a Self-Governing Northern Territory.

This agreement has governed the Territory's financial relationship with the Commonwealth for the past seven years. During that time the issue of statehood has been raised but not seriously pursued.

It would be accurate to say that for most Territorians statehood is a 'non-issue', at present, although there is
not complete acceptance of what is regarded as heavy-handed control by the Commonwealth in the management of uranium development, management of Kakadu and Uluru National Parks and Aboriginal Land Rights. What satisfaction does exist in the Territory with responsible Self-Government derives largely from the acknowledged prosperity and development the Territory has enjoyed since 1978. It also derives largely from the sound financial arrangements which were agreed upon for the Territory in the Memorandum of Understanding.

For the statehood issue to develop some impetus in the Territory it is likely that some disturbance or displacement of the present arrangements would need to occur.

Territorians may need to develop, perhaps, a sense of grievance - a perception of themselves as being disadvantaged, before the prospect of statehood holds appeal as an alternative to Self-Government.

Once the issue is being publicly canvassed a range of questions will need to be answered for Territorians before it could be expected that the move for statehood would gain popular support.

Territory residents will want to be assured that statehood will not bring any financial disadvantage, that it would bring equality with the original States; and that the level of Federal representation accorded to the new State would be commensurate with its new status.

It is essential that in the negotiations which will need to take place between the Commonwealth and Territory Governments the final terms and conditions which will operate under statehood be reached to the mutual satisfaction of the parties.

There should be no settling for a 'second-class' statehood for the Territory, so that in ten to twenty years time the Territory will be faced with going back to the Commonwealth to renegotiate an unsatisfactory arrangement, too hastily agreed to.

This paper is intended to highlight some of the issues which will be involved in the statehood debate. Issues which range from the constitutional considerations to the, perhaps, more daunting political considerations.

The Constitutional Question

Section 121 of the Constitution states that the Parliament may admit or establish new States, and may, upon such admission or establishment, make or impose such terms and conditions, including the extent of representation in either House of Parliament, as it thinks fit.
Constitutionally there is no need for a referendum on the admission or establishment of a new State. There is no requirement that the people of the original States or the Territory be consulted in the matter of statehood. If it so wished, the Parliament could unilaterally impose statehood on the Territory.

However, political considerations will doubtless dictate that the Commonwealth take account of the attitudes of not only the Territory, but the States. The most likely course will be for the Commonwealth to act on an initiative of a Territory Government, calling for statehood.

As straightforward as the Constitutional requirements appear, there has been some debate on aspects of the creation of a new State, and the significance of whether a State is admitted or established.

Professor Daryl Lumb has favoured the view that the steps towards statehood for the Territory will include the formulation and adoption of a Territory Constitution. This view is based on an interpretation of ss.106 and 121 of the Constitution (Lumb 1978, 554).

While s.121 allows for the admission or establishment of new States, s.106 provides that the Constitution of the new State shall continue as at its admission.

These sections, read together, imply that for a Territory to be admitted as a State, it must have a Constitution already in place, in Dr Lumb's view.

That view was not supported in a joint Opinion presented in 1978, by Senator Peter Durack QC, the then Attorney-General, and Sir Maurice Byers QC, the then Solicitor-General. They concluded that the wording of s.121 of the Constitution would not preclude the 'establishment' of a State, which would include conferring a Constitution upon that new State and the subsequent 'admission' of that State to the Commonwealth (Durack and Byers 1978).

The Opinion contemplates that, notwithstanding the pre-existence of a Territory Constitution, the Commonwealth could impose a Constitution of its own creation upon the new State.

If the Territory Government accepts the opinion of the former Attorney-General and the Solicitor-General, then it may regard the formulation of its own Constitution prior to approaching the Commonwealth concerning statehood as being of little value.

However, even accepting the Durack/Byers view, the development of a Constitution for the new State could be of
value to a Territory Government in at least three important respects.

Firstly, it assists in the development of the statehood issue. It brings the matter to the attention of those who would hope to have some input into the document and would indicate to the Commonwealth Government that the Territory is serious in its wish to develop full statehood.

Secondly, the completed document, as the Territory Government would wish it to be accepted by the Commonwealth, could be put to the people of the Territory for ratification, in the form of a referendum.

A negative reaction from the people of the Territory would serve as a warning to the Territory Government that its move towards statehood was premature, or the people of the Territory were not convinced that it was warranted or desirable, or that the document itself was unacceptable.

Such a warning could prove particularly valuable if heeded by a perhaps over-enthusiastic Government, determined to force the issue of statehood.

Alternatively, a positive reaction to the proposed Constitution and its ratification by a majority of electors, would indicate not just to the Territory Government, but more importantly, to the Commonwealth Government, a support for statehood, on the basis of the provisions of the Territory Constitution.

Dr Lumb has taken the view that where a Territory has already formed a Constitution it is admitted to the Commonwealth with that Constitution.

The function of the Parliament is to ratify such a Constitution (which could include a right to request amendments if the Parliament is not satisfied with the content of the Constitution) and to approve admission on terms and conditions (Lumb 1978, 559).

The third potential benefit to the Territory in having formed a Constitution prior to seeking statehood, applies to a greater extent if Dr Lumb's view is accepted. It is conceivable that the Parliament might be less inclined to insist on changes to an established and popularly accepted Constitution, than it would to a relatively 'new' Constitution which has not gained popular acceptance.

The opportunity exists for the Territory to establish a Constitution containing provisions of its own choosing and to pre-empt the imposition of a Commonwealth drafted Constitution on the Territory.
Even if, as Dr Lumb warns, the Commonwealth requires changes to the Territory's Constitution, it may be a more difficult task, politically, disregarding Constitutional power, to insist upon changes to the Territory's Constitution.

In the case of the Territory, its constitutional basis as a political entity separate from the Commonwealth is contained within the provisions of the Northern Territory (Self-Government) Act 1978.

The view has been put that this could not amount to a Constitution within the meaning of s.106 of the Constitution. And with the Territory powerless under the Act to amend its terms or alter its own Constitutional status, no Constitution as contemplated by s.106 could be put in place prior to a grant of statehood.

However, it would be open to the Territory Government to set up a committee or convention to draft a Constitution which might be put to the people of the Territory, and if approved, to the Commonwealth as the preferred Constitution of the Territory.

Such a course of action, that is the formulation of a Constitution through a Territorial Convention, and the submission of the Constitution to the voters of the Territory, would follow the pattern which was established by the colonies last century, in the formulation and adoption of their respective Constitutions. It also follows the pattern established in the American Territories which sought statehood after the formation of the Union. Dr Lumb is of the opinion that there would be no requirement that this course be followed. However, as has already been outlined, the potential benefits of adopting elements of this approach are worth bearing in mind.

Powers of the New State

The most critical negotiations between the Commonwealth and Territory Governments on the issue of statehood will, doubtless, revolve around the 'terms and conditions' which the Parliament may impose upon new States 'as the Commonwealth thinks fit'.

The terms and conditions imposed upon the Territory by the Commonwealth will determine the quality of statehood bestowed upon the Territory.

It is essential that the terms and conditions agreed upon by both Governments are satisfactory and represent conditions by which the parties are prepared to abide, on an ongoing basis.
The Territory Government would be aware of the danger of accepting a 'second-class' form of statehood, perhaps as a last resort, or in the hope that the quality of statehood may be upgraded at some later stage of the new State's development.

As a Territory of the Commonwealth the Northern Territory is, even though self-governing and responsible for the management of most State-like powers, nonetheless subject to the control of the Parliament and its autonomy could be removed by the repeal of an Act of the Parliament.

The Territory, under the Northern Territory (Self-Government) Act 1978 is denied legislative control of some matters which are the domain of the State Governments in the respective States. They are, namely, the administration and control of Aboriginal land rights and national parks and the ownership of uranium. It is reasonable to suppose that in any move towards statehood the Northern Territory Government would contemplate the transfer of control of these matters from the Commonwealth to the Territory.

But however much the Territory might make out a moral case for equality of State powers, there appears to be no constitutional bar to the Commonwealth reserving to itself powers which are enjoyed by the original States.

An Opinion of Sir Maurice Byers QC, the Solicitor-General, dated 10 December 1980, indicates that where the Commonwealth establishes a new State its Constitution may validly contain provisions denying it legislative competence over specific subject matters either for a time or subject to certain conditions (Byers 1980, 9).

However, that view seems to be somewhat contradicted by another opinion expressed in the same paper. The Solicitor-General writes:

The Territories are, prior to admission, subject to Commonwealth legislative power unrestricted as to subject matter and remain so until they become States...(Byers 1980, 11).

The implication contained in that statement is that once the Territory becomes a State, the power of the Commonwealth in relation to the new State is diminished, and further support may be found for the proposition that the:

...[N]ew State, after its formation and admission into the Commonwealth would be entitled to complete equality of status with the other States and entitled to all 'States rights' (Wynes 1976, 111).
There are a number of other authorities which support the view that the new State will enjoy the powers of the original States (Nicholas 1952, 96; Kerr 1925, 57).

The quality of statehood the Territory is offered will depend upon the view which prevails and the attitude of the Commonwealth Government of the day, in the matter of statehood for the Territory.

If it is open to the Commonwealth to offer a form of statehood which is inferior to that enjoyed by the original States, the opportunity may be used by the Commonwealth to impose such terms and conditions, so completely unacceptable to the Territory, as to deter any further calls from the Territory for statehood.

The importance the Territory Government places upon the transfer of all State-like powers to the new State does not stem only from a desire to see equality of the States within the Federation, but a strong belief that the control of uranium mining in the Territory will bestow a financial advantage upon the Territory, in the form of royalties, which the Territory, unlike the States, is presently denied.

The revenue which would be received by the Territory Government may be seen as providing the boost to its revenue raising effort, which will, probably, be demanded by the Commonwealth before consideration may be given to admission of the Territory as a State.

When considering the potential of uranium to provide a substantial amount of the new State's income, it must be borne in mind that under the present arrangements the Territory does not miss out on income from uranium altogether. It receives a grant as compensation from the Commonwealth Government for the royalties which would ordinarily be payable.

The connection between more income from uranium mining and statehood is seen as being in the transfer of powers over Aboriginal land rights to the Territory, thereby paving the way for alterations to the present provisions which amount to a virtual veto on mining of any minerals, uranium included.

It is believed that a change to the legislation which would encourage and facilitate uranium mining would lead to growth in the industry and hence a growth in the income of the Territory.

The level of success achieved by the removal of the land rights legislation as a revenue raising measure will depend upon which view of the rights of a new State prevails.
Once the legal issue is resolved the, perhaps, more difficult political issue must be considered. A Commonwealth Government which is constitutionally permitted to withhold powers from the new State might choose to do so for a number of reasons, not the least of which could be internal party pressure.

For example, bearing in mind the policies of the Hawke Government, on uranium mining and Aboriginal affairs, it would not be difficult to imagine the withholding of the legislative control of these areas from the new State Government.

And even disregarding the political backlash within a particular party which might occur should the Northern Territory, or any other Territory, be granted control of a sensitive area of administrative operation, the Commonwealth Government of the day could withhold control simply to deter the Territory from pressing the issue of statehood further.

The Constitutional Conventions which took place prior to Federation in 1901, marked the beginnings of the Commonwealth/State power struggles which eventually resulted in a Constitution with specific and limited powers, the States being determined to retain those powers which they could.

Given that since Federation the Commonwealth has found it difficult to extend its powers far beyond those specifically set out in the Constitution, it may not want to lose an opportunity to reserve powers to itself, when admitting a new State, even though such reservation of powers would destroy the notion of equality of the States within the Federation.

Another important consideration for the people of the Territory, if they plan to rely upon the prospective revenue from uranium mining to partly, and perhaps, substantially, give them the financial boost which will need to precede statehood, is the prospect of Commonwealth control of the industry by means other than the withholding of the new State's powers, under the Constitution.

In a report prepared by Michael Crommelin and R D Nicholson for the Uranium Advisory Council, entitled Report on Uranium Mining Laws in the Northern Territory the authors conclude that:

...even if the Northern Territory were a State or were to be treated by the Commonwealth as if it were a State, there would be adequate constitutional power on which to base substantial Commonwealth involvement in uranium mining operations in the Northern Territory. Statehood does not provide any absolute protection against
the exercise of Commonwealth constitutional power in relation to the mining of any natural resource, including uranium (32).

However, the authors do go on to note that whilst State ownership of natural resources does not prevent the valid exercise of Commonwealth constitutional power with respect to those resources as a matter of law, it may affect the likelihood of such exercise as a matter of politics.

The powers of the new State in relation to Aboriginal land rights could differ from those in the original States according to a further Opinion prepared in 1981 by the Commonwealth Solicitor-General who indicated that the Aboriginal Land Rights (Northern Territory) Act 1976 which presently operates in the Territory would continue to operate upon land of the Crown in right of the Commonwealth. The Act would cease to operate in respect of land of the Crown in right of the Territory because there would no longer exist land answering that description (Byers 1981).

The Opinion adds that the Commonwealth would retain power to have the Act apply, by an amendment, to land of the Crown in right of the new State, but this would be only at the price of payment of just terms (s.51(xxvi) and (xxxi) of the Constitution).

The Solicitor-General notes that should the Commonwealth in setting the new State's powers deny it entitlement, under s.121, to such compensation, then the new State will have no such entitlement.

Again, this issue will not be resolved until the question of entitlement to States' rights as they exist in the original States is determined in relation to the new State.

Although there has been no resolution of the question of the scope of the Commonwealth to impose terms and conditions under s.121, there has been substantial support for the view that there is only one category of State intended by the Constitution.

Whatever agreement the Commonwealth and Territory Governments reach on this question, it is almost certain that the matter will be finally resolved in the High Court, and until such time as it is, the issue will remain unsettled.

Federal Representation for the New State

The terms and conditions which the Commonwealth may impose upon a new State 'as it thinks fit' under s.121 of the Constitution include '...the extent of representation in either House of Parliament'.

In examining how the Commonwealth might choose to exercise its discretion under s.121 there are two other sections of the Constitution which must be considered. Firstly, s.7 provides that the Senate shall be composed of senators from each State, directly chosen by the people of the State. It goes on to provide:

The Parliament may make laws increasing or diminishing the number of senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six senators.

There would appear to be no difficulty for the Commonwealth, in view of the provisions of ss.121 and 7 of the Constitution, in providing for a lesser or greater or the same number of senators for the new State as represent each of the original States.

Secondly, s.24 of the Constitution provides:

The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of senators.

The number of members chosen in the several States shall be in proportion to the respective number of their people, and shall, until the Parliament otherwise provides, be determined... in the following manner:-

(i) A quota shall be ascertained by dividing the number of people of the Commonwealth as shown by the latest statistics of the Commonwealth, by twice the number of senators;

(ii) The number of members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.

But notwithstanding anything in this section, five members at least shall be chosen in each original State.

There is some debate as to whether the second paragraph of s.24 is qualified by the provisions of s.121.
A number of recent opinions have supported the view that, after the establishment of a new State, the second paragraph of s.24 would be restricted in its application to the original States.

Thus the Commonwealth, in determining the extent of representation of the new State would not be restricted by the nexus provisions of the first paragraph of s.24.

If this approach is adopted by the Commonwealth it would seem that some provisions outside those of the second paragraph of s.24 would need to be made to determine just how the level of representation in the Territory should be determined. As the level of Federal representation to be granted to the new State would form part of the terms and conditions to be imposed by the Commonwealth at the new State's admission, the provisions determining that level of representation would need to be contained in Commonwealth legislation admitting the State.

There is some doubt as to whether, once those terms and conditions are imposed under s.121 contemporaneously with the admission of the new State, there can be any later variation of such terms and conditions (Zines 1981, 11).

This is not to say that the Territory could not propose a formula whereby a base number of senators and representatives could be increased in accordance with increases in the Territory's population. But, of course, the Territory Government would want to be assured that such a formula would eventually result in parity with the original States.

Clearly, any Territory Government involved in discussions with the Commonwealth as to terms and conditions to be imposed upon the Territory will need to be aware that the acceptance of a form of statehood inferior to that of the original States, either in matters of Federal representation or the question of the legislative powers of the new State, may not be able to be altered at a later stage in the new State's development.

