

**NORTHERN
TERRITORY
STATEHOOD
WORKING GROUP**

FINAL REPORT

OVERVIEW

1 During the 84 years since the transfer of the Northern Territory from South Australia to the Commonwealth in 1911, the Northern Territory has progressed through various stages of constitutional development. These stages have included complete Commonwealth administration and have evolved to the current form of self-government granted in 1978.

2 As a Territory of the Commonwealth, the Northern Territory remains subject to the almost plenary power of the Commonwealth, under S. 122 of the Constitution. The Northern Territory's legislative and executive authority is more limited than that of the States and not all constitutional guarantees are applicable to its citizens.

3 As the years since self-government pass and as the Northern Territory's population and economy have expanded, there have been increasing calls for further constitutional development. Internally this momentum resulted in the establishment in 1985 of a bipartisan committee of the Northern Territory Legislative Assembly which has published a series of reports and discussion papers covering the major issues relating to the development of a Constitution for the Northern Territory and to a possible grant of Statehood.

4 Following submissions by the Northern Territory to the Council of Australian Governments the then Prime Minister, Mr Paul Keating, agreed in April 1995, to the establishment of a joint Commonwealth/Northern Territory working group to examine and report on the implications of a grant of Statehood to the Northern Territory. The former Commonwealth Government's participation in the working group was without any commitment as to the outcome. The new Commonwealth Government has stated that it will facilitate Statehood for the Northern Territory according to a negotiated timetable through a truly cooperative Federal partnership. More recently, the Prime Minister has indicated to the Chief Minister of the Northern Territory his support for Statehood on appropriate terms and conditions.

5 This report of the working group lists the major constitutional and policy issues that would arise upon a grant of Statehood.

6 While the report identifies a range of options that might be available in regard to several specific matters, it does not debate the merits of particular options, or of Statehood generally.

LEGAL AND CONSTITUTIONAL IMPLICATIONS

7 The four main constitutional issues that arise are: what mechanism should be used in admitting a new State to the Federation; the level of representation of the new State in both Houses of the Commonwealth

Parliament; the terms and conditions of admission of the new State; and the most appropriate means of resolving any significant legal and constitutional uncertainties.

Mechanisms for Admitting or Establishing a New State

8 The report notes that a grant of Statehood may be achieved either by national referendum under section 128 of the Constitution to amend the Constitution so as to incorporate the new State, or by use of the express power conferred on the Commonwealth Parliament under section 121 to "... admit to the Commonwealth or establish new States ...". Despite the divergence of opinion as to the scope of section 121, this mechanism is generally regarded as the most appropriate means for conferring a grant of Statehood. Assuming it were decided to confer Statehood by relying on section 121 of the Constitution, there are at least three approaches that could be adopted to achieve this aim. These are:

- (i) by a process of widespread community consultation in the Northern Territory, resulting in the adoption of a Territory constitution, followed by an Act of the Commonwealth Parliament under section 121 passed at the request of the Northern Territory and on terms and conditions agreed between the two Governments;
- (ii) an Act of the Commonwealth Parliament under section 121 passed at the request of the Northern Territory Legislature without any community consultation; or
- (iii) simply by an Act of the Commonwealth Parliament under section 121 of the Constitution, made at the Commonwealth's own initiative, with no other action by the Northern Territory (a 'minimalist' approach).

Representation in the Commonwealth Parliament

9 Section 121 also enables the Commonwealth Parliament to determine, in respect of a new State "... the extent of representation in either House of the Parliament, as it thinks fit." This opens up a range of possibilities should a grant of Statehood be conferred on the Northern Territory which are identified and discussed in the report. In summary the options include:

- (i) that the new State is granted the same representation in both Houses of Parliament as an original State;
- (ii) that the Northern Territory is granted full Senate representation equal to a State, but the House of Representatives representation to be on a quota basis only;
- (iii) (a) that Senate representation be granted on the basis of a formula designed to achieve equality with existing States within a reasonable period of time. House of Representative representation to be granted on quota; or

(b) that Senate representation be granted on the basis of a formula related to comparative population (increases). House of Representatives representation to be based on quota; or

(iv) the existing level of representation to continue.

10 Option 2 would place the Northern Territory in a position of immediate equality with the existing States in relation to the Senate. Although the Northern Territory Government seeks ultimate equality in the Senate, it has, however, clarified its position by saying that this should not necessarily be read as a request for full and equal representation immediately upon the grant of Statehood. The Northern Territory Government would consider a formula for Senate representation, such as that set out in Option 3(a), which would ensure equality within a reasonable time, provided that such a formula was not linked to population size.

11 The level of representation also raises the issue of whether the section 24 constitutional nexus between the number of members of the House of Representatives and the number of Senators is applicable to a new State.

Terms and Conditions of Admission or Establishment

12 The terms and conditions upon which a grant of Statehood might be made raises a number of fundamental legal and political issues. Section 121 is again relevant, providing that in respect of the new State, the Parliament “.. may upon such admission or establishment make or impose such terms and conditions, as it thinks fit.” The basic question to be resolved is whether section 121 enables the Parliament to impose terms and conditions for a new State different from the existing balance of powers set out in the Constitution, and if so, to what extent may they differ and what, if any, variation would be considered acceptable by any new State.

13 These questions become particularly relevant when considering the implications of a grant of Statehood for the Northern Territory in the light of those matters currently reserved to the Commonwealth under the existing self-government arrangements.

Means of Resolving constitutional Issues

14 There are two principal options for dealing with substantial legal and constitutional issues which are unresolved and which may require clarification, namely:

(i) to enact the Commonwealth legislation conferring Statehood and then delay the proclamation of Statehood to allow time for the High Court to pronounce on the various issues (see opinion of Professor Howard of 31 October 1986); or

(ii) amend the Constitution.

FINANCIAL AND ECONOMIC IMPLICATIONS

15 The financial arrangements which apply between the Commonwealth and the Northern Territory are detailed in Chapter 2 and are fundamentally the same as those which apply to the States and the ACT. Similarly, the powers and obligations of the Northern Territory in fiscal affairs are equivalent to those of the States and include responsibility for the management of its own budget, the provision and management of the same types of public services that are provided by the States, and the monitoring of borrowings by the Loan Council.