Australia has no precedents to look to, but the recent example of the objections which the people of the United States' State of Alaska took to what they saw as inequitable developments in the flow of funds between the State and Federal coffers, arising out of their statehood agreement with the United States, would indicate to the Government of the Territory that it is essential that the deal it strikes with the Commonwealth is one which it will be able to live with beyond the first few years of statehood.

That sort of arrangement seems unlikely to be offered by an unsympathetic Commonwealth Government, and it may be that the Territory would be best advised to bide its time, developing its relationship with the Commonwealth and
promoting the concept of statehood within the Territory, so that when the time eventually comes to work out the terms and conditions which will be imposed upon the new State, the Territory will be dealing with a more receptive Territory population and a sympathetic and supportive Commonwealth Government.

The financial arrangements which were made between the Commonwealth and Territory Governments when Self-Government was granted to the Territory, reflected the support of the then Federal Coalition Government for the Territory's move to Self-Government. The then Prime Minister, Malcolm Fraser, expressed not only support for Self-Government for the Territory, but its eventual attainment of statehood.

Recent statements by a number of members of the Federal Labor Government, far from indicating similar support for a self-governing Territory, have signalled a deterioration in Commonwealth/Territory relations, which threatens the continued operation of the arrangements which have governed the financial relationship of the two Governments for the past seven years.

The Financial Relationship

That relationship, which was determined under the provisions of the Memorandum of Understanding, was expressed under the document to be '...modelled on the arrangements that apply between the Commonwealth and the States'.

However, there were a few very significant exceptions to that general principle.

The basic elements of Commonwealth assistance available to the Territory are: general revenue assistance; additional assistance grants; special assistance; specific purpose capital assistance; and specific purpose capital assistance.

The Territory's right to apply for funds under the last three of these categories is basically analogous to the rights of the States in relation to the same forms of assistance. However, its entitlements under the first three categories vary quite substantially from those of the States.

Whilst the general revenue assistance provision provides that the tax-sharing entitlements of the Territory will be determined using the same formula as the States, the formula is modified by the Territory's population growth in the previous financial year, so as to take account of the special development needs of the Territory.

This provision, combined with the effect of the so-called 'Whitlam benefit factor', which was withdrawn from
the States but which did not apply to the Territory, has resulted in the Territory receiving, per head of population, more than the States, in comparative terms, under the current tax-sharing arrangements.

Further factors contributing to the Territory receiving funding in excess of that provided to the States, in comparative terms, are provisions of the Memorandum under which the Commonwealth continued to subsidise the Territory's electricity supply; meet the Territory's increasing debt charges; and be liable to make special grants to the Territory until the end of the 1984-85 financial year.

To the end of 1981-82 the Territory Government has been able to justify the higher level of per capita funding which it has received from the Commonwealth, by reference to its special problems in bringing services to its small and dispersed population.

The arrangements under the Memorandum were agreed to with these problems in mind, and in respect of the period to the end of 1980-81 the Grants Commission has found the Territory entitled to grants of additional assistance. In respect of the 1981-82 financial year the Territory received a special grant. As yet the application for a special grant in respect of 1982-83 has not been determined by the Commission.

The Grants Commission has applied a per capita difference method in determining the additional costs involved in funding services in the Territory and to date has found that the additional costs warrant the higher level of funding per head of population.

Regardless of whether the Territory is about to embark upon a push for statehood, it needs to address itself to the problems which are being created by its increasing demands upon Commonwealth financial support.

A volatile, and potentially dangerous situation has been created, which looks set to explode in a rash of Territory funding cuts in the very near future. The Territory is being promoted by at least two Federal Government Ministers, one of whom is the Treasurer, as being financially irresponsible (CPD, H of R 20 March 1985, 578; Sen 20 March 1985, 488).

There are strong indications that the Commonwealth Grants Commission may, when its report on the distribution of tax-sharing grants is made public at the end of March, find that there is a negative entitlement to funding for the Territory, and, in fact, the Territory is over-funded, even applying the per capita difference method, as distinct from the factor-assessment method, which it endeavoured to apply
promoting the concept of statehood within the Territory, so that when the time eventually comes to work out the terms and conditions which will be imposed upon the new State, the Territory will be dealing with a more receptive Territory population and a sympathetic and supportive Commonwealth Government.

The financial arrangements which were made between the Commonwealth and Territory Governments when Self-Government was granted to the Territory, reflected the support of the then Federal Coalition Government for the Territory's move to Self-Government. The then Prime Minister, Malcolm Fraser, expressed not only support for Self-Government for the Territory, but its eventual attainment of statehood.

Recent statements by a number of members of the Federal Labor Government, far from indicating similar support for a self-governing Territory, have signalled a deterioration in Commonwealth/Territory relations, which threatens the continued operation of the arrangements which have governed the financial relationship of the two Governments for the past seven years.

The Financial Relationship

That relationship, which was determined under the provisions of the Memorandum of Understanding, was expressed under the document to be '...modelled on the arrangements that apply between the Commonwealth and the States'.

However, there were a few very significant exceptions to that general principle.

The basic elements of Commonwealth assistance available to the Territory are: general revenue assistance; additional assistance grants; special assistance; specific purpose capital assistance; and specific purpose capital assistance.

The Territory's right to apply for funds under the last three of these categories is basically analogous to the rights of the States in relation to the same forms of assistance. However, its entitlements under the first three categories vary quite substantially from those of the States.

Whilst the general revenue assistance provision provides that the tax-sharing entitlements of the Territory will be determined using the same formula as the States, the formula is modified by the Territory's population growth in the previous financial year, so as to take account of the special development needs of the Territory.

This provision, combined with the effect of the so-called 'Whitlam benefit factor', which was withdrawn from
the States but which did not apply to the Territory, has resulted in the Territory receiving, per head of population, more than the States, in comparative terms, under the current tax-sharing arrangements.

Further factors contributing to the Territory receiving funding in excess of that provided to the States, in comparative terms, are provisions of the Memorandum under which the Commonwealth continued to subsidise the Territory's electricity supply; meet the Territory's increasing debt charges; and be liable to make special grants to the Territory until the end of the 1984-85 financial year.

To the end of 1981-82 the Territory Government has been able to justify the higher level of per capita funding which it has received from the Commonwealth, by reference to its special problems in bringing services to its small and dispersed population.

The arrangements under the Memorandum were agreed to with these problems in mind, and in respect of the period to the end of 1980-81 the Grants Commission has found the Territory entitled to grants of additional assistance. In respect of the 1981-82 financial year the Territory received a special grant. As yet the application for a special grant in respect of 1982-83 has not been determined by the Commission.

The Grants Commission has applied a per capita difference method in determining the additional costs involved in funding services in the Territory and to date has found that the additional costs warrant the higher level of funding per head of population.

Regardless of whether the Territory is about to embark upon a push for statehood, it needs to address itself to the problems which are being created by its increasing demands upon Commonwealth financial support.

A volatile, and potentially dangerous situation has been created, which looks set to explode in a rash of Territory funding cuts in the very near future. The Territory is being promoted by at least two Federal Government Ministers, one of whom is the Treasurer, as being financially irresponsible (CPD, H of R 20 March 1985, 578; Sen 20 March 1985, 488).

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to the Territory in the recent State Relativities Tax-Sharing hearings.

In this sort of climate, the question of statehood for the Territory is likely to be met with substantial opposition from both the Commonwealth and the States. It is conceivable that they could both cite the Territory's 'financial indulgences' as objections to the concept of statehood, and it seems almost certain that before the Commonwealth would entertain the notion of statehood for the Territory it will require a substantial or even complete re-negotiation of the financial arrangements which determine the level of Commonwealth funding to the Territory.

The approach the Territory takes to the Grants Commission findings, and subsequent Commonwealth action, could have a considerable effect on the reaction of the Commonwealth Government to a proposal of statehood for the Territory.

Even ignoring the impact of the Grants Commission report upon the Territory's move towards statehood, the Territory will need to resolve some of the problems which have developed, in the matter of Commonwealth funding, as a result of the operation of the Memorandum of Understanding over the past seven years.

If it does not attempt to address these problems, then, given the escalation in the overall levels of funding for the Territory, which show no sign of levelling-off, and certainly no sign of diminishing, it must recognise that the Commonwealth will require a review of the situation.

The signs that such a review is well on the way are reflected in the recent comments of the Treasurer and the Minister for Finance, and as it seems likely that the Territory will have to consider ways and means of reducing its reliance upon the Commonwealth Treasury.

The Territory Government may now be faced with the prospect of a politically unpalatable decision to reduce its level of spending or to review productivity and efficiency. Alternatively, it may seek to maintain the spending status quo with income from an alternative source.

The view has been put that prospective sources of income will become available with the granting of statehood to the Territory. Of course, just what would be made available to the Territory, as a State, will depend upon the terms and conditions imposed upon the new State by the Commonwealth. So, much hinges upon the interpretation of sections of the Constitution. However, disregarding the constitutional argument surrounding the new State's powers, it is valuable to examine those areas which might be potential sources of income for the Territory.
Two of the Territory's major industries are currently being limited in their development by the operation of the Aboriginal Land Rights (Northern Territory) Act 1976. This is one piece of legislation which the Territory might expect to be repealed as one of its terms and conditions for statehood.

Tourism is developing rapidly in the Territory. In 1983-84 the value of total associated direct expenditure on tourism in the Territory was estimated to be $172.14 million, and that figure was estimated to be an increase of 58.2 per cent of spending two years earlier.

If the industry can maintain a satisfactory growth rate, it has the potential to contribute a substantial amount to the Territory's revenue raising effort. Present indications are that it will do just that.

It must be borne in mind that many tourists come to the Territory to see areas such as Kakadu National Park, Katherine Gorge and Ayers Rock and the Olgas, and the Territory's task of promoting tourism in the Territory, and increasing its income from this industry is not made any easier by the fact that the Commonwealth retains control of national parks in the Territory, and also permits, under the Land Rights Act, land claims to be made upon these national resources. The ultimate outcome of such claims could be to restrict or deny access to these parks to non-Aboriginal visitors and Territorians alike.

The lack of liaison between the Commonwealth and Territory Governments has already made development of the tourist industry in the Territory more difficult than it should be. The inability of the Territory to participate in the control and management of the parks controlled by the Commonwealth is detrimental to the development of tourism and it seems probable that the Territory would seek the transfer of control for these areas to its own legislature, in addition to seeking changes to present land rights legislation.

But the impact of the Land Rights Act upon the tourist industry pales in comparison when its impact upon the mining industry is examined. Since the implementation of the Land Rights Act, mineral exploration and development in the Territory has been stifled, with not one application to develop a mining operation, which was not under way prior to the commencement of the operation of the legislation, being approved.

With this halt to mineral exploration and development has come a freeze upon the income derived by the Territory from mining royalties.

The situation in the States is quite different, with ownership of mineral deposits vested in the States, and with
no Commonwealth legislation to require Aboriginal approval before mineral exploration or development can proceed.

It is to the prospective income which would be generated by increased mining activity that the Territory might look when considering means of reducing its reliance upon Commonwealth grants and becoming more self-sufficient.

In particular, the Territory could stand to receive a considerable boost to its revenue raising effort with the 'handing-over' of ownership of uranium.

When the Territory was granted Self-Government the Commonwealth retained ownership of uranium and made provisions for the payment of a grant in lieu of royalties from uranium mining to the Territory on the basis of an agreed formula. However, the Territory would gain substantially should ownership be vested in the new State, although it would still need to overcome the negative impact of the Land Rights Act upon development in the mining sector.

Prior to the grant of Self-Government, in the negotiations leading up to the formulation of the Memorandum of Understanding, the matter of royalties from uranium was considered. But it was concluded, at the time, that even if the forecast development had occurred in the mining industry and the Territory had received its share of the royalty income, that level of income would have been offset by the Commonwealth Government, in its annual grants, which were agreed upon under the Memorandum. The Memorandum effectively offered a more secure financial arrangement.

The other consideration which will determine the value of uranium to the Territory is the fact that it is tied up in Aboriginal land, and with an effective power of veto, there is no way of developing deposits without the repeal or amendment of the Land Rights Act by the Commonwealth.

With the Commonwealth examining the possibility of national land rights legislation which will not include the right of veto over mining on Aboriginal land the situation may be substantially altered, and with the prospect of the Commonwealth calling for the Northern Territory to reduce its spending and raise its revenue, the Territory might be able to argue for a freeing-up of the mining industry.

Recently quoted conservative estimates put the discounted value of national income generated if all present and proposed uranium development in the Territory went ahead at some $9,000 million by the year 2000, of which $1,600 million would stay in the Territory. The loss of income if only existing uranium contracts are not allowed to be filled would be $6,300 million by the year 2000 with the Territory missing out on some $1,300 million.
For the Commonwealth to require the Territory to cut expenditure, or find more money by itself, or both, and then deny it the right to proceed with projects which have the potential to produce income of this magnitude is inconsistent.

One final but extremely important consideration for a Territory Government basing its financial future as a State upon the premise that minerals, and in particular uranium, will pay for it, is as to whether, once the way is clear to the developers to proceed, they will immediately go ahead.

Uranium, like any other mineral, can diminish in value as a result of over-supply, and a State economy based substantially upon one commodity would be quite vulnerable to fluctuations in demand and price.

A large part of the task which a Territory Government will face in preparing the Territory for statehood, will be in developing further the Territory's infrastructure and diversifying its economic base. The recent decision of the Territory Government to proceed with the construction of a gas pipeline to transport natural gas from reserves near Alice Springs to both Darwin and Gove has the potential to do both.

The decision may also result in a reduction in the level of Commonwealth subsidisation of the Darwin power supply. Under the Memorandum, although it was recognised as a matter of principle that the Territory Government's undertakings would be fully self-sufficient in the long term, the provision of cl.69 allows for the subsidisation of the NTEC until 1981-82, with the subsidy level to be re-negotiated at that time. The present arrangements cover the period to the end of the 1986-87 financial year.

The development of the gas pipeline and power station, rather than the proposed coal-fired station would mean the eventual elimination of the Commonwealth subsidy as the NTEC would become self-sufficient in the early to mid 1990s.

With negotiations still proceeding over the Commonwealth's contribution towards the conversion of the coal-fired station, to the gas proposal, the Territory would be impressing upon the Commonwealth the potential of this project, to develop the infrastructure of the Territory, through the provision of cheap power.

With the availability of low-cost power, the Territory would undoubtedly seek investment from new industries, both from the southern States of Australia and overseas. The pipeline could also prove beneficial to the development of the proposed Free Trade Zone near Darwin. The long-term potential of the gas pipeline and its provision of power to the Territory is even greater when the possibility of gas
being piped into the Territory from the Bonaparte Gulf is considered. Depending upon the extent of the reserves, the possibility of a national gas pipeline network across the continent may become a reality.

The significance of the pipeline and possible eventual gas from the Bonaparte Gulf is in the potential these projects have to broaden the Territory's revenue base, and reduce its reliance on only a limited number of industries. A broader industrial base will be essential to ensure a more secure economy for the Territory.

Although the financial prerequisites which might be set by a Federal Government before statehood could be achieved by the Territory can only be guessed at, it seems reasonable to assume that an increase in the size of the Territory's population, and an increase in its own revenue-raising effort from a broadened economic base might be on the list.

The impetus for such development will not come from private investment alone. It will also rely on the Territory and Commonwealth Governments having the foresight to direct funds into projects which will see the infrastructure of the Territory developed to a point where the move towards statehood is seen as the logical next step.

Apart from the gas pipeline, the other major development which has the potential to do that, is the Alice Springs to Darwin railway line. A line from Alice Springs to Darwin would provide the manufacturing and service industries, not only of the Territory but of the southern States, with the means of transporting by rail to Australia's northern-most port. The link's economic benefits would therefore extend beyond the Territory and the industries already established there to the southern States.

The line also has the very real potential to provide a cheap alternative method of transporting goods from overseas countries to the southern States. Imports could be transferred from ship to rail at Darwin and hastened to southern markets, saving both time and shipping costs.

An Alice Springs to Darwin railway would bring not only immediate employment to those involved in the construction of the line, but also to those in the service industries during the period of construction. It would provide a boost for local industries which would supply materials involved in the construction.