16 As part of the Northern Territory's transition to State-like funding arrangements, the Territory has been included in the pool of Commonwealth general revenue assistance to the States since 1988/89. The Northern Territory is now a full member of the Loan Council and party to the Commonwealth/State Financial Agreement. The distribution of the general revenue assistance pool is determined at the annual financial Premiers' Conference having regard to the per capita relativities recommended by the Commonwealth Grants Commission. The relativities are based on the achievement of a measure of horizontal fiscal equalisation (HFE) as between the States and take into account the significant cost disabilities faced by the Northern Territory in those areas of expenditure covered by the HFE process. Provided the current HFE arrangements remain in force, the Northern Territory's per capita share of Commonwealth general revenue assistance will continue to be calculated on the same basis irrespective of its status as either a self-governing Territory or a State.

17 Changes to financial arrangements in respect of uranium mining, national parks, the operation of the *Aboriginal Land Rights (Northern Territory) Act 1976* and the status of the Ashmore and Cartier Islands on Statehood, may have economic implications for the Northern Territory and impact on the Northern Territory Government's revenue capacity and expenditure requirements. However, to the extent that these are reflected in the HFE process, it is expected that there would be little overall impact on the financial position of the Territory arising out of Statehood.

RESERVED POWERS

18 Upon the establishment of self-government in the Northern Territory, a number of powers and functions normally within the legislative and executive authority of States, were reserved to the Commonwealth under the *Northern Territory (Self-Government) Act 1978* (pursuant to section 122 of the Constitution). These include, for example:- Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act 1976*; control and management of some parks; ownership of uranium and 'prescribed substances' (pursuant to the *Atomic Energy Act 1953*); ownership of minerals on Commonwealth land in the

Northern Territory; and industrial relations. These issues are dealt with in detail in Chapter 3 of the report.

Issues for Indigenous Residents

19 Some of the powers and functions raise issues which are of particular concern to Aboriginal people. The Northern Territory is unique in that over one quarter of its population is comprised of Aboriginal people, many of whom maintain strong and distinctive cultural heritage. They are integral to the development of the Northern Territory and look to a constitutionally secure place upon a grant of Statehood. The Northern Territory is currently the only jurisdiction where constitutional development, involving Aboriginal people and specifically addressing Aboriginal issues, is being actively pursued.

20 Consultation with Aboriginal communities to date has resulted in the production of discussion papers dealing with issues such as Aboriginal customary law, traditional rights to land, sacred sites, self determination and which canvass the constitutional protection of specific rights. Further consultation and appropriate education programs are proposed, together with the development of a comprehensive package of legislative and constitutional proposals for discussion. Participation by ATSIC, the Land Councils and community councils in further developing education and consultation strategies is considered important to ensure that the process is meaningful and constructive.

21 In respect of the *Aboriginal Land Rights (Northern Territory) Act 1976* (the ALRA), a number of issues have been identified and discussed. The options in relation to the Act include:

- (i) the patriation of the ALRA to the Northern Territory, with some form of constitutional entrenchment to protect key provisions; or
- (ii) the status quo be continued, ie the Commonwealth retains jurisdiction over the ALRA.

22 There may be a variety of intermediate options that could be negotiated either transitionally or on a permanent basis and included within a Heads of Agreement setting out the terms and conditions of the grant of Statehood. Such an agreement could include undertakings by the Northern Territory to protect the national and international interests of the Commonwealth in respect of the rights of indigenous people to self determination and land rights, including under international agreements. This may facilitate the first Option.

23 In relation to the operation of the Aboriginals Benefit Trust Account under the ALRA, the options for dealing with royalty equivalent payments for minerals on Aboriginal land include:

- (i) continued royalty equivalent payments by the Commonwealth to Aboriginal interests in respect of Aboriginal land granted by the Commonwealth; or
- (ii) assumption by the Northern Territory of responsibility for royalty equivalent payments to Aboriginal interests, either absolutely or subject to:
 - (a) some form of constitutional or legislative provisions dealing with indigenous people's rights, in respect of royalty equivalent payments on Aboriginal land;
 - (b) appropriate financial arrangements with the Commonwealth for any increased liability on the new State.

National Parks

24 Uluru-Kata Tjuta and Kakadu National Parks are situated in the Northern Territory on Aboriginal or Commonwealth Land. They were declared under the *National Parks and Wildlife Conservation Act 1975* and are leased to the Director of National Parks and Wildlife and managed by the Australian Nature Conservation Agency (ANCA) in cooperation with Aboriginal people. The options for dealing with these parks on the creation of a new State include:

- (i) transfer the two National Parks to the Northern Territory; or
- (ii) the two National Parks continue under existing arrangements (subject to this option being constitutionally available).

25 There are a variety of intermediate options that could be negotiated, either transitionally or on a permanent basis and included within a Heads of Agreement setting out the terms and conditions of the grant of Statehood. Such an agreement could include undertakings by the Northern Territory to protect the national and international interests of the Commonwealth in respect of the National Parks including under international agreements.

26 In considering any possible future transfer of these two National Parks to the Northern Territory as a new State, a number of issues are identified and discussed. They include: the significance of the Parks to Aboriginal people; their World Heritage status; their economic and environmental significance; their geographic location within the Northern Territory; and their financial and other resource implications.

Uranium and Other Prescribed Substances

27 Unlike the States, ownership of uranium in the Northern Territory is vested in the Commonwealth under the *Atomic Energy Act 1953*. The Alligator Rivers Region (ARR) of the Northern Territory is the location of Nabarlek (now being decommissioned), Ranger uranium mine and the North Ranger/Jabiluka

and Koongarra uranium orebodies. These orebodies are on Aboriginal land; there are no other proven orebodies in the Northern Territory.

28 Mining of uranium has a number of both perceived and real environmental risks associated with it and accordingly, there are special arrangements for environmental protection and for the management of mining activity, particularly in the ARR.

29 The report identifies a number of options in relation to the ownership of uranium and in relation to specific mines and regions upon a possible grant of Statehood. Generally, these options involve:

- (i) the transfer of ownership of all uranium and other prescribed substances to the Northern Territory as a new State;
- (i) transfer the ownership and management of uranium to the Northern Territory except at Ranger;
- (iii) transfer the ownership and management of uranium to the Northern Territory except uranium in the Alligator Rivers Region; or
- (iv) the ownership and management of uranium to remain with the Commonwealth.