The long-term benefits to the Territory would be substantial. Tourism would benefit, and the link would provide the opportunity for transporting goods from our pastoral industry up and down the line to both northern and southern destinations, opening up new, readily accessible markets. In addition to the employment generated by the construction
of the line itself, many jobs will be created in the production of rails, sleepers and rolling-stock.

Growth in employment will not stop with the completion of the railway, as with the opportunities which would grow from the extension of the Territory's infrastructure the growth of new industry and the creation of new jobs would continue.

In any approach by the Territory Government to the Federal Government on the issue of statehood, the matter of improving the Territory's revenue raising effort will need to be canvassed, and, in that context, the issues of the projects such as the Alice Springs to Darwin rail link and the gas pipeline, and the potential which they have to develop the Territory's infrastructure should be made clear to the Commonwealth.

The Territory should also make clear that Commonwealth support for projects such as these, will, in the long-run result in a lessening of reliance by the Territory on the Commonwealth.

Of course, if the Territory could establish some sort of timetable, detailing the points at which it could expect to decrease its claim on the Commonwealth, and what level of decreases it would expect to make, the Commonwealth may be all the more receptive to the prospect of providing some assistance to the Territory in the development of these capital works.

One other area of considerable concern to Canberra, where the Territory needs to reconsider its position under the arrangements set out in the Memorandum of Understanding, is the matter of debt servicing.

Although cl.47 of the Memorandum provides that there is an implication that the Territory would have to pay interest at the appropriate market rates and meet debt servicing obligations analogous to the States' obligations to make sinking-fund payments, cls. 48 and 49 provide that because of the special situation in the Territory immediately following Self-Government where debt charges would escalate rapidly, the Commonwealth would meet these charges in the form of a specific purpose payment. It was intended that eventually when the level of debt charges plateaued, a base figure, which would represent the Commonwealth's annual contribution, should be set, and the Territory would meet any further increases in the charges.

Seven years later, the debt charges continue to escalate and the Commonwealth continues to meet the costs. The estimated payment for 1984-85 is $65.3 million, compared with $48.8 million in 1983-84 and $3.1 million in 1982-83.
These steep rises in the Territory's interest payments could present a contentious issue in an approach to the Commonwealth for statehood.

In fact, they are becoming contentious in Canberra, regardless of the impact they may have on statehood, as part of the general concern being expressed over the level of Commonwealth assistance making its way to the Territory. With a view to making an approach to the Federal Government concerning statehood for the Territory, it may be much more profitable for the Territory to review the situation which has arisen, in the context of Federal funding.

The Territory Government could seek to negotiate with the Commonwealth a base figure which would continue to be paid to the Territory, and undertake to meet any amounts over that base figure which are incurred by the Territory. Such a move would be consistent with a level of 'responsible self-sufficiency' which would precede the granting of statehood.

On the theme of self-sufficiency, it is also probable that the Commonwealth would raise the issue of superannuation payments to members of the Territory Public Service.

The provisions of the Memorandum of Understanding established that a joint Commonwealth/Territory task group would look into the question of employer contributions, to consider the possibility of the Territory being placed in a position to establish its own superannuation fund.

To date, no such fund has been established, which means that the Commonwealth is making all employer contributions in respect of the public servants of the Territory Government.

Should the Territory seek statehood, the Commonwealth may wish to resolve the situation which has arisen in the Territory concerning funding of superannuation contributions for local public servants. Certainly, no State enjoys Commonwealth funding of employer contributions to State public service superannuation schemes, and the relevant clauses of the Memorandum make it fairly clear that it was not the intention of the Commonwealth to be the sole contributing employer to the superannuation fund.

It is apparent that the financial relationship which the Territory presently enjoys with the Commonwealth may require some modification before there can be any question of admitting the Territory as a State; it should be equally clear that even if the Territory is not concerned with the issue of statehood there are aspects of its financial arrangements with the Commonwealth which require reconsideration, given recent developments.
A paranoia over Territory funding is beginning to take hold in Canberra which, if not checked, could threaten the Territory's chances of achieving statehood.

The prospect of a Grants Commission finding of an over-funded Territory only supports the proposition that the Territory must begin to reconsider its position, and tackle the task of reducing its dependence on Commonwealth funding.

Other Factors

In examining the issue involved in statehood for the Territory, there are some considerations which fall outside the Constitutional question or the issue of how the Territory would fund itself as a State but which, nonetheless, have the potential to create some difficulties for an aspiring State.

One is the attitude which may be adopted by any or all of the States to the Territory's move for statehood. Already the Territory, along with the ACT, has experienced the opposition of a number of States to any extension of State-like privileges to political entities outside the original States, when the legislation entitling the Territories to representation in the Senate was challenged.

Apart from the concern of the States at the swamping of the Senate with senators from the new State, who can be 'appointed' as the Commonwealth sees fit, there is also the prospect that the States may be opposed to statehood for the Territory given that it might make it easier to amend the Constitution.

This could come about as under s.128 of the Constitution, which requires that a majority of States must support a proposed amendment for it to succeed, the amendment could be met by a 4-3 vote as opposed to the present requirement of a 4-2 majority.

The basis upon which any of the States might challenge statehood for the Territory can only be the subject of conjecture, but on past experience it seems likely that a challenge would be mounted, particularly if the smaller States feel that their positions would be weakened by the admission of a seventh State, or alternatively the larger States feared that the addition of another smaller State would strengthen the smaller States' alliance.

The Next Step

From a general consideration of some of the issues involved in the statehood debate it appears that there may be a number of next steps, depending upon which constitutional
expert is relied upon, and from which point of view the issue of funding is approached.

As regards the constitutional aspect of the question, even if the view of Dr Lumb regarding admission as opposed to establishment is not accepted, the development of a model for a Territorial Constitution appears to have a number of advantages outlined earlier in this paper.

It is difficult to determine what further action the Territory can take which will be of assistance in determining the constitutional questions surrounding statehood, short of arming itself with as many authorities as it can muster to support its case in the High Court where most of these matters will ultimately be resolved.

As to the financial question, the need to resolve the Territory's financial relationship with the Commonwealth is most urgent.

The Territory will need to commence statehood discussions with the Commonwealth from a position where it is regarded as making efforts to develop its level of self-sufficiency, and reduce its reliance on Commonwealth funding.

In order to overcome some of the foreseeable difficulties, the formation of a Commonwealth Joint Parliamentary Committee on the constitutional development of the Territory might be considered.

A similar committee facilitated the transfer of responsible Self-Government to the Territory in 1978. A committee of this nature could provide a valuable forum for the discussion of reservations and difficulties which the Commonwealth or the States might have with the notion of statehood for the Territory. It would also enable the resolution of some of those difficulties prior to the introduction of the legislation which would be required to admit or establish the Territory as a State.
Appendix 10

TERMS OF REFERENCE:
SELECT COMMITTEE ON CONSTITUTIONAL DEVELOPMENT

[Northern Territory Parliamentary Record,
17-19 June 1986]

1) A Select Committee be established to inquire into, report and make recommendations to the Legislative Assembly on:

(A) The constitutional issues arising between the Northern Territory of Australia and the Commonwealth of Australia, and the Northern Territory of Australia and the States of Australia concerning the entry of the Northern Territory of Australia into the Federation as a new State including but without limiting the generality of the foregoing:

(I) the representation of the new State in both Houses of the Commonwealth Parliament;

(II) legislative power;

(III) executive powers; and

(IV) judicial powers;

(B) The framework of a new State Constitution and the principles upon which it should be drawn;

(C) The method to be adopted to have a draft new State Constitution approved by or on behalf of the people of the Northern Territory of Australia; and

(D) The steps required or desirable to be taken by the Northern Territory of Australia, the Commonwealth and the States for the grant of statehood to the Northern Territory of Australia as a new State within the Federation...

11) The committee to report to the Assembly twelve months from the date of this resolution...
Appendix 11

MINISTERIAL STATEMENT BY THE CHIEF MINISTER
ON STATEHOOD FOR THE NORTHERN TERRITORY

28 August 1986

[from S Hatton, Towards Statehood, 1986, 1-8]

A year ago in this Assembly, my predecessor as Chief Minister formally announced the Northern Territory's bid for equality within the Australian Commonwealth. The case then presented was undeniably strong and cogent. It was based on a number of premises.

These were: the Territory's legitimate claim to statehood as the ultimate constitutional objective; the unacceptable disadvantages of the current constitutional situation; the maturing of the financial arrangements struck at Self-Government in 1978 and the explicit policy of the Federal Government to treat the Territory as a State from 1988.

Developments since then have reinforced the validity of the case and, if anything, have strengthened my Government's resolve to press ahead.

My own commitment to statehood has never wavered; I remain, as I noted in last year's debate, 'a strong supporter of moves ...towards the achievement of full constitutional, political and democratic rights for the citizens of the Northern Territory'. I am sure that this sentiment is shared by all members of this Assembly.

My Government's approach to constitutional development for the Territory has already been clearly articulated. In his address at the opening of the third session of the Assembly, the Administrator noted the continuing aspiration for 'full, equal status for Territorians... at the earliest opportunity'.

Constitutional and political equality, long denied to Territorians and long sought after, is the keystone and the prime objective of my Government's policy. That theme of equality was expressed quite deliberately in my address-in-reply when I reaffirmed the commitment to statehood. My words then are worth repeating: 'Statehood is essential if we are to take our place as equal Australians; statehood alone will ensure that we have the same rights, privileges, responsibilities... the same degree of self-determination... (as) other Australians'.
Thus statehood, however worthy an attainment in its own right, is not simply an end. It is much more significant as a means to ensure that Territorians are no longer second-class citizens.

The Territory has long been preparing to take its place as an equal partner in the Australian Federation; the time has now arrived for it to do so. No longer is the Territory a backwater, it has become a focal point of northern development. The granting of statehood will more effectively allow Territorians to promote and manage development.

The last year has not been, as some media commentators have suggested, a wasted and barren time. Particularly since the CLP Statehood Conference in November, it has been used productively to set the necessary organisational infrastructure into place, to refine broad objectives and strategy and to produce detailed position papers. We are now confident that the case for statehood can be pursued vigorously, and with ultimate success.

In organisational terms, a tripartite structure has been provided. The existing Select Committee on constitutional development will be centrally concerned with the complex and demanding task of preparing the groundwork for the new State Constitution. Overall administration of the statehood process will be handled by the Office of Constitutional Development in the Department of the Chief Minister.

The third arm is the Statehood Executive Group. Its role is to advise and assist me as Minister for Constitutional Development, to co-ordinate the total Government approach, to provide necessary research and analysis and to support the activities of the Select Committee. As existing capacity and expertise have been utilised, this system is an effective and economical mobilisation of resources.

Two weeks ago, the Cabinet adopted three broad statehood objectives. They were based upon a considerable body of specific work undertaken by the Executive Group identifying the dimensions of inequality suffered by Territorians and analysing the current constitutional, legal and political disadvantages. The objectives are:

1. The attainment of a status which provides constitutional equality with other States and [the] people [of the Territory] having the same constitutional rights, privileges, entitlements and responsibilities as the people of the existing States;

2. Political representation in both Houses of the Federal Parliament which will result in the people of the
Territory enjoying the same political consideration as the people of the States; and

3. The settlement of secure financial arrangements with the Commonwealth as similar as possible as those which apply to the States particularly in respect of loan raising and revenue sharing.

Although these prescriptions are not new and have already been accepted as reasonable and necessary, their formal adoption does serve as a critical first milestone in what will be a long, complex and arduous journey.

Each broad objective emphasises the commitment to full equality with the existing States. It is the Government's firm intention, insofar as it is constitutionally possible, that equality should apply contemporaneously with the grant of statehood. No deviation from eventual equal treatment will be tolerated. We will not accept that the new State will be a second-class State (or a 'Claytons State' as some would wish to label it).

The first objective lays claim to constitutional equality with other States. At present, the Territory suffers from grievous disadvantages.

I seek leave to table a paper entitled Northern Territory Constitutional Disadvantages which summarises our constitutional detriments. The list is long, imposing and ominous; it deserves the closest of scrutiny by all Territorians.

Noticeably absent in the Territory are the entrenched constitutional rights enjoyed by residents of the States. In this regard, the capacity of the Commonwealth to saddle the Territory with legislation which it is unable to impose upon the States is particularly vexing. The most notable measure of that type is, of course, the Aboriginal Land Rights (Northern Territory) Act 1976. With statehood, land rights would be administered by either a Territory new State law or a Federal law relevant to all States. The Territory could not be singled out for discriminatory treatment; it would be protected generally by its partnership with other States and particularly by ss.51(ii), 92, 99 and 117 of the Constitution. These sections guarantee equal treatment in respect of taxation, trade and the legal status of residents.

Moreover, the Territory as a State would gain safeguards against discriminatory land acquisition made by the Commonwealth without consultation with the people of the Territory. Lack of those safeguards which are available to the States enabled the Commonwealth without compensation to
excise or otherwise remove from Territory control the Ashmore-Cartier Islands, Kakadu, Ayers Rock and Aboriginal land. In the States, s.51(xxxi) of the Constitution requires the Commonwealth to acquire land 'on just terms'.

I do not need to remind either this Assembly or the community of the detriment to economic development foisted upon the Territory by such unilateral land acquisition.

Even less acceptable are the limitations contained in that keystone of Self-Government, the Northern Territory (Self-Government) Act 1978. As an ordinary statute it can be amended or even repealed, entirely without reference to the Territory. Moreover, the Commonwealth can, by mere regulation, alter the powers and functions of the Territory Government which affect our daily lives, such as housing, education and health. Our Self-Government is not guaranteed by the Constitution as a new State Constitution undoubtedly would be. It contains legislative and executive controls on the Territory Government and upon this Assembly.

A further serious constitutional disadvantage, which is well known, is the retention by the Commonwealth of what are essentially State-type functions. Uranium, Aboriginal land and national parks are the prime examples.

Not so well known is the position of the Administrator - unlike State Governors he is appointed and may be removed by the Commonwealth.

Nor is the Commonwealth's power to determine a fundamental part of our electoral process, specifically those who may vote as Territorians in Federal elections. By implication and convention the Constitution protects States from having other areas outside their jurisdiction incorporated into their electorates. This would avoid the cynical manipulation which occurred with the imposition on us of the Cocos and Christmas Island electors. They have no particular common interest with Northern Territorians and the Territory Government has no direct relationship with them.

Finally, the experience of the fringe benefits tax provides a dramatic contrast between the competence of the Territory and the States. Whereas Queensland is able to challenge parts of the tax judicially, the Territory is denied that right by its continuing dependent constitutional position. Statehood would have given the Territory the standing to negotiate on this issue from a position of strength. In this regard, it is interesting to note that the Commonwealth not only can impose a tax upon the public property of the Territory but, as I have already stated, it can also deprive the Territory of property without just compensation. Under the Constitution, the Commonwealth
Territory enjoying the same political consideration as the people of the States; and

3. The settlement of secure financial arrangements with the Commonwealth as similar as possible as those which apply to the States particularly in respect of loan raising and revenue sharing.

Although these prescriptions are not new and have already been accepted as reasonable and necessary, their formal adoption does serve as a critical first milestone in what will be a long, complex and arduous journey.

Each broad objective emphasises the commitment to full equality with the existing States. It is the Government's firm intention, insofar as it is constitutionally possible, that equality should apply contemporaneously with the grant of statehood. No deviation from eventual equal treatment will be tolerated. We will not accept that the new State will be a second-class State (or a 'Claytons State' as some would wish to label it).

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Moreover, the Territory as a State would gain safeguards against discriminatory land acquisition made by the Commonwealth without consultation with the people of the Territory. Lack of those safeguards which are available to the States enabled the Commonwealth without compensation to
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A further serious constitutional disadvantage, which is well known, is the retention by the Commonwealth of what are essentially State-type functions. Uranium, Aboriginal land and national parks are the prime examples.

Not so well known is the position of the Administrator - unlike State Governors he is appointed and may be removed by the Commonwealth.

Nor is the Commonwealth's power to determine a fundamental part of our electoral process, specifically those who may vote as Territorians in Federal elections. By implication and convention the Constitution protects States from having other areas outside their jurisdiction incorporated into their electorates. This would avoid the cynical manipulation which occurred with the imposition on us of the Cocos and Christmas Island electors. They have no particular common interest with Northern Territorians and the Territory Government has no direct relationship with them.