30 Some of the above options may be subject to constitutional availability.

31 There are a variety of intermediate options that could be negotiated, either transitionally or on a permanent basis and included within a Heads of Agreement setting out the terms and conditions of a grant of Statehood. Such an agreement could include undertakings by the Northern Territory to protect the national and international interests of the Commonwealth in respect of uranium and other prescribed substances including under international agreements.

32 In considering these options, a number of issues are identified and discussed including: the interests of the public and tenement holders; existing royalty and Trust Fund arrangements, and arrangements between the Commonwealth and traditional owners; environment and conservation issues; and the role and functions of the Office of the Supervising Scientist.

Industrial Relations and Trade Practices Arrangements

33 A number of Commonwealth Acts dealing with industrial relations and trade practice arrangements have, when compared to their application in the States, extended operation in the Northern Territory. The report discusses these Acts, and looks at the options for dealing with them, were there to be a grant of Statehood.

- 34 In respect of industrial relations, the options identified include:
- (i) the status quo to be continued (if it is constitutionally available) with the Commonwealth retaining jurisdiction over those aspects of industrial relations which it presently controls; and
 - (ii) transfer of industrial relations powers to the new State (subject to section 51(xxxv) of the Constitution). Upon transfer the new State Parliament to decide upon:
 - (a) establishment of its own State industrial relations system; or
 - (b) referral of the industrial relations power back to the Commonwealth pursuant to section 51(xxxvii) of the Constitution.

35 In addition there may be a variety of intermediate options that could be negotiated either transitionally or on a permanent basis and included within the terms and conditions of a grant of Statehood under section 121 of the Constitution.

36 Options similar to those expressed in relation to industrial relations appear to be available in regard to the extended application of Commonwealth trade and commerce laws. To place the new State of the Northern Territory in a position of constitutional equality with existing States, amendment of certain Commonwealth legislation would be required. The new State Parliament would have the opportunity to continue participation in co-operative schemes and uniform laws.

TERRITORIAL IMPLICATIONS

37 The issue of whether a possible grant of Statehood to the Northern Territory would have any implications for other Commonwealth Territories is also examined in the report. Particular attention is given to the Ashmore and Cartier Islands Territory, and to the electoral implications of any changes.

Ashmore and Cartier Islands

38 The options identified for dealing with the Ashmore and Cartier Islands include:

- (i) to reincorporate them into the Northern Territory, either before or upon a grant of Statehood;
- (ii) to leave them as a separate Commonwealth territory without further change; or
- (iii) to attach them administratively to Western Australia.

39 There may be a variety of intermediate options that could be negotiated, either transitionally or on a permanent basis and included within a Heads of Agreement setting out the terms and conditions of a grant of Statehood. Such an agreement could include undertakings by the Northern Territory to protect the national and international interests of the Commonwealth in respect of the islands, including under international agreements, in particular the existing Memorandum of Understanding between Australia and Indonesia. This may facilitate the implementation of the first Option.

Electoral Implications

40 The Indian Ocean Territories (IOTs) of Cocos (Keeling) and Christmas Islands are represented federally by the Northern Territory's single member of the House of Representatives and its two Senators. In the event of a grant of Statehood to the Northern Territory legal advice indicates that constitutionally, existing arrangements for Federal representation of the IOTs through the Northern Territory could not continue unless the IOTs were integrated into the new State. Were the Northern Territory to become a State, a number of options have been identified to deal with the federal representation of these Territories:

- (i) attach the IOTs to the Federal electorates in the ACT;
- (ii) create a new electoral division that would enable participation by the residents of the IOTs;
- (iii) integration of the IOTs with another State, presumably Western Australia;
or
- (iv) integration of the IOTs into the Northern Territory.

41 It is not known at this stage, if the creation of a new federal electoral division to cater specifically for the IOTs is constitutionally possible and the desirability of pursuing such an approach would need further consideration.

42 The option to integrate the IOTs with another State (possibly Western Australia) could occur under section 123 of the Constitution but would depend upon a successful Western Australia-wide referendum.

LEVEL OF POPULAR SUPPORT

43 Opinion polls on the Statehood issue over the past 20 years, while only a general indication of trends, show an increasing awareness of, and support for, Statehood. The increase in awareness is likely to be the result of a variety of activities and consultative programs conducted over several years and in particular by the Northern Territory Legislative Assembly Sessional Committee on Constitutional Development.

44 Clear proposals for Statehood would be required however, before the consultation process could be completed. This would probably require the

availability of a draft Constitution and some indication of the terms and conditions upon which Statehood might be granted. Further education and public awareness programs would need to be developed with, and involve, Aboriginal, ethnic and community groups.

45 It has been suggested that the final measure of Territorians' support for Statehood should be a referendum of Northern Territory electors prior to a formal approach by the Territory to the Commonwealth seeking a grant of Statehood.

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REPORT ON THE IMPLICATIONS OF A POSSIBLE GRANT OF STATEHOOD TO THE NORTHERN TERRITORY

INTRODUCTION

At a meeting of the Council of Australian Governments (COAG) in April 1995, the former Prime Minister, with the Chief Minister of the Northern Territory, agreed to set up a Working Group of Commonwealth and Northern Territory officials to consider and report on issues relating to the possible grant of Statehood to the Northern Territory by the end of 1995.

The Working Group was chaired by the Commonwealth. The previous Commonwealth Government's participation was stated to be "without commitment to the outcome". The new Commonwealth Government has stated that it will facilitate Statehood for the Northern Territory according to a negotiated timetable.

The Working Group was required to consider the following terms of reference:

- (a) legal and constitutional implications;
- (b) financial and economic implications;
- (c) territorial implications;
- (d) environmental implications;
- (e) implications for the mining of uranium and the control of prescribed substances;
- (f) industrial relations implications;
- (g) implications for the indigenous residents of the Northern Territory;
- (h) the level of popular support in the Northern Territory for the grant of Statehood; and
- (i) any other matters of relevance.

In preparing its report, the Working Group was to consult with relevant interests, including Commonwealth and Northern Territory agencies, as it saw fit. At its initial meeting, the Steering Committee decided that it would not have sufficient time to act as a consultative group but that it would identify what additional consultative processes may be necessary.

A Steering Committee was formed comprising representatives from the Commonwealth Departments of Prime Minister and Cabinet, Attorney General, Environment, Sport and Territories, the Aboriginal and Torres Strait Islander Commission (ATSIC) and the Northern Territory Departments of the Chief Minister, Attorney General and Lands. The Steering Committee was Chaired by Stuart Hamilton, the former Secretary, DEST. Four Task Forces consisting of Commonwealth and Northern Territory representatives were also established to address specific terms of reference for consideration by the Steering Committee.

The deliberations of the Steering Committee together with the papers of the Task Forces form the basis of this final report.

CHAPTER 1

LEGAL AND CONSTITUTIONAL IMPLICATIONS OF A POSSIBLE GRANT OF STATEHOOD TO THE NORTHERN TERRITORY

This Chapter deals with the following issues in relation to the legal and constitutional implications of a grant of Statehood to the Northern Territory:

1. The present constitutional status of the self-governing Northern Territory and its powers and responsibilities, for the purpose of identifying the existing constitutional differences between the Northern Territory and the existing States.
2. The constitutional capacity to admit or establish the Northern Territory as a new State.
3. The constitutional processes available for the creation of a new State out of the Northern Territory and the relative merits of those processes.
4. The constitutional and legal processes available and necessary to develop and give effect to a constitution for the Northern Territory.
5. The constitutional status of any such constitution, including its status under section 106 of the Australian Constitution and its relationship with federal legislation.
6. The extent of the federal representation that can be granted to the new State.
7. The terms and conditions, other than those relating to the extent of federal representation, that can be imposed by the Commonwealth under section 121 of the Australian Constitution, including whether these terms and conditions can place the Northern Territory in a different constitutional position to that of the existing States.
8. Any means by which uncertainty over the legal and constitutional implications of Statehood may be clarified before a grant of Statehood.
9. Outstanding executive powers.
10. Appointment of Administrator/Head of State.
11. Reservation and disallowance powers.

1. Present Constitutional Status

Basic Constitutional Difference Between the Northern Territory and the States

It is clear that the Northern Territory has the status of a Territory of the Commonwealth, and is not a State of the federation, and hence is subject to the plenary power of the Commonwealth Parliament under section 122 of the Constitution, subject only to any limitation that might be expressed or implied elsewhere in the Constitution. It follows that the Northern Territory is not subject to federal division of legislative power as between the Commonwealth and the States, as primarily contained in section 51 of the Constitution.

The Northern Territory's status as a territory of the Commonwealth did not change upon the grant of self-government in 1978. The grant of self-government derives its existence from and depends upon an ordinary Commonwealth Act - the *Northern Territory (Self-Government) Act 1978* ('the *Self-Government Act*'). Under self-government, the Northern Territory remains a Commonwealth territory, albeit with its own self-governing powers, and as such it has no constitutional guarantee of its existence as a self-governing entity (unlike the States - see e.g. section 106 of the Constitution).

The *Self-Government Act* is, in many respects, the Northern Territory's constitution. But being an Act of the Commonwealth Parliament, it is unable to be changed other than by that Parliament, and there is no legal obligation on the Commonwealth to consult with the Northern Territory on any such changes. Further, as the scope of Northern Territory executive authority is defined in regulations made under the *Self-Government Act*, the grant of executive authority to the Northern Territory is amenable to change by a decision of the Governor-General on the advice of the Commonwealth Executive Council (subject to any later disallowance by either House of the Commonwealth Parliament).

Powers of the Legislative Assembly and Executive Government of the Northern Territory

Under the *Self-Government Act*, the Legislative Assembly of the Northern Territory is given a grant of legislative power for the Northern Territory, broadly expressed, but subject to the other provisions of that Act. The limitations on this grant in other sections of the Act include the need for the assent of the Administrator to any Bill passed by the Legislative Assembly before it becomes law. If a Bill in whole or part deals with a matter that is not within the executive authority of Ministers of the Territory, it is liable to reservation by the Administrator for the consideration of the Governor-General. If a Bill is assented to by the Administrator, it is subject to a power of disallowance by the Governor-General within six months (sections 6-10).

In addition, the *Self-Government Act* contains a number of express limitations on Territory legislative power. For example, there is no power to legislate as to the compulsory acquisition of property other than on just terms (section 50(1), a limitation not applicable to the States), nor to legislate as to most industrial matters (section 53).

Further, a number of Commonwealth Acts have an application in the Northern Territory beyond that in the States. To that extent, they result in a limitation on the scope of the legislative power of the Legislative Assembly of the Northern Territory given that it is unable to legislate contrary to an Act of the Commonwealth Parliament (a test similar to section 109 of the Constitution). Examples of such an extended application of Commonwealth Acts include the *Aboriginal Land Rights (Northern Territory) Act 1976*, the *National Parks and Wildlife Conservation Act 1975* (under which Kakadu National Park and Uluru National Park are established), the *Trade Practices Act 1974* and the *Atomic Energy Act 1953*. As to the last-mentioned Act, it should be noted that the Commonwealth retained ownership of all uranium and other prescribed substances in the Northern Territory after self-government (*Self-Government Act*, section 69). The *Industrial Relations Act 1988* has an extended operation in the Northern Territory as a result of section 53 of the *Self-Government Act*.

In particular, the Commonwealth has exercised greater control over trade and commerce in, and with, the Northern Territory than it has in, and among, the States. For example, much of the *Trade Practices Act 1974* applies generally to trade and commerce within territories, including the Northern Territory, and not just in respect of corporations and other heads of power in section 51 of the *Constitution*. This position will continue in respect of the Northern Territory as a “Participating Territory” under the *Competition Policy Reform Act 1995*. A similar situation applies to the *Secret Commissions Act 1905* under section 52 of the *Northern Territory (Self Government) Act 1978*. In addition, certain constitutional limitations on the Commonwealth with respect to trade and commerce affecting States do not apply to Territories (e.g. sections 92 and 99).

Executive Powers of the Northern Territory Government

The grant of executive authority to Ministers of the Territory, those Ministers being chosen from among the members of the Legislative Assembly of the Northern Territory, is expressly defined in the *NT Self-Government Regulations*, made by the Governor-General under the *Self-Government Act*. Those Regulations define the scope of that executive authority by reference to specific subject matters rather than by way of general reference. The scope of those Regulations is fairly broad, but in some respects it is narrower than the grant of legislative power to the Legislative Assembly. In relation to two matters, there are express exclusions of executive authority - rights with respect to Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act 1976* and also the mining of uranium and other prescribed substances.