Finally, the experience of the fringe benefits tax provides a dramatic contrast between the competence of the Territory and the States. Whereas Queensland is able to challenge parts of the tax judicially, the Territory is denied that right by its continuing dependent constitutional position. Statehood would have given the Territory the standing to negotiate on this issue from a position of strength. In this regard, it is interesting to note that the Commonwealth not only can impose a tax upon the public property of the Territory but, as I have already stated, it can also deprive the Territory of property without just compensation. Under the Constitution, the Commonwealth
cannot treat the States in such a manner. Even if Queensland is successful in its challenge, the Territory will still have to bear the impost of the fringe benefits tax as it lacks the protection of s.51(ii) and s.114 of the Constitution which prohibits Commonwealth taxation of State property.

Those rights (and others specified in the tabled document) must be secured. Ultimately, they can only be guaranteed by the granting of statehood to the Territory on constitutional conditions equal to other Australian States.

That essentially is our bid for constitutional equality; we want nothing more, nothing less.

I seek leave to table a further paper entitled Constitutional Equality with the States, which sets out our claims. Of most significance is the demand for local control over land and mineral and energy resources; that involves among other things the transfer of ownership of uranium, the control of national parks and the patriation of the Land Rights Act.

Control of land is fundamental. The broad position of my Government is set out in a paper prepared by the Department of Law entitled Land Matters Upon Statehood which again I seek leave to table. The new State lays claim to title of all land related to State-type purposes in the Territory including land presently held by the Commonwealth or Commonwealth authorities.

The transfer of the Lands Right Act - to the responsible people of the Territory who are directly affected by its operation and away from those people who are remote from the Territory and for whom the issues are often of mere ideological and academic concern - is imperative. In the tabled papers, policy options for patriation are outlined and they will form a basis for discussion with all Territorians but particularly Aboriginal Territorians.

Patriated land rights will provide existing ownership guarantees. As a result of full consultation, it might also make provision for alternative tenure arrangements and provide flexibility which will enable traditional owners to have real control of their land with the ability to decide whether to exploit its economic potential consistent with their cultural values. I am sure that this approach will be favourably received.

The second objective refers to representation in the Federal Parliament. As members are aware, this is one of the thorniest problems to be addressed and one which has already provoked considerable, and often heated, debate. It
is important that I spell out my Government's approach in precise terms.

Let me first deal with the House of Representatives, the 'people's chamber'. Except for Tasmania which enjoys as an original State an entitlement of five members, representation there is determined by the population quota. State representation is in broad conformity with population size.

Any claim that the Territory should be treated as generously as Tasmania in the very different context of the 1980s is quite unrealistic. We shall therefore not pursue that course; we shall abide by the constraints of the quota. However, I hasten to point out that, on becoming a State, the Territory with its high relative population increase would soon be entitled to a second member. Remaining a Territory would delay the prospect of gaining an extra member significantly.

Presently, the Territory, because of its small ratio of electors to population size – 48 per cent as compared to about 60 per cent in the States – is theoretically under-represented. Having recourse as a State to the quota based on population and the advantage of achieving an additional member once half a quota has been achieved will thus be beneficial.

In the case of the Senate, the 'State's house', the Territory is entitled to equal representation. No relationship between Senate representation and population size will be accepted. Since 1901, the principle of equality, regardless of geographic size and numbers of residents, has been fundamental. We see no reason, philosophic or expedient, to warrant breaching that principle in respect of new States. Our claim to equality is unequivocal, incontestable and will not be compromised.

However, we recognise, as a matter of political reality, that the achievement of immediate parity will not be easy. Although we will pursue that cause as earnestly and persistently as we can, we will not allow it to become an insurmountable obstacle, frustrating the receipt of the other worthwhile advantages of statehood.

If we are forced to concede immediate equality, we will insist on eventual equality based upon an unadorned and legally-binding formula which includes a reasonable initial representation and a short time-frame to achieve equal numbers. No fanciful formulae, like the one which requires the Territory to have a population of about 2.5 million before we are allowed equal representation will be countenanced.
Without Senate equality the Territory will never get the necessary 'clout' in the Federal Parliament to advance the cause of northern development and the means to correct the gross imbalance between the less and the more populated parts of Australia.

The third objective concerns the financial implications of our bid for statehood. On this question I will be as blunt as I can. There will be no - I repeat no - financial cost to Territorians. The Commonwealth has clearly indicated its intention to treat the Territory financially as a State in 1988; with or without statehood, the financial situation after 1988 will be the same.

Our Treasury has carefully reviewed the impact of statehood and their investigations categorically support that assessment; its considered views are contained in a further paper which I seek leave to table. Therefore, it makes no earthly sense to be burdened with the financial responsibilities of statehood without seeking the full range of equivalent rights and the full State-type capacity to develop the Territory and broaden our own revenue base.

If we are to demonstrate that we are willing to and capable of increasing the Territory's level of economic self sufficiency and its financial independence, we must control all legitimate State-type functions.

I should not need to remind the Assembly of the inhibitions placed on the Territory in the mineral royalties area. Uranium provides the best example. The Department of Mines and Energy has calculated that if our royalty regime had been applied to the two uranium producers since the Royalty Act came into operation in July 1982, we would have received, by the end of 1985, at least an additional $85 million.

Furthermore, in respect of Ranger, a study undertaken by an ANU Research Fellow has concluded that the Commonwealth will recover its total expenditures (to the end of 1985) on Ranger/Jabiru during the company's first full year of tax liability. Afterwards, it would collect a significant net contribution of about $50 million per year. On the other hand, my Government will receive almost no net benefit as expenditure on services and regulation will account for nearly all direct and indirect revenue. We surely have a legitimate claim for a much greater share of the fruits of our own resources! Nor should the considerable potential revenue denied us by the Territory's inability to control mineral exploration and production on a sizeable proportion of its land be forgotten. Our claim to 'secure financial arrangements as similar as possible as those that
apply to the States' will not force additional costs on the Territory taxpayer.

Indeed, my Government believes that there are far greater financial risks in remaining a mere Territory than in acquiring statehood. Statehood would provide us with protection flowing from the constitutional prohibition of preferences and discrimination between States and State residents and also from the prohibition on Commonwealth taxes on State property. Thus, for example, the Commonwealth could not retrospectively recover moneys already paid as has happened in recent times to the Territory as a result of Grants Commission reviews. Significant also would be the benefit to a new State of a constitutional guarantee of freedom of trade and commerce.

Moreover, statehood will equip the Territory, through full participation in the Premiers Conference; the Financial Agreement; the Loan Council and by the application of constitutional and statutory guarantees in the same way as the States, with the means to protect the financial interest of Territorians.

What needs to be done in the period ahead? Obviously a first priority is to secure the support of Territorians. That support is imperative if this bid for statehood is to be successful, or even to be persevered with.

Members will no doubt remember the findings of the opinion poll publicised earlier this year which indicated that the level of support for and knowledge of statehood was not particularly high. However, I am confident that there will be a groundswell of support once the issues are made clear. An analysis of that poll also shows that the Territory community is confused about the need for and the impact of statehood, particularly as it will affect financial arrangements. There is a majority conviction that the Territory will be worse off financially under statehood. That perception simply is not correct, as I have demonstrated earlier in this statement.

Nor is the fear, which I have heard expressed by some spokesmen for Aboriginal interests, that statehood would necessarily be detrimental to Aboriginal land owners. We recognise that support by Aboriginal Territorians is a key consideration and we will strive to overcome their concern. It would be idle to deny that relationships between the Territory Government and the organised voice of Aborigines have sometimes been less than smooth. However, it should also be recognised that in areas other than those related to land rights relationships have been, and continue to be, usually strong and productive.
My assurances on land rights included in this statement can only contribute to the diminution of concern and provide a catalyst for fruitful and co-operative discussions on statehood issues. In the end, we are all Territorians and, whatever our heritage, we will all benefit from statehood.

We, as parliamentarians and representatives of the people of the Territory, all have a responsibility to support this bid for statehood and to actively promote it in the Territory community and throughout Australia. Our activities will be crucial in determining public attitudes on statehood; we have a very convincing case but our commitment in presenting it vigorously is essential.

For its part, the Government will be providing over the next few months, full and informative material on the salient issues, comprehensive media exposure and a wide-ranging programme of direct consultation. In the latter area, the Select Committee will also have an important role to play. The new State Constitution must be developed within the Territory and not be imposed from outside by the Commonwealth. Moreover, it must be acceptable to and accepted by the majority of Territorians. To those ends, the Constitution-making process will consist of three stages, all of which will involve wide participation by Territorians. First, the Select Committee will prepare a Draft Constitution which will then, as the second stage, be submitted for ratification to a convention representing a broad cross-section of community interests and opinions. The details of the composition and role of the convention are still to be finalised. Finally, it will be put before the Territory electorate in a referendum. No one, therefore, should doubt our allegiance to full and open consultation in the formulation of the constitutional centrepiece of our future State. It will be demonstratively The Northern Territory People's Constitution.

The task of convincing politicians and political parties operating in Federal and State jurisdictions will, I suspect, be formidable. But I am fortified both by the inherent strength of our case and by positive indications that the people of the States would welcome us as full partners in the Commonwealth. I am today sending letters to the Prime Minister and State Premiers communicating our intention to proceed with the bid for statehood and asking for meetings at the earliest possible opportunity.

Soon after, I intend to initiate inter-Governmental and inter-Party negotiations and a concerted effort to influence inter-State opinion in our favour. As an interim measure, I shall press the Commonwealth as consistently and as hard as I can to amend the Self-Government Act and other relevant legislation in order to place the Territory in a position of
greater similarity to the States in respect of transferred powers and functions. By this phasing-in process the later transition to statehood will be eased significantly.

I have been singularly encouraged by the degree of bipartisanship which has so far been demonstrated in this worthy cause and I am grateful for the broad support offered by the Opposition in this Assembly. In itself that attests to the validity of the statehood argument; it will also make the gaining of credibility and acceptability both in the Territory and outside more certain. Although I would delude myself if I supposed that there will be no differences of opinion and approach, I trust that, as far as possible, bipartisanship can be preserved. To that end, I undertake to keep the Leader of the Opposition fully informed on future developments.

Finally, let me reiterate what I said in June about the timing of statehood. Of course I believe that it should be achieved as soon as possible but, because of the complexity of some of the issues and the need for comprehensive consultations and negotiations, I do not wish to set an inflexible timetable. It is much better to prepare the case well than to move precipitously. But I can assure the Assembly that the momentum we have developed in the recent past will be accelerated. The promotion and winning of statehood deserve nothing less than total commitment and endeavour from my Government and this Assembly.
Appendix 12

NORTHERN TERRITORY CONSTITUTIONAL DISADVANTAGES

[from S Hatton, Towards Statehood, 1986, 12-23]

The following is a list of what may be regarded as areas of constitutional disadvantage incurred by the Northern Territory as compared to the States as of June 1986. The word 'constitutional' in this sense is taken to have a broad meaning, although it includes those areas of disadvantage directly arising under the Constitution. This list attempts to be comprehensive, although there is no guarantee that it is exhaustive. Further research may be required on particular areas that have been identified in order to adequately assess the nature and extent of the disadvantage and its implications.

DISADVANTAGES ARISING BY REFERENCE TO THE COMMONWEALTH CONSTITUTION

The Constitution, read with the Imperial Commonwealth of Australia Constitution Act, is the fundamental constitutional document establishing the Australian Federal system. It also contains the authority for the creation and maintenance of Commonwealth Territories. The disadvantages arising from it for Territories are as follows:

1. Senate - The States, as original States, have a guaranteed minimum number of senators of six each plus a guarantee of equality in number between them. At present they have twelve senators each.

The Territory has no such guarantee and presently only has two senators. This representation is given by the Commonwealth Electoral Act 1918 and is not constitutionally guaranteed.

It should be noted that the above guarantees for the States would not apply to the Territory as a new State unless the Constitution was amended by referendum to so provide. This is because the constitutional guarantees only apply to original States. The number of senators for a new State would be a matter for negotiation.

State senators hold office under the Constitution for a fixed term of six years on a rotational three year basis (subject to any double dissolution). Territory
senators have a term of office corresponding with that of the House of Representatives (three years or less).

A State Governor has specified constitutional functions with respect to the senators from that State – the issue of writs for elections; the filling of casual vacancies when the State Parliament is not in session, the certification of senators elected or chosen.

The Administrator has equivalent functions for casual vacancies, but only because of the Commonwealth Electoral Act.

A State Parliament has specified constitutional functions with respect to senators from that State – the making of laws as to time and place of election for senators; the filling of casual vacancies.

The Legislative Assembly has equivalent functions for casual vacancies, but only because of the Commonwealth Electoral Act.

State senators must be directly chosen by the people of the State, have a constitutionally guaranteed vote and have all the constitutional rights and privileges of senators. Territory senators have similar rights and privileges, but only by virtue of the Commonwealth Electoral Act.

2. House of Representatives

The States, as original States, have a guaranteed minimum number of five members of this House. Any increase beyond this is constitutionally guaranteed in accordance with a population quota per State. The Territory has no such guarantees and presently only has one member of this House. This representation is given by virtue of the Commonwealth Electoral Act and is not constitutionally guaranteed.

It should be noted that the above guarantees for States would not apply to the Territory as a new State unless the Constitution was amended by referendum to so provide. This is because the constitutional guarantees only apply to original States. The number of members for this House for a new State would be a matter for negotiation, although there is some legal uncertainty whether that number of members would be limited in accordance with the population quota.

State members of this House must be directly chosen by the people of the State and they have all the constitu-
tional rights and privileges of members. Territory members have similar rights and privileges, but only by virtue of the Commonwealth Electoral Act.

3. Legislative Powers

The Federal legislative powers of the Parliament are restricted to specific subject matters detailed in the Constitution, and despite the expansive judicial interpretation generally given to these matters, there remains a substantial area beyond Commonwealth legislative control as to which State Parliaments have residual legislative powers.

The legislative powers of the Parliament as to Territories are plenary and unlimited as to subject matter. There is an untested argument that there may be some limitation of these powers in relation to a self-governing Territory, but this argument offers little, if any, protection.

Specific areas constitutionally excluded from Commonwealth legislative control in relation to States by express mention include:

(a) fisheries within territorial limits;
(b) state banking;
(c) state insurance;
(d) conciliation and arbitration of industrial disputes within the limits of a State;
(e) the State Constitution;
(f) taxes on State property.

Limitations also arise from various express constitutional rights, discussed below.

4. Constitutional Rights

The Constitution does not contain a comprehensive Bill of Rights, but does constitutionally entrench certain rights, most of which are not, or probably are not, applicable to a Territory. They probably are applicable to a new State. These comprise:

(a) No discrimination in Commonwealth taxation laws between States or parts of States;

(b) Commonwealth laws for the acquisition of property in a State to be on just terms, (note: a similar guarantee is contained in the Northern Territory (Self-Government) Act 1978, but being an ordinary Act it is not constitutionally entrenched);
(c) Commonwealth laws imposing taxation to deal only with the imposition of taxation and, other than customs and excise, only one subject of taxation;

(d) Trial on indictment for an offence against a law of the Commonwealth shall be by jury;

(e) Trade, commerce and intercourse among the States to be absolutely free, (note: a similar guarantee as between the Territory and the States is contained in the Northern Territory (Self-Government) Act 1978, but being an ordinary Act, is not constitutionally entrenched);

(f) The Commonwealth is not by any law or regulation of trade, commerce or revenue to give any preference to one State or part thereof over another State or part thereof;

(g) The Commonwealth not to make any law for establishing any religion, or imposing any religious observance or for prohibiting the free exercise of any religion, and no religious test to be required as a qualification for any office or public trust under the Commonwealth, (note: there is some argument as to whether this provision also applies to Territories);

(h) Residents in any State not to be subject in any other State to any disability or discrimination;

(i) Full faith and credit to be given throughout the Commonwealth to laws, public Acts and records and judicial proceedings of every State, (note: a similar legislative provision applies to Territories but is not constitutionally entrenched);

(j) The Commonwealth to protect each State against invasion and, on application of the State Government, against domestic violence;

(k) No increase, diminution or other alteration of the limits of a State without the consent of the Parliament of the State;

(l) No alteration of the Constitution by referendum diminishing the proportionate representation of any State in either House of Parliament or the minimum number of representatives of a State in the House of Representatives or increasing, diminishing or otherwise altering the limits of the State or in any manner affecting the Constitution in relation thereto unless a
majority of the electors of the State approve the same.