This division of executive authority directly impacts on the role of the head of government in the Northern Territory, the Administrator. He or she is appointed by, and holds office at the pleasure of, the Governor-General (unlike State Governors). In respect of matters not within the executive authority of Ministers of the Territory, the Administrator is subject to the directions of the relevant Commonwealth Minister. In other matters, by convention he or she

follows the advice of the Ministers of the Territory. This divided role has no parallel in the States.

The full implications of the grant of self-government to the Northern Territory have yet to be fully ascertained by the courts. This, in part, reflects the unique nature of the grant, and in part the fact that there are some uncertainties as to the place of Commonwealth territories under the Constitution, a matter discussed below. For example, while it is now clear that it is within the capacity of the Commonwealth Parliament under section 122 to create a self-governing territory, the exact status of the Administrator and the Territory Government under the Crown in such an arrangement, the concept of a separate Crown in right of a self-governing territory, and the capacity of a self-governing territory to bind the Crown in other rights, are all issues yet to be conclusively resolved.

Constitutional Position of Northern Territory Residents

As residents of a territory of the Commonwealth, the Northern Territory residents do not in all respects have the same rights under the Constitution as do residents of the States. As just stated, the exact constitutional place of territories under the Constitution is not, however, entirely clear. Traditionally it has been thought that most of the relatively few provisions of the Constitution which confer guarantees on individuals do not apply to Territory residents¹. For example, in *Teori Tau v The Commonwealth* (1969)119 CLR 564, the High Court held that section 51(xxxi) of the Constitution, which requires the Commonwealth to provide 'just terms' for any of its legislation which compulsorily acquires property, does not apply to an acquisition made under the Territories power (section 122). The basis for this view was that section 51 is merely concerned with 'federal legislative powers as part of the distribution of legislative power between the Commonwealth and the constituent States'. As such, it cannot qualify section 122 which is concerned with the legislative power "for the government of Commonwealth territories in respect of which there is no such division of legislative power" (at p.570)².

However, more recently, a majority of the High Court held in *Capital Duplicators Pty Ltd v A.C.T. [No 1]* (1992) 177 CLR 248 that section 90 of the Constitution prevents a self-governing Territory legislature from imposing a duty of excise. Section 90 provides, in part, that the Commonwealth Parliament's power to impose duties of customs and excise shall be 'exclusive'. It had previously been thought that 'exclusive' in section 90 meant merely exclusive of State Parliament's, and that there was no objection to the Commonwealth Parliament acting under section 122 of the Constitution to confer on the legislature of a self-governing Territory such as the A.C.T., the power to impose excise. A majority of the Court in *Capital Duplicators*³ rejected this view. The majority's conclusion was based in part on the belief that section 90 was incorporated into the Constitution for the

¹Section 51(xxxi) (acquisition of property); section 80 (trial by jury); section 117 discrimination on the basis of residency; but not, it appears section 116 (see note 2 below).

²The Court, however, (at p.570) seemed inclined to the view that section 116 (which guarantees freedom of religion) does restrict the Commonwealth's power under section 122.

³Brennan, Deane, Toohey and Gaudron JJ; Mason CJ, Dawson and McHugh JJ dissenting.

protection of the Australian people, and that there was no reason why a person should lose that protection merely because the part of Australia in which he or she resides has ceased to be part of a State and has become an internal Territory (as was the case with the Northern Territory).

The decision raises the possibility that at least some members of the present High Court would be prepared to reconsider the correctness of cases such as *Teori Tau* on the basis that residents of internal Territories should enjoy the same constitutional rights as the residents of the States unless there is some indication to the contrary in the Constitution. Despite these doubts, with respect to the acquisition of property in a Territory, the Commonwealth remains of the view that its power under section 122 is not qualified by section 51 (xxxi) and that it can acquire property from both the self governing Territory and individuals without the application of 'just terms'.

There are however, some areas where it is clear that residents of the Northern Territory are not in the same constitutional position as residents of the States. With respect to amending the Constitution under section 128, voting residents of the Northern Territory are counted in ascertaining the overall majority of electors in Australia but not in determining if there is a majority of electors in a majority of States.

In relation to federal representation, the Northern Territory has no constitutional guarantee of any representation in either House of the Commonwealth Parliament (unlike the States). Representation has been conferred on the Northern Territory by an Act of the Commonwealth Parliament⁴, being currently one member of the House of Representatives and two Senators. This member and those Senators have the same rights and are in the same position as members and Senators from a State, except that the Territory Senators do not have fixed six year terms with a three year rotation, as provided by the Constitution for State Senators. Instead, Territory Senators hold their places for one term of the House of Representatives.

There is also the vexed question of the relationship between Chapter III of the Constitution (sections 71- 80) - which deals with the Federal Judicature and the judicial power of the Commonwealth - and the Territories power under section 122. As the Constitutional Commission noted in its Final Report (1988) (at p.389) much of the law relating to this question is 'difficult or obscure and devoid of any rational or social purpose'. In summary, it appears that section 72 of the Constitution, relating to the appointment and tenure of judges, and section 80, which guarantees trial by jury in some matters, are not applicable to the Territory courts and jurisdictions. Further it has been held that a Territory court is not a Federal court and that, accordingly, section 73(ii)⁵ is unable to be used to appeal to the High Court from a Territory court. However, the Parliament may, and has,

⁴Part III of the Commonwealth Electoral Act 1918.

⁵Section 73(ii) of the Constitution confers appellate jurisdiction on the High Court, (subject to exceptions prescribed by Parliament) in relation to decisions of other federal courts and State Supreme Courts etc.

conferred appellate jurisdiction on the High Court in relation to a judgement from a Territory court.

There are other constitutional differences. These were previously summarised by the Northern Territory Government in a paper *Northern Territory Constitutional Disadvantages*, as contained in *Towards Statehood* (Ministerial Statement, 28 August 1986, pp 9-23), Schedule 12 to *Australia's Seventh State* (Loveday and McNab (Eds), Law Society of the Northern Territory and NARU, 1988). A list of Commonwealth legislation that may need to be repealed or amended should the Northern Territory be granted Statehood on the basis of constitutional equality with existing States is contained in Schedule 1 at the end of this chapter.

2. Constitutional Capacity to Admit or Establish the Northern Territory as a New State

Can the Northern Territory become a New State?

It is clear that, constitutionally, the Northern Territory can become a new State under section 121 of the Constitution - see *Capital Duplicators* (No 1) per Mason CJ, Dawson and McHugh JJ at 266, Brennan, Deane and Toohey JJ at 271-273. Section 121 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 power to admit or establish the Territory as a new State is recognised by covering clause 6 of the *Constitution Act* which defines 'the States' to include 'and such colonies or territories as may be admitted into or established by the Commonwealth as States'.

'Admit' or 'Establish'?

Although it is clear that the Northern Territory can become a State of Australia, the question whether, assuming section 121 of the Constitution is used, the Northern Territory should be “admitted” or “established” as a new State is yet to be determined. Various views have been expressed - see the opinion of then Attorney-General Durack and Sir Maurice Byers “*The Northern Territory: Establishment as a State - Joint Opinion*” of 18 July 1978, the opinion of Sir Maurice Byers “*The Northern Territory: Establishment as a State*” of 10 December 1980, the opinion of Professor Colin Howard “*Northern Territory Statehood*” dated 31 October 1986, and the article by Professor Daryl Lumb “*The Northern Territory and Statehood*” (1978) 52 ALJ 554, the four views being reproduced as Appendices 2, 3, 4 and 5 to “*Australia's Seventh State*”.

Professor Lumb believes that any Territory which has attained responsible and representative government should properly be 'admitted' as a new State rather than 'established' as a new State. Sir Maurice Byers QC has taken a

contrary view, arguing that the words 'admit' and 'establish' in section 121 do not express notions so opposed that the Commonwealth Parliament might not establish the Northern Territory as a State and thereupon admit it to the Commonwealth.

For present purposes, the distinction is only significant to the extent that it restricts the options available in relation to conferring Statehood on the Northern Territory. In this respect, Professor Lumb suggests that the function of the Commonwealth Parliament under section 121 in relation to territories which already have a grant of representative self-government is confined to *ratifying* a constitution developed by the Territory. It is not, on Professor Lumb's view, a function of the Commonwealth Parliament to *establish* or *create* a State Constitution. Again, that view is rejected by Sir Maurice Byers.

This issue can, of course, only be conclusively resolved by the High Court. However, in the Commonwealth's view it is difficult to see why, given the Commonwealth's near plenary power over the Northern Territory under section 122 prior to Statehood and the very general terms of section 121, the Commonwealth could not 'establish' the Northern Territory as a State or prescribe the new State's constitution. Accordingly, as a matter of law these options appear to remain open to the Commonwealth.

This, however, raises the question of the political acceptability of the use of section 121 by the Commonwealth to either legislate a State constitution unilaterally or to prescribe terms and conditions which may not be acceptable to Territorians, as opposed to a process of preparation of a new State constitution by the Northern Territory and its citizens and a grant of Statehood on the basis of that constitution and any other terms and conditions that have been agreed to by the Commonwealth and Northern Territory Governments.

3. *Constitutional Processes for the Creation of a New State and Their Relative Merits*

Sections 121 and 128 of the Constitution

As just noted, the Northern Territory could become a State in accordance with section 121 of the Constitution. Alternatively, it would be possible to create a new State by amending the Constitution under section 128 by a successful national referendum expressly to provide for both the new State's existence and the terms and conditions of its admission into Statehood. Given this, the threshold issue is whether section 128 or 121 of the Constitution should be employed to confer Statehood on the Northern Territory.

One issue in relation to any possible use of section 128 is whether the referendum, in so far as it dealt with the new State's representation in Parliament, would require approval from a majority of electors in *all* States as opposed to the ordinary requirement of a majority of electors in a *majority* of State's (and, of course, an overall majority). The argument that majority support in all States

might be required stems from the penultimate paragraph of section 128 which provides:

'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 approve the proposed law.'

It may be that a successful referendum under section 128 would require only the ordinary majority required for referendums under that provision - a majority of electors in a majority of States and an overall majority. This was the view of Professor Howard, in his opinion of 31 October 1986, who advised that despite the wording of the penultimate paragraph of section 128, a majority in each State would not be required provided that the guaranteed federal representation of Original States was not altered.

Although a referendum would provide a means of removing various legal doubts over the conferral of Statehood, there are several disadvantages to using section 128:

- given the Australian people's traditional reluctance to approve constitutional change, there is, at best, a significant doubt whether such a referendum would be successful;
- it might be thought that section 128 is not the appropriate mechanism for conferring Statehood given that section 121 was specifically designed to deal with that issue;
- problems might arise under section 128 if it is necessary to attach the terms and conditions to the referendum or as part of the amended constitution; and
- as indicated above, because of the question of whether a majority is required in all States, this method itself is not entirely free from legal doubt.

One possible advantage to using section 128 rather than section 121 is that matters such as:

- the section 24 nexus issue (discussed at Item 6 "Federal Representation of a New State" under the sub heading "Effect on Nexus Between Senate and House of Representatives"); and
- the other terms and conditions of the grant of Statehood (discussed at Item 7 "Other Terms and Conditions Upon a Grant of Statehood"),

could be expressly dealt with at the referendum stage, thus avoiding any legal uncertainty.

From a practical point of view, section 121 appears to provide a more (although not completely) straightforward and less expensive means of conferring Statehood. Further, it is worth noting, that if section 128 is used and a referendum is defeated, then any future use of section 121 to grant Statehood to that new State may be affected by perceptions of a mandate against the grant of Statehood, either on the same terms and conditions or at all.

Options Under Section 121

Assuming it were decided to confer Statehood by relying on section 121 of the Constitution, there are at least three approaches that could be adopted to achieve this aim:

- (i) By a process of widespread community consultation in the Northern Territory, resulting in the adoption of a Territory constitution, followed by an Act of the Commonwealth Parliament under section 121 passed at the request of the Northern Territory and on terms and conditions agreed between the two Governments;
- (ii) An Act of the Commonwealth Parliament under section 121 passed at the request of the Northern Territory Legislature without any community consultation; or
- (iii) Simply by an Act of the Commonwealth Parliament under section 121 of the Constitution, made at the Commonwealth's own initiative, with no other action by the Northern Territory (a 'minimalist' approach).

As a matter of law, the approaches outlined above could each be implemented consistent with section 121. In particular, no referendum of the people of the Northern Territory is constitutionally required under section 121, merely an Act of the Commonwealth Parliament.