5. **Courts**

Although State Courts are not established by the Constitution, the existence of the Supreme Court of each of the States is recognised therein, and the right of appeal from that Court to the High Court is guaranteed.

The Supreme Court of the Northern Territory has no such constitutional status, although its existence is recognised in some Commonwealth legislation, including by way of a right of appeal to the High Court.

The Constitution provides that the High Court has automatic original jurisdiction in all matters between States or between residents of different States or between a State and a resident of another State. No equivalent jurisdiction arises in the case of a Territory.

6. **Financial matters**

Under s.105A of the Constitution, inserted in 1929, the Commonwealth has entered into a Financial Agreement with the States in respect of their public debts. This includes the establishment of a Loan Council to control governmental and semi-governmental borrowings.

Territories are not direct parties to the Financial Agreement and are not members of the Loan Council.

7. **Referenda**

Under the Constitution, a referendum to alter that Constitution must be carried in a majority of States plus a majority of electors overall.

As a result of the 1977 referendum, the electors of a Territory in respect of which there is in force a Commonwealth law allowing its representation in the House of Representatives, may now vote in referenda, and are counted in the overall majority. However, the Territory is not counted in the majority of electors in a majority of States, as a Territory is not a State.

8. **Offshore Settlement**

Following the decision of the High Court in the *Seas and Submerged Lands Act* case that the States had no proprietary rights beyond low-water mark, the Parliament legislated to give the States specific powers and
title to the adjacent territorial sea. This legislation was enacted in part pursuant to the request of the State Parliaments under a particular provision of the Constitution.

The Parliament legislated to place the Territory in substantially the same position offshore as the States, except that it did not and could not rely on this provision in the Constitution. Constitutionally, it may be that the States are in a more secure position than the Territory should the Commonwealth seek to unilaterally vary the settlement, although this remains a matter of some uncertainty.

9. Continued Existence of the States

Although the High Court has rejected any doctrine of the reserve powers of the States or the immunity of the States and their instrumentalities from Commonwealth legislative attack, it has accepted that the Constitution recognises that the States will continue to exist as part of the indissoluble Federal system and that the Commonwealth cannot do anything that prejudices this existence or interferes with any of the vital functions of the States. No such doctrine exists in the case of Territories, even if they are self-governing. It may be unlikely that the Commonwealth would terminate the status of the self-governing Northern Territory or substantially impair its vital functions, but constitutionally it may be possible.

DISADVANTAGES ARISING FROM THE STATUTE OF WESTMINSTER

The Imperial Statute of Westminster, 1931, as adopted in Australia in 1942 and as amended by the Australia Act 1986, is part of the fundamental constitutional documents of Australia.

That statute grants certain powers to the Parliament, and provides that nothing in the statute is deemed to authorise that Parliament to make laws on any matter within the authority of the States, not being a matter within the authority of that Parliament or the Government of the Commonwealth.

No similar guarantee exists in the case of a Territory.

DISADVANTAGES ARISING FROM THE AUSTRALIA ACT

The Australia Act 1986 is also now part of the fundamental constitutional documents of Australia. It gives rise to
certain disadvantages for a Territory as follows:

1. **Extra-Territorial Powers**

   The Australia Act gives the Parliaments of the States full power to make laws that have extra-territorial operation.

   No similar power may exist for the Legislative Assembly of the Northern Territory, although it can legislate with effect beyond the limits of the Territory providing the law has a sufficient connection or nexus with the Territory.

2. **Entrenchment**

   The Australia Act requires that legislation of a State Parliament respecting the Constitution, powers and procedure of that Parliament must be made in such manner and form as may be required by a law of that Parliament, thus enabling the States to entrench certain aspects of their legislation.

   A similar power does not exist in the case of the Legislative Assembly of the Northern Territory.

3. **Links with the Crown**

   Under the Australia Act the Governor of each State is the representative of Her Majesty and is appointed and the appointment terminated by Her Majesty on the advice of the State Premier.

   In the Northern Territory there is a difference of views in the High Court whether the Administrator is the representative of the Crown in the Territory, although the Northern Territory (Self-Government) Act 1978 extends his duties, powers, functions and authorities to the exercise of the prerogatives of the Crown. The Administrator is appointed and dismissed by the Governor-General (see below) and there is no legal obligation to seek the advice thereon of the Chief Minister. There are no direct links between the Northern Territory and the Sovereign.

4. **Royal Powers**

   Under the Australia Act, all powers and functions of Her Majesty in respect of a State are exercisable only by the Governor of the State, except where Her Majesty exercises them when personally present in the State or where she appoints the Governor or terminates his appointment.
There is no equivalent provision in the case of the Administrator of the Northern Territory. He only has such powers as are conferred on him from time to time by Commonwealth or Territory laws. The Northern Territory (Self-Government) Act 1978 renders him subject to the directions of the relevant Commonwealth Minister in respect of non-transferred matters and gives the Governor-General on the advice of the Commonwealth Government power to terminate his appointment without cause (see below).

5. Disallowance

Under the Australia Act, a State Act of Parliament, once assented to by the Governor, is not subject to disallowance by Her Majesty nor can its operation be suspended.

A law passed by the Legislative Assembly of the Territory and assented to by the Administrator is liable to disallowance by the Governor-General (Northern Territory (Self-Government) Act 1978 - see below).

6. Reservation

Under the Australia Act a State Act of Parliament cannot be subject to any obligation to withhold assent by the Governor nor is it subject to reservation to Her Majesty.

A law passed by the Legislative Assembly of the Territory is liable to reservation to the Governor-General in the case of non-transferred matters (see below).

REPEAL OR AMENDMENT OF THE STATUTE OF WESTMINSTER AND THE AUSTRALIA ACT

The Australia Act 1986 provides that it and the Statute of Westminster can only be repealed or amended by an Act of the Parliament passed at the request or with the concurrence of the Parliaments of all the States. The request or concurrence of the Northern Territory or its legislature is not required. Note: the Australia Act 1986 will by definition extend to any new State.

DISADVANTAGES ARISING BY REFERENCE TO THE NORTHERN TERRITORY (SELF-GOVERNMENT) ACT 1978 AND OTHER COMMONWEALTH ACTS

The Northern Territory (Self-Government) Act 1978, enacted by the Parliament pursuant to s.122 of the Constitution, and
pursuant to which the Northern Territory Government is established as a separate body politic under the Crown, itself gives rise to certain disadvantages applicable to the Territory as follows:

1. **Commonwealth Act**

The Constitutions of the States are in the main contained in State Acts and are amenable to alteration by the State Parliaments in accordance with the procedures therein laid down. They are substantially protected by the Commonwealth Constitution.

The constitutional basis of the self-governing Northern Territory is found in a Commonwealth Act, the **Northern Territory (Self-Government) Act 1978**, and apart from a few matters detailed in that Act on which the Legislative Assembly can legislate, alteration of the Act is beyond the constitutional capacity of the Territory Legislature. It may even be beyond that Legislature's capacity to take any preliminary legal steps to alter that Act or the Northern Territory's constitutional status.

2. **Reservation**

As noted above in relation to the **Australia Act 1986**, the Administrator has a discretion to reserve any proposed law for the Governor-General's pleasure if that proposed law deals in whole or part with non-transferred matters. Where a proposed law is so reserved the Governor-General, on the advice of the Commonwealth Government, may assent or withhold assent, in whole or part, or return the proposed law with recommended amendments, which must be considered by the Legislative Assembly.

3. **Disallowance**

As noted above in relation to the **Australia Act 1986**, State Acts are no longer subject to disallowance by the Sovereign.

Under the **Northern Territory (Self-Government) Act 1978**, the Governor-General on the advice of the Commonwealth Government may disallow any Territory law or part of a law assented to by the Administrator within six months of assent. This applies whether the law deals with transferred or non-transferred matters. The Governor-General may in the alternative recommend amendments to that law, in which event the six months period is extended until six months after the date of the recommendation. There may be a developing
convention that these powers will not be exercised in the case of wholly transferred matters, but at law this is not the case.

4. Legislative Assembly

State Parliaments are established and their composition determined by the State Constitutions and other State legislation.

The Legislative Assembly is established, and its composition is largely determined, by the Northern Territory (Self-Government) Act 1978. This means that the Territory is limited to a unicameral legislature with single member electorates with a maximum permissible variation in the number of electors per electoral division of 20 per cent either way and with a maximum four-year term of office. Further, the Act specifies that persons qualified to vote for the election of a member of the House of Representatives are qualified to vote for members of the Legislative Assembly. The Act also exhaustively prescribes the qualifications for members.

Some room is left for the Legislative Assembly to pass laws on certain matters relating to the Legislative Assembly, for example, the number of members to be elected, electoral requirements, etc, but otherwise the matter is beyond Territory legislative control.

5. Calling of Elections and Prorogation

Elections for State Parliaments are called and State Parliaments are dissolusd or prorogued pursuant to provisions in State Constitutions and State laws.

The Northern Territory (Self-Government) Act 1978 gives the Administrator power to issue writs for the election of members of the Legislative Assembly. A general election is held on a date determined by the Administrator, providing it is not more than four years after the first meeting of the Legislative Assembly since the last general election. The Administrator may appoint times for holding sessions of the Legislative Assembly and may from time to time prorogue it. There is no express statutory power to dissolve the Legislative Assembly, but this can be achieved by issuing writs for a general election.

In the exercise of all these powers, the Administrator is legally subject to any instructions of the relevant Commonwealth Minister. It may be that there is a developing convention that these powers will not be
exercised except after obtaining the advice of the Chief Minister of the Territory Government, but at law this is not the case.

6. **Administrator**

As noted above, State Governors are appointed and their appointments may be terminated by Her Majesty on the advice of the State Premier. State Governors cannot be instructed or advised by the Commonwealth.

The Administrator of the Northern Territory is appointed by, and his appointment may be terminated by, the Governor-General on the advice of the Commonwealth Government. There may be a developing convention that the Chief Minister of the Territory Government should be consulted in advance in relation to the exercise of these powers, but at law this is not the case.

In relation to non-transferred matters, the Administrator is subject to the instructions of the relevant Commonwealth Minister. The Administrator holds office in accordance with the tenor of his Commonwealth commission.

7. **Executive Authority**

The executive authority of the States, exercised through the State Governor and Ministers of the Crown in right of the State, is generally expressed in undefined terms not limited to specific subject matters, and subject only to any limitations contained in the Letters Patent constituting the Office of Governor and the Constitution and laws of the Commonwealth and of the State.

The executive authority of the Territory, exercised through the Administrator and Ministers of the Territory, is apparently limited to matters specified in the Northern Territory (Self-Government) Regulations. Although these matters may now be extensive, encompassing most State-type matters, there are two express exceptions (rights in respect of Aboriginal land and the mining of uranium) and there may be other unexpressed exceptions not included in the detailed list.

It is not possible for the Commonwealth to affect the executive powers of a State except pursuant to a Commonwealth statute that is validly made under some Federal head of legislative power.
The Commonwealth has wide powers to affect the executive power of the Northern Territory Government, either by way of a Commonwealth statute under its plenary grant of legislative power for Territories or by way of an amendment of the Northern Territory (Self-Government) Regulations. There may be a developing convention that the Commonwealth should not derogate from the Territory's grant of executive power, but this may not be so as a matter of law. The State Governments can exercise all the Royal prerogative powers appropriate to the State.

The Territory Government is expressly given the power in the Northern Territory (Self-Government) Act 1978 to exercise the Royal prerogative powers, at least in respect of transferred matters, although some doubts remain as to whether this includes all the major prerogatives.

8. **Borrowing**

States have broad powers of borrowing, limited only by the Financial Agreement with the Commonwealth and the provisions of the Constitution. The Northern Territory (Self-Government) Act 1978 requires that all borrowing by the Territory Government or a Territory authority have the Commonwealth Treasurer's approval.

9. **Acquisition of Property**

States are free to acquire property in the State in accordance with their own laws and are not obliged to pay compensation on just terms. The Legislative Assembly of the Territory has no power to make laws with respect to the acquisition of property otherwise than on just terms.

10. **Industrial Laws**

The States have broad industrial powers, limited only by the effect of any Commonwealth laws as to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.

The Conciliation and Arbitration Act 1904 has an extended application in the Northern Territory, and apart from some specific but limited instances, the Legislative Assembly has no legislative power in industrial matters. The Territory as a consequence does not have its own industrial arbitration system.
11. **Commonwealth Acquisitions**

The Commonwealth has no power to acquire property under its Federal acquisition power applicable to the States except for Commonwealth purposes and on just terms.

The Commonwealth can acquire property under the Territories power for any purpose and constitutionally is not obliged to provide just terms. Immediately following Self-Government in 1978, the Commonwealth acquired back the whole of the Alligator Rivers Region, including the minerals, without compensation. That area remains in many respects a Commonwealth enclave in the Territory.

12. **Uranium**

The Commonwealth does not own the uranium deposits in the States, nor does it legislatively control the mining thereof. The controls it does have are mainly exercised through its power over exports.

The Commonwealth owns the uranium deposits in the Northern Territory. It has the capacity to control the mining of uranium in the Territory via the Atomic Energy Act 1953 and has exercised this on one occasion — Ranger. Commonwealth approval is also required for anything done by the Territory under the Mining Act as to uranium. The Commonwealth receives the royalties for uranium mining in the Territory although it makes a partial reimbursement to the Territory.

13. **Aboriginal Land Rights**

The Commonwealth has not legislated as to Aboriginal land rights in the States, although there is a view that constitutionally it can do so providing it pays just compensation for any acquisition of property.

The Commonwealth has specifically legislated on this topic for the Northern Territory in the Aboriginal Land Rights (Northern Territory) Act 1976 and does not pay the Territory compensation for any Territory land granted as Aboriginal land under it. Further, payments equivalent to royalties for minerals on Aboriginal land are applied by the Commonwealth for the benefit of Aboriginal people in accordance with the Act.

Territory laws only run on Aboriginal land insofar as they can do so consistently with that Act, and the Legislative Assembly cannot legislate inconsistently with the Act.
14. National Parks

The Commonwealth does not own or control national parks in the States and constitutionally it is doubtful if it has power to so own or control them other than in the implementation of international treaties to which Australia is a party and possibly in some other limited circumstances.

The Commonwealth has apparently unlimited powers to own and control national parks in the Territory. Pursuant to the National Parks and Wildlife Conservation Act 1975 it has established two major national parks in the Territory, Kakadu and Uluru, and vested title to them in the Director of National Parks and Wildlife without payment of compensation to the Territory.

Territory laws only run in these national parks in so far as they can do so consistently with that Act and the Regulations made pursuant thereto.

15. Other Commonwealth Acts

Several other Commonwealth Acts have an extended application in the Territory beyond that which they are constitutionally capable of having in the States. For example, the Trade Practices Act 1974 and the Family Law Act 1975.

OTHER DISADVANTAGES

1. Financial Matters

The financial relationship between the Commonwealth and the States is worked out by a process of joint negotiations and is incorporated in various items of Commonwealth legislation. This creates a degree of certainty for the States and gives them some security to assist in forward financial planning.

The financial relationship between the Commonwealth and the Territory is based on a non-statutory Memorandum of Understanding entered into prior to Self-Government and which has no legal status. Subsequent changes have been made from time to time to the arrangement contained in this Memorandum, in most cases (but not all), with the agreement of the Territory. Increasingly the Territory is being brought into line with the States as to financial matters, a fact that may be regarded as having both positive and negative aspects. A number of items of Commonwealth financial legislation now extend to the Territory in a similar way to the
States. However, it may be reasonable to say that the Territory is still not in as secure a position as the States in terms of its financial relationship with the Commonwealth.

2. **Ashmore and Cartier Islands**

Under the Constitution it is not possible to increase, diminish or otherwise alter the limits of a State without the consent of the Parliament of that State (see above). No similar guarantee applies to a Territory.

Prior to Self-Government in 1978, the Territory of Ashmore and Cartier Islands was annexed to and deemed to form part of the Northern Territory and Northern Territory laws were on force in the Islands.

Contemporaneously with the grant of Self-Government, the Parliament legislated without consulting the Northern Territory, to terminate the status of these Islands as part of the Northern Territory, and to only preserve the effect of Northern Territory laws in force on the islands up to the grant of Self-Government. The Governor-General was given power to make Ordinances for the Islands.

More recently, the Parliament has reapplied current Northern Territory laws to the Islands, subject to certain powers vested in the relevant Commonwealth Minister. The Islands remain a separate Territory.

3. **Cocos (Keeling) Islands and Christmas Island Territories**

It is constitutionally doubtful if a Territory can be joined with a State for Federal electoral purposes. Two or more Territories can be joined for Federal electoral purposes.

Recently, the two separate Territories of Cocos (Keeling) Islands and Christmas Island, by an amendment to the relevant Commonwealth legislation, were joined to the Northern Territory for Federal election purposes. Thus the two Territory senators and the Territory member of the House of Representatives also represent the electors of these islands.
Appendix 13

LAND MATTERS UPON STATEHOOD

OPTIONS PAPER

November 1986

1.0 Basic Position

The Territory Government's basic position is that a grant of statehood to the Northern Territory should place the new State in a position of constitutional equality with the existing States. In relation to land, upon a grant of statehood -

1.1 the radical title to land in the Territory not already vested in the self-governing Northern Territory body politic or its authorities, that is, land owned by the Commonwealth or Commonwealth authorities for State-type purposes, such as in the Alligator Rivers Region plus Uluru and Kakadu National Parks, should be transferred without cost to and become the administrative responsibility of the new State or the appropriate new State statutory authority;

1.2 any alienated land presently held from the Crown in right of the Commonwealth, including Aboriginal freehold land in the Alligator Rivers Region and any pastoral leases such as Gimbat and Goodparla, should then be held from the Crown in right of the new State;

1.3 any land leased by the Commonwealth Director of National Parks and Wildlife from Aboriginal owners should become land leased on the same terms by the appropriate new State statutory authority;

1.4 the Aboriginal Land Rights (Northern Territory) Act 1976 must be patriated to the new State by some agreed method, such that it becomes part of the law of the new State and comes under the administrative responsibility of the new State Government (this to apply in the absence of a Commonwealth Land Rights Act applying generally throughout Australia);

1.5 this process of patriation of the Act should include appropriate guarantees of Aboriginal ownership;

1.6 the method of patriation of the Act, the ownership guarantees to be provided and all matters concerning Aboriginal land rights in relation to statehood would
be matters for consultation with Territorians, and in particular with Aboriginal Territorians, without preconditions.

The Chief Minister of the Northern Territory, in his address to the Legislative Assembly on 28 August 1986, indicated that there would be a continuation of land rights upon statehood and stated that support by Aboriginal Territorians was a key consideration in the approach to statehood. He pointed out that patriated land rights will provide existing ownership guarantees. As a result of full consultation, it might also make provision for alternative tenure arrangements and provide flexibility which will enable traditional owners to have real control of their land with the ability to decide whether to exploit its economic potential consistent with their cultural values.

The purpose of this paper is to list options for dealing with Commonwealth owned or controlled land in the Territory, including Aboriginal land, and related issues, upon a grant of statehood, to facilitate consultation and further discussion on these important issues.

2.0 Status of Commonwealth Lands in the Territory

This paper is concerned with a number of areas of land in the Territory which are subject to different forms of direct or indirect Commonwealth ownership or control. These are:

2.1 Aboriginal land as defined in the Land Rights Act. This in turn comprises:

2.1.1 Aboriginal freehold land vested in Land Trusts.

2.1.2 Aboriginal land held in escrow subject to the termination of some prior proprietary interest.

2.1.3 Aboriginal freehold land leased to the Director of National Parks and Wildlife for the purposes of a national park.

2.2 Land other than Aboriginal land that is vested absolutely in the Director of National Parks and Wildlife for the purposes of a national park. This includes land which in turn is leased by the Director to a Territory statutory authority for the purposes of a town, as in the case of Jabiru.

2.3 Commonwealth controlled land in the Territory including land controlled by Commonwealth statutory authorities other than the Director of National Parks and Wildlife.
This in turn comprises:

2.3.1 Commonwealth controlled land held for State-type purposes.

2.3.2 Commonwealth controlled land held for Commonwealth or Federal-type purposes. This paper is not so much concerned with this latter category except in so far as there are demarcation problems between land in 2.3.1 and land in 2.3.2. For example, land purportedly held for Federal-type purposes but not used or likely to be used for those purposes, such as land relating to the former North Australia Railway.

3.0 Aboriginal Land (see 2.1)

3.1 Patriation

Basically there are three ways of patriating the Land Rights Act upon statehood to achieve the basic position stated above:

3.1.1 By providing that the Land Rights Act will, as from the date of the grant of statehood, become and have effect as a law of the new State and cease to be a law of the Commonwealth.

This option avoids the need for revised legislation and facilitates continuity of the law and rights under the law ...

3.1.2 By repealing that Act and at the same time enacting a revised Aboriginal Land Act (NT) as part of the law of the new State, with appropriate transitional provisions.

This approach would necessitate the passage of Aboriginal land legislation by the Legislative Assembly prior to statehood, that legislation being expressly continued after statehood. The passage of such new legislation would facilitate the making of agreed changes to the Land Rights Act after completion of the consultative process mentioned above. The Commonwealth would retain the final say in that if the new legislation was not considered satisfactory, the Commonwealth could refuse to make the grant of statehood and repeal the existing Land Rights Act.

3.1.3 By continuing the existing Land Rights Act for a specified time after the grant of statehood, say
for 12 months, to enable the new State Parliament to pass new Aboriginal land legislation within that time, with appropriate transitional provisions ... 

It should be noted that any concurrent Commonwealth powers with respect to Aboriginal land in the States will remain after the grant of statehood and will be pertinent to all the above options.

3.2 Content of the Patriated Act

The available approaches in determining the content of the patriated Land Rights Act upon statehood are:

3.2.1 The patriated Act must at least contain those necessary amendments to give effect to the basic Territory position stated above. The nature of these amendments is a matter for consultation, and might include:

(a) Replacement of references to the Commonwealth Minister with references to the appropriate new State Minister or other agreed officer.

(b) Replacement of the powers of the Governor-General in the Act with references to the new State Governor or other agreed officer.

(c) Replacement of references to the Commonwealth Parliament with references to the new State Parliament.

(d) Replacement of references to the Administrator with references to the Governor of the new State.

(e) Appropriate amendments to reflect the changes necessary to accommodate the basic position outlined above in relation to the Director of National Parks and Wildlife and the National Parks and Wildlife Conservation Act 1975.

(f) Amendments necessitated by the transfer to the new State of ownership and control of uranium and other prescribed substances under the Atomic Energy Act 1953 of the Commonwealth. In this regard, the Territory Government has indicated it will be seeking
such ownership and control of these substances, leaving the Commonwealth with only the Federal-type controls that it has in respect of the States, and in particular power over exports.

3.2.2 The patriated Aboriginal land legislation could contain further modifications to provide for flexible tenure arrangements of the nature referred to by the Chief Minister, being in addition to those necessary amendments referred to in 3.2.1 above. The object would be to give a greater measure of self-determination to Aboriginal owners over their own land. Such further modifications are also a matter for consultation and could include one or more of the following:

(a) Removal of some or all of the outside controls on the alienation of Aboriginal land in s.19 of the Act - for example, the necessity in some cases to obtain Ministerial consent to a grant of a lease or licence.

(b) An extension of the powers of alienation of Aboriginal land under s.19 of the Act - for example, a power to grant a lease or licence for specified longer periods, or to remove the existing time limits on the period of such leases and licences altogether. This would facilitate dealings in Aboriginal land by Land Trusts without infringing any of the freehold rights of the traditional owners. Long-term leases could be used to provide security against which to borrow, to grant secure occupancy to particular Aborigines and others, to promote joint ventures or to grant rights to non-Aborigines for various developmental projects approved by the Land Trust on agreed terms.

Whether these extended powers should ever extend to a power to sell the Aboriginal freehold or any subdivided part thereof, or to mortgage, exchange or otherwise deal in the freehold title, and if so, under what circumstances, is a matter listed under 3.2.2(d) below and requires further careful consideration.
(c) A new option to be exercised at the time of the traditional owners' choice, to convert their Aboriginal freehold into ordinary freehold title, with all the powers that attach of dealing and alienating that land and subject to the general property laws of the new State. Where necessary, the land could be subdivided to facilitate the grant of title for identified parts of the land to the particular Aboriginal owners of those parts. Once the option was exercised, the trustees could be given wide powers to develop the land or otherwise deal with it.

This option would require consideration as to whether the land the subject of the option would continue to be held by a Land Trust on the present model in the Land Rights Act or in some new trust or other arrangement after the exercise of the option. It would also require the creation of an appropriate method of identifying the traditional owners, particularly for Schedule 1 land, and also for identifying the land boundaries of the respective traditional owners within each area of Aboriginal land.

(d) The express grant to existing Land Trusts upon statehood of full rights of dealing in and alienation of the Aboriginal land held by them in the manner of ordinary freehold; that is, the removal of all statutory controls and restraints on dealing and alienation, leaving the Land Trusts with total control of the freehold. This would of course be subject to the beneficial rights of the traditional owners in the land and in other investments made by the Land Trusts, which rights would be protected under the law.

Any of the modifications in (a), (b), (c) or (d) above could be introduced across the board in a general way, or on a selective case by case basis at the appropriate time in a more flexible way to suit the particular circumstances applying to each piece of land. They could also have built-in safeguards to limit the potential for abuse, such as by requiring special majorities among the trustees for certain proposed transactions or by requiring clear
evidence of support among the traditional owners to certain proposals. The nature of these safeguards could vary depending on the nature of the proposed transaction ...

The existing powers of Land Councils warrant consideration in this context. If a flexible approach is to be adopted, this could include consideration as to whether the contractual and consent powers and powers of direction of Land Councils in the present Act in relation to Aboriginal land could be passed over to the trustees or to the traditional owners at the appropriate time.

3.2.3 The patrified Aboriginal land legislation could also contain any additional modifications agreed as a result of consultation but not yet incorporated in the Act at the time of the grant of statehood. This could, for example, include changes such as those already being considered for amendment to the existing Act, including a power to acquire an interest in Aboriginal land on just terms for defined public purposes.

3.3 Guarantees of Aboriginal Ownership

At present, there are no legal guarantees of Aboriginal freehold title except that it is held pursuant to an ordinary Commonwealth Act. This offers no real security as that Act can be changed and land taken away without compensation (compare the Petermann Aboriginal Land Trust (Boundaries) Act 1985). As the Northern Territory at present remains a Territory of the Commonwealth, the constitutional guarantees in s.51 (xxxii) of the Constitution that any acquisition of property must be on just terms does not apply, although an equivalent statutory provision has been applied in the Territory by force of s.50(2) of the Northern Territory (Self-Government) Act 1978. The Legislative Assembly of the Northern Territory has no power to legislate to resume, compulsorily acquire or forfeit Aboriginal land (s.67 of the Land Rights Act), although the Parliament does have such a power.

The opportunity is available upon a grant of statehood to provide constitutional guarantees of Aboriginal title on any agreed terms. Depending on the way in which any such guarantees are entrenched, it may be possible to provide a more secure title than that at present. The additional guarantees that could be provided could take one or more of the following forms:
3.3.1 A guarantee that all existing titles to Aboriginal land and other interests in respect of that land immediately before the grant of statehood will continue upon the grant.

3.3.2 A guarantee applicable to the new State in similar terms to s.51 (xxxii) of the Constitution, to prevent the acquisition of property pursuant to new State law as well as Commonwealth law otherwise than on just terms (compare s.50(1) of the Northern Territory (Self-Government) Act 1978).

3.3.3 A guarantee that will impose acceptable limits on any power of the new State or the Commonwealth to resume Aboriginal land for defined public purposes, such as those presently being considered by way of amendment to the existing Act.

3.3.4 A guarantee that any future change to rights in respect of Aboriginal land can only be made in accordance with specified procedures set out in the new State Constitution. The nature of these procedures would need to be determined, and could take a variety of forms. Any continuing Commonwealth involvement in these procedures after statehood would, however, be inconsistent with a grant of statehood to the Territory on equal terms with the existing States.

Guarantees and procedures entrenched in the new State Constitution would be protected both by s.106 of the Constitution and also by s.6 of the Australia Act 1986, as well as by the general law.

3.4 National Park Leases

Two national parks in the Territory, Kakadu and Uluru, have been created pursuant to the National Parks and Wildlife Conservation Act 1975. Kakadu is partly vested absolutely in the Director of National Parks and Wildlife and is partly held by the Director on long-term lease from an Aboriginal Land Trust. Uluru is held by the Director on long-term lease from an Aboriginal Land Trust. The basic Territory position indicated above provides that upon a grant of statehood, these titles held by the Director will be vested in the appropriate new State statutory authority on the same terms.
There is, however, some concern to ensure that where these Parks are on leased land, that the Parks are continued at that future point in time when the current leases from Aboriginal Land Trusts expire. There are several options as to how this may be achieved.

3.4.1 To leave the position as it is at present, such that it would be a matter for negotiation between the Aboriginal Land Trusts and the park lease holder at the time of expiry of the leases to agree on a renewal of these leases and the terms of any such renewal.

There may, however, be some concern about this option, particularly if the Aboriginal title becomes constitutionally guaranteed in some way upon statehood. If a renewal of the Park leases could not at that time be agreed on reasonable terms, the Parks would cease and there may be nothing that any Government could legally do about it.

3.4.2 To provide at the time of the grant of statehood that upon the expiry of the current Park leases, there will be a continuing right of renewal of the leases to ensure the continuation of the Parks, on such terms as may at that time be agreed and failing agreement as determined by an independent arbitrator.

3.4.3 To convert the current Park leases at the time of the grant of statehood to perpetual leases, but with a right to review the terms and conditions thereof at stated intervals and with provision for an independent arbitrator in the case of any disagreement on the review.

3.4.4 To replace the current Park lease tenure system at the time of the grant of statehood with a new arrangement which will establish the Parks in perpetuity for the benefit of all humankind, with a system of management and control which reflects the Aboriginal ownership of the land, the imperatives of nature conservation, and the aspirations of the community at large to visit and enjoy the area. The current arrangements applying under the Cobourg Peninsula Aboriginal Land and Sanctuary Act (NT) and those presently to apply to other Territory parks, reserves and sanctuaries are relevant in this regard.
4.0 National Parks (see 2.2)

The basic Territory position above would require that any land vested absolutely in the Director of National Parks and Wildlife for the purposes of a national park would, upon the grant of statehood, become vested in the appropriate new State statutory authority. This does not in any way limit any options that the Commonwealth has to legislate Australia-wide in a way that may have implications for nature conservation.

Where the land is at the time of the grant of statehood the subject of a lease or other lesser interest from the Director to another person or body, such as the townsite lease to the Jabiru Town Development Authority, that lease or other interest would be held upon statehood on the same terms from the new State statutory authority in which the title to the Park is vested.

5.0 Commonwealth Land (see 2.3)

The basic Territory position above will require that radical title to all land in the Territory owned or controlled by the Commonwealth or Commonwealth authorities at the time of the grant of statehood for State-type purposes, be transferred without cost to the new State or the appropriate new State statutory authority. There may, however, be some difference of views as to whether particular land is in fact held for State-type purposes or not, or where held for Federal purposes, whether it is ever likely to be used for those purposes. This should be the subject of consultation and resolution before the grant of statehood is implemented.
Appendix 14

MINERALS AND ENERGY RESOURCES UPON STATEHOOD

OPTIONS PAPER

April 1987

1.0 Introduction

1.1 In November 1986, the Northern Territory Government published an options paper entitled Land Matters Upon Statehood.

That paper stated the Government's basic position that a grant of statehood to the Northern Territory should place the new State in a position of constitutional equality with the existing States. It set out a number of options for dealing with land upon statehood, subject to that basic position.