There have been suggestions that if a national referendum were to be held before the year 2001 on the issue of whether Australia should become a republic or any other matters of constitutional reform, a further referendum could be held at the same time on all or part of the issues concerning the grant of Statehood to the Northern Territory. This is a matter that would require further consideration although there is no necessary link between Northern Territory Statehood and other constitutional reforms.

Proposal of the Northern Territory Legislative Assembly Sessional Committee

The Northern Territory Sessional Committee of the Legislative Assembly on Constitutional Development has outlined its suggested process for implementing Statehood which accords with the first limb of section 121. Information Paper No 1; *'Options for a Grant of Statehood'* sets out the basic steps to Statehood using the section 121 method, with a process of community consultation in the Northern Territory. These steps include the preparation and adoption in the Northern Territory of a new State constitution (see Section 4 below). In addition, the Sessional Committee proposed that a Memorandum of Agreement between the Northern Territory and the Commonwealth be negotiated and concluded, incorporating the terms and conditions of the proposed grant of Statehood for implementation under section 121.

The Sessional Committee also suggested consultation with the existing States as being necessary to seek their support to the proposed grant of Statehood, including in particular the proposals for representation of the new State in the Commonwealth Parliament and as to financial arrangements.

The Information Paper continues that once the new State constitution has been adopted and approved at a (Territory) referendum, and the Memorandum of Agreement has been concluded, proposed legislation be placed before the Commonwealth Parliament to give effect to the grant of Statehood. That legislation should accurately reflect the terms and conditions of the Memorandum of Agreement and should refer to, but not set out in full, the new State constitution. That constitution should be part of new State law and not be part of a Commonwealth Act.

The Information Paper further suggests that in the event that the legislation, as finally enacted by the Commonwealth Parliament, contains any significant variations from the terms and conditions contained in the Memorandum of Agreement, the legislation should provide that the grant of Statehood should not take effect until proclaimed, and that the proclamation is conditional upon a further referendum of Territory electors being carried. This would ensure that the Commonwealth Parliament did not impose any terms and conditions on a new State that were not acceptable to Territorians. In the absence of any such significant variations, the legislation should come into operation automatically on a specified date (subject, presumably, to the outcome of any High Court litigation, see Section 8 below).

The Sessional Committee proposal would not be the only model. One possible alternative would be to have a referendum of Territory electors on the proposed Commonwealth legislation in any event, such that Statehood is unable to be proclaimed without a majority of Territory electors voting in favour of the overall proposal. This might be in addition to any earlier Territory referendum to adopt the new State constitution (see below).

4. Constitutional and Legal Processes to Develop and Give Effect to a New Northern Territory Constitution

The Need for a New Northern Territory Constitution

In its “*Discussion Paper on a Proposed New State Constitution for the Northern Territory*” (October 1987), the Northern Territory Sessional Committee noted that section 106 of the Commonwealth Constitution anticipates the existence of an appropriate constitution ‘at the admission or establishment of the [new] State’ and also noted the general concurrence of views that the existence of some form of constitution is a necessary precondition for Territory Statehood.

The Northern Territory of Australia currently derives its constitutional status as a self-governing entity from the *Self-Government Act*, an ordinary Commonwealth statute. While the provisions of that Act may be thought suitable or adaptable as a new State constitution, it is clear that it could not serve as that constitution without substantial modification. For this reason the Sessional Committee advocated the preparation and adoption of a new State constitution to replace the *Self-Government Act*.

Proposal of the Northern Territory Legislative Assembly Sessional Committee

In its Discussion Paper, the Sessional Committee took the view that, as a matter of policy (rather than law), the new State constitution must be prepared by Territorians; it should not be imposed on the Northern Territory by outside agencies. Territorians should decide its form and content. However, given the crucial role of the Commonwealth Parliament in any grant of Statehood, it is obvious that any constitution would also have to be acceptable to the incumbent Federal Government and the Parliament (see Discussion Paper on a ‘*Proposed New State Constitution for the Northern Territory*’, July 1995, second edition).

The Sessional Committee has been proceeding with the preparation of a draft new constitution in accordance with its terms of reference, and following a proposed course of action which it has itself outlined. This has involved a program of community participation, with a number of published discussion and information papers, the receipt of public submissions on those papers, public hearings, briefings, conferences and other activities. Recently it has published an Exposure Draft on parts of a new Constitution.

Once it has completed its draft Constitution, the Committee proposes to present it to the Legislative Assembly by way of final report for debate. It is then suggested that the draft be put to a Territory Constitutional Convention for finalisation, to begin sometime in the second half of 1996, and then to a Territory referendum for approval, perhaps some time in 1988 (see the Discussion Paper on “*A Proposed New State Constitution for the Northern Territory*”, Information Paper No 1 “*Options for a Grant of Statehood*”, Interim Report No 1 “*A Northern Territory Constitutional Convention*” (February 1995), “*Exposure Draft Parts 1 to 7: A New Constitution for the Northern Territory and Tabling Statement*” (June 1995) and “*Additional Provisions to the Exposure Draft*” (Nov 1995)). The Sessional

Committee's suggested timetable is set out in Appendix 7 to the Committee's Annual Report 1 July 1993 - 30 June 1994.

The Northern Territory's stated aim is to have a grant of Statehood in place on or before the year 2001. This is the target date indicated by the former Chief Minister, the Hon. Marshall Perron MLA, in a presentation to the Centenary of Federation Advisory Committee, chaired by the Hon. Joan Kirner AM, on 30 June 1994. The current Chief Minister, the Hon. Shane Stone MLA, has suggested that this date could be brought forward to prior to any national referendum on an Australian republic. The Commonwealth Government has now committed itself to facilitating Statehood for the Northern Territory according to a negotiated timetable through a truly co-operative Federal partnership.

Alternative Option

As already noted, there is of course no constitutional requirement that the new constitution for the Northern Territory be prepared and adopted in this manner. In theory at least, it could be prepared by the Commonwealth and simply imposed on the Northern Territory, either with or without a grant of Statehood. The political implications of acting in this 'minimalist' manner would require careful consideration.

A Constitution Before Statehood ?