This paper is complementary to that earlier paper, and deals with the position of mineral resources (including energy) in the Territory upon a grant of statehood other than the land itself.

The utilisation of these resources will be based on the principles of multiple land use within a balanced framework of conservation and development.

1.2 Following on from the basic position expressed in the earlier paper as to constitutional equality, in relation to resources the basic position of the Territory Government is that upon statehood, all resources in the new State, other than those held by the Commonwealth for genuinely Federal-type purposes, should be owned and controlled by the new State. As noted in paragraph 3.2.1.(f) of the earlier paper, this must extend to ownership and control of uranium and other prescribed substances under the Atomic Energy Act 1953 of the Commonwealth. It also includes ownership and control of off-shore resources to the same extent as in the existing States.

The purpose of this paper is to list options upon a grant of statehood for dealing with mineral resources in the Territory that are not already fully owned and controlled by the Territory, consistently with the basic position stated above, to facilitate consultation and further discussion on these important issues.
2.0 Status of Mineral Resources in the Territory

2.1 Pursuant to s.69 of the Northern Territory (Self-Government) Act 1978, the title of the Commonwealth to all minerals, being any naturally occurring substance or mixture of substances, whether solid, liquid or gas, but excluding uranium and other prescribed substances under the Atomic Energy Act, was by force of that section vested in the new Northern Territory body politic created by that Act. Prescribed substances remained in Commonwealth ownership and control, although the Northern Territory Government acquired the power to deal with these substances under Territory law subject to Commonwealth direction.

2.2 As the Commonwealth already owned all minerals in the Territory by virtue of prior Territory legislation, the new Territory Government inherited this ownership. It also inherited the method of control through the Territory Mining Act and other Territory legislation the responsibility for which was transferred to the Northern Territory on and from the grant of Self-Government.

2.3 This position applies to minerals on Aboriginal land, except in so far as the Aboriginal Land Rights (Northern Territory) Act 1976 of the Commonwealth imposes controls on minerals and mining (see paragraph 4.0 below).

2.4 This position also applies to minerals on the two national parks, Kakadu and Uluru, established under the National Parks and Wildlife Conservation Act 1975 of the Commonwealth, except in so far as that Act imposes controls on minerals and mining and, to the extent that those Parks are also Aboriginal land, subject to any controls imposed under the Aboriginal Land Rights (Northern Territory) Act 1976.

2.5 However under s.70 of the Northern Territory (Self-Government) Act 1978, the Commonwealth was empowered to and did in fact acquire back certain land in the Territory within one year of the grant of Self-Government, including a vast area in the Alligator Rivers Region. An amendment to s.70 in 1982 made it clear that any such acquisition also vested in the Commonwealth the minerals in or on the acquired land.

2.6 In a few cases, and notably in the Gove-Nabalco case, the residual effect of certain pre-Self-Government agreements between a miner and the Commonwealth has continued to impose some limitations on full Territory control since Self-Government.
2.7 In the case of offshore areas, the Northern Territory has already been placed substantially in the same position as the States with respect to resources in so far as this has been constitutionally possible. The position as to the Ashmore and Cartier Islands and their offshore resources requires special consideration, given that their status as part of the Territory was terminated by the Commonwealth at Self-Government.

2.8 The Northern Territory has assumed general responsibility for environmental issues concerning mining since Self-Government, including with respect to Commonwealth minerals under arrangements with the Commonwealth, subject to a number of items of Commonwealth legislation on the subject.

2.9 This paper discusses each of the above issues in turn -

(a) Uranium and other prescribed substances (paragraph 3.0).
(b) Mining and Aboriginal land (paragraph 4.0).
(c) Mining and national parks (paragraph 5.0).
(d) Mining and Commonwealth land (paragraph 6.0).
(e) Commonwealth mining agreements (paragraph 7.0).
(f) Mining offshore (paragraph 8.0).
(g) Environmental issues (paragraph 9.0).

3.0 Uranium and other prescribed substances

In order to comply with the basic position of the Territory Government above, there is no option but to transfer ownership of these substances to the new State without payment. Amendments to relevant Commonwealth and Territory legislation to effect this and to remove existing Commonwealth controls going beyond those applicable in the States would be necessary. The Ranger licence under s.4(1) of the Atomic Energy Act, being the only current licence issued under that Act, would need to be transferred to the new State on the existing terms and conditions, subject to new State law and any renegotiated arrangements. Any Commonwealth liability arising from past events would be covered by a general indemnity in favour of the new State (cf s.72 of the Northern Territory (Self-Government) Act 1978).

Royalties would be payable to the new State in respect of the mining of these substances under the then current new State royalty legislation, subject to any particular arrangements negotiated with the miners, in lieu of arrangements previously applying. The position as to royalties and Aboriginal land, including Ranger, is discussed in paragraph 4.4 below.
4.0 **Mining and Aboriginal Land**

4.1 The paper *Land Matters Upon Statehood* stipulates that the *Aboriginal Land Rights (Northern Territory) Act 1976* must be patriated to the new State by some method and that this will require certain minimal amendments to the Act. These will include amendments to reflect the changed ownership of uranium and other prescribed substances, discussed in paragraph 3.0 above. The paper contemplated the possibility of further changes, being a matter for consultation.

One question that arises is as to the provisions to be made in the patriated Act concerning the existing power over mining on Aboriginal land of the Land Councils.

The range of options that might be advanced by any interested party are -

4.1.1 To place Aboriginal land in at least the same position as any other privately owned fee simple land that is not Aboriginal land, with all the protection offered by new State law to such land (see for example, Part VI, Division 4 and s.184 of the *Mining Act*).

4.1.2 To amend the provisions of the patriated Act to provide for prior consultation with Aboriginal owners before mining or exploration occurs, and some mechanism for resolving any differences where agreement cannot be reached on mining or exploration within a reasonable time, for example, by arbitration. Subject thereto, mining and exploration would be permitted on Aboriginal land in accordance with new State law.

4.1.3 To retain the Act as to actual mining on Aboriginal land as it is at the time it is patriated, but to provide some additional mechanism for encouraging and facilitating exploration on Aboriginal land, perhaps on the basis of prior consultation, and arbitration where necessary, as in 4.1.2 above.

4.1.4 To retain the Act as to mining and exploration as it is at the time it is patriated.

4.2 Irrespective of the option adopted, the objective of the Territory Government is to ensure that rational and progressive multiple land use policies are enshrined in the patriated Act for the benefit of the whole of the new State and its economy, consistent with new State ownership and control of resources, and the special
interests and needs of Aboriginal people. In its view, this should include provision for adequate consultation with the traditional owners before any mining or exploration takes place and the need for exploration and mining development access that would protect identified sacred sites; limit interference with Aboriginal social and cultural activities and traditions; control the use of firearms and lighting of fires; restrict the sale and consumption of liquor; provide for liaison and consultation on work programs, determine routes of ingress and egress and the location of temporary work camps; provide for employment opportunities for Aborigines; determine the compensation payments for being deprived of the use of or damage to the land and for the distribution method of those payments, and other matters as may be agreed.

However, given new State ownership of the resources, the Territory Government is of the view that it should not include provision for compensation in relation to the value of any such resource itself.

4.3 The existing provision for the Governor-General to declare that the national interest requires a grant of a mining interest would not be consistent with statehood.

The options are -

4.3.1 To vest the power in the new State Governor or in the new State Parliament.

4.3.2 To delete the power.

4.4 Where the Commonwealth has granted land as Aboriginal land prior to statehood, and mining has occurred on that land, an obligation will have been incurred by the Commonwealth under Part VI of the Aboriginal Land Rights (Northern Territory) Act 1976 to make payment to the Aboriginals Benefit Trust Account equivalent to the royalties received by the Commonwealth or the Territory.

It might be argued that one option is for this liability to be transferred to the new State as part of the patriation of the Act.

In the Territory Government's view, any such liability arising in respect of land granted by the Commonwealth prior to statehood should continue to be a Commonwealth liability and not be passed to the new State. As it was a Commonwealth decision to grant the land under a Commonwealth Act without seeking prior Territory
concurrence (even though in most cases it had been Territory-owned land, with no compensation being payable to the Territory as a result of the grant), the Commonwealth should accept the financial consequences.

The question of control over royalties in respect of new State minerals mined after statehood should be solely a matter for the new State Parliament and Government. Any Commonwealth imposed restraints on the disposition of new State revenue would be inconsistent with the basic position outlined above.

The Commonwealth should also continue to be liable to make any payments due under the Ranger Agreement executed by it pursuant to s.44 of the Aboriginal Land Rights (Northern Territory) Act 1976.

5.0 Mining and Commonwealth National Parks

Although ownership of the land in a national park declared under the National Parks and Wildlife Conservation Act 1975 vests in the Director of National Parks and Wildlife, ownership of minerals in the park remains with the Crown. Existing mining interests at the time of the declaration of the Park are protected, and the Act does not prohibit mining, whether pursuant to existing or new mining interests. However, control over mining operations in the Park can be exercised pursuant to the park plan of management, and the Parliament is currently considering legislation to prohibit mining operations in Kakadu National Park.*

The basic position of the Territory Government as to national parks, as discussed in Land Matters Upon Statehood, is that the land comprised in national parks should be transferred as a park to and become the administrative responsibility of the appropriate new State statutory authority upon a grant of statehood.

This position does not admit of any options. It would then be a matter for the new State and its statutory authority to determine matters concerning the use of that land.

This would of course be subject to any restrictions arising from the fact that the land may also be Aboriginal land (see the discussion above) and also any environmental or other restrictions that may be imposed by the new State Constitution or its legislation.

* Legislation to this effect is now in place [eds].
Commonwealth legislation would operate only to the extent that it was of a Federal nature applying Australia wide.

The implementation of the above basic position would require substantial amendments to the National Parks and Wildlife Conservation Act 1975. Consideration could be given to the inclusion of new legislative provisions, either in the new State Constitution or in new State legislation, dealing with the transferred responsibilities of the new State. The exact content of these new legislative provisions would be a matter for consultation.

6.0 Mining and Commonwealth Land

The main area of concern in this respect is the Commonwealth-acquired land in the Alligator Rivers Region. Given the basic position of the Territory Government outlined above, all minerals in or on this land, together with the land itself, should be transferred to the new State without cost.

7.0 Commonwealth Mining Agreements

The main area of concern in this respect is the Gove-Nabalco agreement between the Commonwealth and the miner. This agreement was not transferred to the Territory upon Self-Government, and it continues to contain a number of provisions which are incompatible with the transfer of responsibility for the minerals and mining to the Territory. It contains other provisions which are properly the responsibility of the Commonwealth. It has not so far proved possible to renegotiate this agreement.

A continuance of this situation beyond statehood would not be consistent with the basic position outlined above. There is no option but to renegotiate this agreement before the grant of statehood to resolve the legal difficulties, to provide a legislative framework that allows for a continuation of Nabalco's operations and their further development together with their existing land and mining interests and their renewal, to ensure that the relevant new State legislation on royalties will apply to the mining operations and to provide for the continuation of the Township of Nhulunbuy after the cessation of mining.
8.0 Mining Offshore

8.1 The basis of the application of Territory laws offshore to three nautical miles from the baselines drawn under the Seas and Submerged Lands Act 1973 is to be found in the Coastal Waters (Northern Territory Powers) Act 1980 and the Coastal Waters (Northern Territory Title) Act 1980 of the Commonwealth. There is a further application of Territory and State laws offshore under the Petroleum (Submerged Lands) Act 1967, under which the Northern Territory administers the adjacent offshore area and receives a share of the royalties (and see also the Minerals (Submerged Lands) Act 1981). The two Coastal Waters Acts run parallel to and are in similar terms to Commonwealth legislation applicable to the States. In the case of the Coastal Waters (State Powers) Act 1980, this legislation was enacted by the Commonwealth Parliament at the request of the State Parliaments under s.51 (xxxviii) of the Constitution, thus giving it a constitutional status beyond that of the equivalent Act in the Territory. It is arguable that upon a grant of statehood, the Coastal Waters (Northern Territory Powers) Act 1980 should in its application to the new State be given a similar entrenched constitutional status, perhaps by inclusion in the terms and conditions of admission of the new State.

8.2 The Ashmore and Cartier Islands Territory was, prior to Self-Government, deemed to be annexed to and to form part of the Northern Territory under the Ashmore and Cartier Islands Acceptance Act 1933. This Territory has its own adjacent offshore area for the purposes of the Petroleum (Submerged Lands) Act 1967. By amendment of the Ashmore and Cartier Islands Acceptance Act 1933 in 1978, enacted without the consent of the Northern Territory, the Islands reverted to being a separate Territory, although the Northern Territory continues to administer the adjacent area on behalf of the Commonwealth without receiving any share of the royalties.

The options on statehood are either a continuation of this arrangement, or the inclusion of the Islands Territory in the new State, with its adjacent area to the Northern Territory. The Northern Territory Government advocates the latter option.

9.0 Environmental Issues

The transfer of full ownership and control of resources to the new State in accordance with the basic position above would carry with it full responsibility for
environmental issues relating to the development and utilisation of those resources. This will necessitate a review and replacement of those items of Commonwealth legislation dealing with environmental aspects in so far as they are applicable specifically to the Territory, including the National Parks and Wildlife Conservation Act 1975, the Environmental Protection (Alligator Rivers Region) Act 1978 and the Environmental Protection (Northern Territory Supreme Court) Act 1978. Any new legislative provisions could be included in either the new State Constitution or in new State legislation.
Introduction

In the newspapers and on the radio people are talking about statehood for the Northern Territory.

This tape has been made by the Northern Land Council to let you and your community know about what could happen to your land rights if the Northern Territory becomes a State like Queensland and Western Australia.

When the Balanda [i.e. white, eds] people started invading this country 200 years ago there were no states.

After many years when Balanda people moved all over the place, they decided to have their own big areas of country and set up their own State Governments.

These Balanda people didn't care about where your country was. They just thought they could have white fella laws everywhere. The Balanda people set up six States, six Governments, covering all of Australia.

The big bit of country now called the Northern Territory didn't have many Balanda people in it. So Balanda people decided it didn't need its own State Government, and for many years it belonged to South Australia and then the Australian Government in Canberra.

A long time ago all the State Governments got together and decided to make a big new government - called the Commonwealth or Australian Government - to be in charge of all of Australia.

But the six State Governments decided to set up some rules and laws which told the new Australian Government what laws it could make. This set of rules and laws is called the Australian Constitution. The Australian Constitution tells the politicians in the Australian Government in Canberra what laws they can make. The Australian Government looks after some things in every State, like in Queensland and Western Australia. This Australian Government in Canberra looks after social security, unemployment, money for education and so on.
Some laws can still be made by the six State Governments for their States — things like roads, the running of schools, hospitals, prisons and electricity.

The only way the Australian Constitution can now be changed is for all people living in Australia to have a big vote. These big votes to change the Constitution are called referenda.

A special referendum was held in 1967 to allow the Australian Government to make special laws for Aboriginal people. This meant the Australian Government had the power to make land rights laws for Aboriginal people, anywhere in Australia.

So far the only place where the Australian Government has made Aboriginal land rights a law is in the Northern Territory which is not a State. It doesn't have State Government.

The Australian Government hasn't made land rights a law in the six States like Queensland and Western Australia because it is scared of having a big political fight with those Governments.

Those six State Governments think too many Balanda people living in their States don't like Aboriginal land rights.

Now the story has changed.

Politicians and some other people living in the Northern Territory now want their own State Government. One thing those people want is to be boss of land rights in the Northern Territory. They want to take this job away from the Australian Government.

A hundred years ago Aboriginal people were not asked by the invading Balanda people if they wanted their country cut up into States and white man's law in charge of things.

This time Aboriginal people living in the Northern Territory must have a big say.

It will be up to Aboriginal people to make their voice heard.

You are the owners of this country here in the Northern Territory. You will always live here. Many Balanda people come and go from this place. Your views must be heard.

The way you want your land rights to happen in the Northern Territory may be blocked if the Northern Territory
gets its own powers away from the Australian Government.

Your Land Councils in the Northern Territory have always said Aboriginal people only want to deal with the Australian Government on land rights.

This whole country was all Aboriginal land.

That's why the Australian Constitution should say that Aboriginal people were the owners of Australia before Balanda people and that this matter has nothing to do with all the State Governments.

Aboriginal people and their land should be controlled by Aboriginal people under an agreement with the Australian Government in Canberra.

Aboriginal people have never said they accepted the taking over of their country by Balanda people. They say that all Australians must now know that Aboriginal people are the first owners of this country in all the States and the Northern Territory, and this should be said in the Australian Constitution so that any State Government, like a new State Government in the Northern Territory, wouldn't be able to take your land rights away.

What is all this talk about statehood?

The Australian Government has been boss of the Northern Territory since 1911. That's been 76 years. The Australian Government decided to give the Northern Territory a little bit of power only eight years ago. This was called Self-Government but that's not as powerful as being a State.

The Northern Territory Government can now make its own laws but the Australian Government in Canberra can block them if they think a law is no good.

Now Territory politicians and some other people living here want statehood. That means the Northern Territory wants to have the same powers as the other State Governments in Australia. They want to stop the Australian Government looking after people in the Northern Territory.

The Northern Territory politicians say the Australian Government has too many powers over the Northern Territory and this is blocking mining and other industries. The politicians in the Northern Territory are saying they now want more control over everyone's land in the Northern Territory.

At the moment statehood is just a word - just an idea.
That is why nobody can tell you just now what statehood really means for this place.

But we know one thing very clearly.

The Northern Territory Government is saying it wants to take over the Land Rights Act from the Australian Government.

They are also saying they want the same number of politicians in Canberra as the other States, even though the other States have much bigger populations.

This could mean the Northern Territory politicians, who are mostly against our land rights, could control the Australian Government and have a big say over what the Land Rights Act says.

This same CLP Government in the Northern Territory that wants to take over our land rights has already said it wants to make public roads through Aboriginal land ... use some of your Aboriginal land for the Government ... and allow mining on Aboriginal land and in national parks, whether you want it or not.

The Northern Territory Government has tried to stop every land claim. It has been friends with the cattlemen in stopping many of our people getting living areas called excisions on the big stations.

If they get this power of statehood, the Territory Government will have more control over Aboriginal people and their land. Aboriginal people will not be able to sing out to Canberra for help and support. That's why Aboriginal people from around Australia say they want their rights protected in the Australian Constitution so that politicians in the Territory, the States or the Australian Government can't change Aboriginal land rights.

What will statehood mean for land rights and Aboriginal people?

The Northern Territory CLP Government wants statehood as a way of making the Commonwealth hand over the Aboriginal Land Rights (Northern Territory) Act 1976 to the new Northern Territory State. That means the Commonwealth land rights law would be taken over. Then the Northern Territory Government under statehood could make its own land rights law, and be in charge of land rights in the Northern Territory.

The CLP Government says that giving Aboriginal people back their land forever is not good because you can't sell
your land for money, like Balanda people do. This is not true. Aboriginal people can get money from their land by letting people use their land for a little while - maybe 10 years; maybe 20 years - maybe more if that's what you really want. But if you do that, you know your land will come back to you. That means your children and grandchildren will have your country forever.

Many important people, like Aboriginal Land Commissioners who are judges, support Aboriginal beliefs. They have all agreed that traditional owners should keep their country forever.

The CLP Government wants to let miners and other big development companies use their power and money to sweet talk some traditional owners into selling their land forever ... the whitefella's way.

The American and New Zealand Governments tried this on American Indian land and Maori land a long time ago. It was no good, because many Indian and Maori people were tricked and sold their land and lost it forever. They were left with nothing.

The Northern Territory Government says Aboriginal people will be consulted about the way land rights would be looked after in the new State if the Territory gets statehood.

But it isn't true. Without even talking to Aboriginal people, the Northern Territory Government has decided that Aboriginal people should be able to sell or mortgage their Aboriginal land.

The CLP Government in the Northern Territory says the best title is ordinary freehold title. This is the title that Balanda people have when they buy or sell land. No one really owns or belongs to any land in the Aboriginal way. They buy and sell land with other people just to make money.

It also means that landowners can borrow lots of money from a bank and give the bank the title to their land as 'security'. If things go wrong and they can't pay back the money they borrowed, the bank will take the land away from them forever.

Do you want to sell or mortgage your country and lose it forever from your families?

The best title you can have for keeping your land forever is inalienable Aboriginal freehold title, the sort of title you get to your land now, under the Land Rights Act. Traditional owners can develop their country under the
Aboriginal land rights law, or be partners in any development on their land and make money from that if they wish.

This is the way Aboriginal people are developing their country now, and they don't have to worry about losing their land.

Can the Northern Territory Government be trusted to control Aboriginal land?

All it has really done is to try and stop Aboriginal people getting their land back and owning it the proper Aboriginal way.

Look at what they have done so far. The Northern Territory CLP Government has tried to block every land claim and the land rights law at every chance. Many land claims have been held up or stopped.

The Northern Territory Government has also blocked many people forced off their land by the cattlemen from getting back small parts of their land to live on. The CLP Government has made it very hard for people to get these excisions.

Aboriginal people will have to think very carefully about this statehood business. They could lose many of their rights if Darwin is in charge of land rights and not Canberra. Aboriginal people will have to make sure that their rights are protected in the Australian Constitution if the Territory is to get statehood.

How does statehood come about?

The CLP Government in Darwin is looking at two ways under Australian law that a new State can be made.

The first way is for everyone in Australia to have a big vote, like we talked about earlier (called a referendum). They will be asked to say 'yes' or 'no' on whether the Northern Territory should become a State. For this to work, most of the Australian people have to say 'yes'. Also, most of all the States have to say 'yes' to a new State.

The second way is for the Canberra Government itself to make a new law for a new State.

The CLP Government in Darwin wants to do it the second way because they think it would be easier for them to get what they want. Because the CLP represents mostly white people in the Northern Territory, they think they will be able to talk Canberra into passing a law for a new State.
If they tried to do it the other way they would find it much harder as they would have to talk all Australians into believing a new State is a good idea the way the CLP Government wants it. The CLP Government is worried that they would find it too hard to talk so many people into voting this way when Australian people have already voted for the Australian Government to look after land rights.

That's why many Aboriginal people want their land rights written down in those special rules of the Australian Constitution to be there forever. Aboriginal people could lose out from statehood in the Northern Territory.

This might happen because most of the people who live in the Northern Territory are Balanda people, many of whom don't like land rights and don't know much about Aboriginal culture.

What can Aboriginal people do to protect their rights under statehood?

Aboriginal people need to get the Northern Territory Government and other people wanting statehood to sit down with them to talk about what Aboriginal people want.

At the moment the Government has only been telling us what they want.

Aboriginal people are a big part of the Northern Territory population. They are the original owners of the Northern Territory and they live here forever, so they must be listened to if they have one strong voice about statehood.

Aboriginal people say land rights should be protected in the Australian Constitution. It should be taken away from the politicians who keep changing their minds and laws, and who don't think land rights are a good idea, and put into law that lasts forever.

The Northern Territory Government has already started visiting Aboriginal communities and sweet talking them about statehood. That's where Aboriginal people can tell the Chief Minister or his Ministers that you don't want the kind of statehood the Northern Territory CLP Government is talking about.

Aboriginal people and their land should be controlled by Aboriginal people under an agreement with the Australian Government in Canberra. This agreement should be put in the Australian Constitution forever.
Statehood in the Northern Territory could be good for Aboriginal people and their land rights if the Australian Constitution said this.

This would force all Governments to recognise Aboriginal law and force them to help protect Aboriginal land.

It would be very bad if it did not.

Only one thing is certain at this time.

The issue of statehood is a very very important and serious issue for Aboriginal people to consider.

To fully understand and have a strong say about this issue you must make further questions to the NT politicians, Commonwealth politicians and Land Councils about it.

It will affect your rights and your children's rights forever.
Appendix 16

TRANSCRIPT OF: 'STATEHOOD'

Central Land Council

Introduction

This is a tape about statehood. Statehood would change the law in Canberra so that the Territory got a new kind of government, called State Government.

This is something a lot of people are talking about, in the newspapers, on radio, on Government videos, and at meetings with Government people in your community.

CLC has made this tape so that you can hear ideas and information about statehood, especially how it might affect Aboriginal people, and what might happen to land rights.

There are some very important questions that Aboriginal people must ask the NT Government. It is important that you get proper answers.

This tape is in four parts.

First, we talk about what sort of government we have in the Territory now.

Second, we talk about the reasons why the Territory is different from other places with State Governments, like in South Australia, Queensland, and Western Australia.

Third, we talk about what changes would happen if the Territory Government was changed into a State Government.

Fourth, we talk about the questions you should ask the NT Government and the NT Labor Party Opposition.

The Territory Government we have now

About eight years ago, in 1978, the Territory got Self-Government.

Before this happened, all the laws and government business for the Territory came from Canberra.

When we got Self-Government up here in the Territory, everyone living here got to vote for politicians to represent us in the parliament in Darwin. Paul Everingham
was the first Chief Minister, the first boss of Self-Government. Other people we have elected are Labor Party people like Bob Collins, Brian Ede and Neil Bell and Country Liberal Party people like Steve Hatton, Barry Coulter and Ray Hanrahan.

Self-Government meant that these people, elected by us, now make the decisions about rules and Territory management of things like housing, rents, roads, the running of schools, hospitals, prisons, electricity, and local government.

Canberra still pays the money for all these things, but when we got Self-Government Territory politicians were allowed to decide how this money was spent and how these things are run up here.

Now the Territory Government says it wants more power, it wants to get more power by getting a State Government like they have in other places like Queensland and Western Australia.

They still want Canberra to pay for most things, but they want to take over some laws, especially laws about land rights.

This might be very bad for Aboriginal people living here in the Territory, and for Aboriginal people everywhere in Australia.

If land rights gets taken away from Canberra and given to a State Government in the Territory, it would be like history going backwards.

Why is the Territory different from the States?

We all know the terrible things that happened to Aboriginal law and culture when the Europeans came here and set up their governments and their laws.

They did not talk to Aboriginal people, who belonged to and looked after all the land all over Australia. Our land was just stolen from us everywhere.

These English people made laws, and English governments everywhere, they did not care about where your country was, and who were the bosses for it.

All over Australia they made State Governments, in South Australia, in Victoria, New South Wales, Queensland, Western Australia, Tasmania. They made six big places, and these six State Governments and just left out Aboriginal people, Aboriginal laws and culture.
Later, they made one big Government in Canberra, for the whole of Australia. Because there were not many European people up here they decided that this Government in Canberra would be the boss of the Territory. Aboriginal people in the Territory were never asked about all this, our laws and our land rights were just ignored.

Aboriginal people did not keep quiet about this. For nearly 150 years our people kept shouting out against this, and demanding the right to the land that was taken away, and the right to Aboriginal law and culture.

In the 1970s our voice was heard. The Canberra Government of Gough Whitlam, and later Malcolm Fraser, agreed that what had happened was wrong and Aboriginal people should have a way of getting back some of our land, land no-one else was using.

But both Mr Whitlam and Mr Fraser decided it was too hard to make land rights laws where there were the six State Governments.

So they only made one land rights law for here, in the Territory.

This is why Aboriginal people here in the Territory were the first Aboriginal people anywhere in Australia to get land rights.

This 1976 Canberra law is the only time that the Australian Government agreed that Aboriginal people belonged to all the land in Australia, before it was stolen from us.

It was just a start. It is from this starting point that Aboriginal people here, and everywhere else in Australia, are still fighting to get just recognition of our rights.

It is good to have a land rights law, but it is just a beginning.

Aboriginal people everywhere have always said they want the Australian Government to make a rule that respects Aboriginal people as the original owners of this country, that our land and our culture and our laws should be respected and protected and also that we have the right to be in charge of this.

This is why Aboriginal people travelled from all over Australia to Canberra to tell the Hawke Government not to change our land rights law in the Territory, and to build on it, make it stronger, and extend it to Aboriginal people living under the laws of State Governments.
So, it was a very good thing, that when the Territory got Self-Government, the land rights law stayed in Canberra with the National Parliament.

What would happen if the Territory changed from Self-Government to a State Government?

Canberra would still look after things like social security, unemployment, and pay for health, education and so on.

But laws to do with land, especially Aboriginal land would change.

At the moment, with Self-Government, if the Darwin parliament made a law against our land rights it can be stopped by the Canberra Government.

If the Territory was a State this would change and the Australian Government in Canberra could no longer protect Aboriginal land rights here in the Territory.

It is a very big worry that if we get a State Government here, Aboriginal people will not be able to sing out to Canberra for help and support for our land rights.

The Chief Minister, Mr Hatton, says the Government wants to be a State and take over the land rights law because it wants to be able to make roads on Aboriginal land, use some of your land for the Government and allow mining on Aboriginal land and in national parks, whether you want it or not.

They also think it is good if Aboriginal people can sell their land for money.

The NT Government also says that giving Aboriginal people back their land forever is not good because you cannot use the land to make money. This is a wrong thing to say, this is not true. Aboriginal people can get money by letting people use their land for a little while, maybe 10 years, maybe 20 years - maybe more, if that's what you want. But when you make money this way, you know your land will always come back to you, and your children and grandchildren will have your country forever.

Traditional owners also have the right to say how this happens.

The Canberra land rights law lets all this happen now. If it is changed the way the NT Government wants, you could make money in ways that are dangerous, ways that would take your land away forever.
The NT Government says the land rights law should be changed so that it is ordinary freehold title. This means the land can be bought and sold and mortgaged to other people, just to make money.

The CLP Government wants to make a State law to let miners and other big development companies use their money and power to sweet-talk some traditional owners into selling their land European way.

When governments made this happen in other countries like America and New Zealand, Indian and Maori people were tricked, and now they can never get their land back.

When Aboriginal people hear the ideas about the Territory changing into a State Government, and about new laws for Aboriginal land they should ask the politicians why they want to change it? What is wrong with things now?

Under the Canberra law that we have now, traditional owners can develop their country or be partners in any development on their land and make money from that.

The questions we must ask

We must ask these politicians why they have tried to stop all our land claims?

Why they want to take the land rights law from Canberra?

Why they have not sat down and talked with us before running to the newspapers and TV and radio stations all around the country?

The most important question we must ask them is this: What will they do to help our on-going struggle for proper recognition as the traditional owners of this country, as the first people who belonged to the whole of Australia?

Like our grandfathers and grandmothers, and their grandparents, we will keep asking for rights and justice.

And we must tell them that we Aboriginal people are 30 per cent of the Territory's people, and that no laws should change without talking to us first.
BIBLIOGRAPHY

(* indicates that this item is included as an appendix in this volume)


Attorney-General's Department, 1980. The Australian Constitution Annotated, AGPS, Canberra.


Budget Paper No.7, 1986/87. Payments to or for the States, the Northern Territory and Local Government Authorities, AGPS, Canberra.


Dacks, Gurston, 1986. The case against dividing the North West Territories, in Canadian Public Policy 12, 1, 202-213.


University Planning Authority, Darwin.


Herr, R and Loveday, P, (eds), 1981. Small is Beautiful: Parliament in the Northern Territory, Study of
Parliament Group and NARU, Darwin.


Hodgins, B, Loveday, P and Grant, S (forthcoming). Not Quite Federal Members, Comparative Evolution of the Territorial Norths in Canada and Australia, in Hodgins, B, Eddy, J and Grant, S (eds), Federalism in Canada and Australia, Comparative Historical Evolution.


Loveday, P and Wade-Marshall, D (eds), 1985. Economy and
People in the North, North Australia Research Unit, Darwin.


Senate Standing Committee on Constitutional and Legal Affairs, 1983. *Two Hundred Years Later* .... A Report
on the feasibility of a compact or 'Makarrata' between the Commonwealth and Aboriginal people, AGPS, Canberra.


Toohey, J, 1981. Alligator Rivers Stage II Land Claim, Report by the Aboriginal Land Commissioner ... to the Minister for Aboriginal Affairs and to the Administrator of the Northern Territory, AGPS, Canberra.


*Whalan, D J, 1980. Aspects of Northern Territory Law, in Jones, R (ed.), Northern Australia: Options and
Implications, Australian National University, Canberra, 203-217.


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