There is a question whether a new constitution for the Northern Territory could or should be brought into operation before any grant of Statehood. This is a matter canvassed in the Sessional Committee's Discussion Paper No. 5, *The Merits or Otherwise of Bringing a NT Constitution into force before Statehood* (March 1993), but it is not the Northern Territory Government's preferred position. This would require an Act of the Commonwealth Parliament to repeal the *Self-Government Act* and to replace it with the new constitution as adopted at a Territory Constitutional Convention and Territory referendum. The political and practical advantages of this course of action are discussed in that Discussion Paper. Reference should also be made to the Northern Territory Government's Submission to the Commonwealth *'Full Self-Government, the Further Transfer of Power to the Northern Territory'* (Northern Territory of Australia, June 1989). It is a course of action that may have added attractions if for any reason the Territory did not proceed to a grant of Statehood. If this option was to be accepted, the Northern Territory Government would seek a firm timetable for the implementation of Statehood. The effect of this course of action under section 106 of the Constitution in conjunction with any later grant of Statehood is discussed below.

5. Constitutional Status of a New Northern Territory Constitution

Status of 'Constitution' Prior to Grant of Statehood

The new Northern Territory constitution, if implemented by the Commonwealth Parliament prior to any grant of Statehood in place of the *Self-Government Act*, and containing its own amendment procedures, would still derive its force and validity from section 122 of the Constitution. It would therefore also be amenable to change by a subsequent Act of the Commonwealth Parliament. There can be no abandonment of Commonwealth legislative power under the Constitution in relation to a Commonwealth territory. The position would change should the Northern Territory thereafter be granted Statehood under section 121 on the basis of that existing constitution.

In relation to section 121, in theory at least, it is open to the Commonwealth Parliament, at the time of granting Statehood under this section, to qualify or amend any existing or proposed Territory constitution that is to become the new State constitution, as the Commonwealth Parliament sees fit. Whether it would wish to do so is a matter that raises political considerations. If the proposal for a Memorandum of Agreement between the Northern Territory and the Commonwealth is adopted, to be entered into prior to the grant of Statehood, then presumably that Agreement will comprehensively deal with all aspects of the grant including reference to the proposed new State constitution which will have already been determined by another process.

Status of Constitution Following Grant of Statehood

If the new Northern Territory constitution were to be implemented by the Commonwealth Parliament under section 121 of the Constitution contemporaneously with a grant of Statehood, or if the new Northern Territory constitution had already been implemented prior to that grant of Statehood and the Northern Territory was thereafter granted Statehood under section 121 on the basis of that existing constitution, then section 106 of the Constitution would become relevant.

Section 106 appears to constitutionally guarantee the continuation of a new State's constitution after a grant of Statehood until it is altered in accordance with that new State's constitution (see the opinion of Professor Colin Howard, *Northern Territory Statehood*, dated 29 June 1989, being scheduled to the Sessional Committee's Information Paper No.2, *Entrenchment of a New State Constitution*). It follows that, after the granting of Statehood, it will not constitutionally be open to the Commonwealth Parliament to change that new State constitution (unless, perhaps, the grant of Statehood purports to confer on the Commonwealth the power to do so as a term and condition under section 121). This is a view consistent with the interpretation of section 121 as a 'once only' power, which is spent once it is exercised to create a new State. Thereafter, the new State constitution will only be able to be amended either by following the procedures for amendment to that new State constitution, or by way of a national referendum under section 128 of the Constitution.

In addition, there is a doctrine of implied inter governmental immunity based on the federal structure of the Constitution which prevents the Commonwealth Parliament from legislating in a way which discriminates against a State by placing on it special burdens or disabilities, or being a law of general application, that operates to destroy or curtail the continued existence of the State or its capacity to function as a government⁶. Under this doctrine, the High Court has held⁷, for example, that the Commonwealth is unable to use its interstate conciliation and arbitration power to control the staffing levels of State Government Departments. This general implied prohibition is in addition to several express provisions of the Constitution which prevent the Commonwealth from discriminating between States or parts of States in relation to particular matters such as the imposition of taxation, or which protect the States from certain Commonwealth action - see sections 51(ii), (iii), 99 and 114 of the Constitution.

6. Federal Representation of a New State

Background

As noted previously, the Northern Territory at present has one member of the House of Representatives and two Senators. Subject to any transitional provisions, this representation, being Territory representation and not State representation, may change with a grant of Statehood.

The extent of the federal representation that can be granted to a new State will depend in part on whether Statehood is granted under section 121 of the Constitution or by way of a national referendum under section 128 of the Constitution. If the latter method is adopted, then the terms of the national referendum question should, if the referendum is successful, determine the extent of the representation of the new State.

If the former method is employed, section 121 confers on the Commonwealth Parliament a discretion at the time of the grant of Statehood to impose terms and conditions on the grant, including the extent of representation in either House of Parliament.

Prescribing Representation under Section 121

It appears that the Commonwealth Parliament's power under section 121 to impose terms and conditions in relation to the parliamentary representation of the new State is confined to prescribing the extent of that representation⁸. Further, the power is probably only exercisable 'upon the admission or establishment of the new State'⁹, although there is nothing to prevent the Parliament at that time from tying the extent of representation to a formula which operates by reference to future events (see below).

⁶See, for example, *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 162.

⁷*Re State Public Services Federation; ex parte Victoria* (1995) 128 ALR 609.

⁸*Western Australia v Commonwealth* (1975) 134 CLR 201 at 268 per Mason J.

⁹*Western Australia v Commonwealth* (1975) 134 CLR 201 at 229 per Barwick CJ.

There is High Court dicta to the effect that the Northern Territory is entitled as a new State to a minimum of at least one member of the House of Representatives and one Senator¹⁰. At the other end of the scale it may be that the extent of representation granted to a new State can not be so excessive that it distorts the federal system and its democratic nature.

Within these broad boundaries, the Commonwealth Parliament has, under section 121, a discretion over the level of representation which the new State is to have in the Commonwealth Parliament. In this respect, the better view is that the requirement in section 24 of the Constitution for both the 2 for 1 nexus between the House of Representatives and the Senate, and that the number of members for each State in the House of Representatives "shall be in proportion to the respective numbers of their people" applies only to the Original States and does not qualify the Parliament's power under section 121.

In his opinion of 15 August 1984, the Commonwealth Solicitor General, Dr Gavan Griffith QC, advised that any conflict between section 24 and 121 should be resolved by treating as paramount that provision (i.e. section 121) which deals specially with the subject matter of the extent of the new State's representation in either House of Parliament. (See the opinion of Sir Maurice Byers QC of 10 December 1980; and *McGinty v Western Australia* (unrep) H Ct. 26 Feb 1996 per McHugh J; contra *Western Australia v Commonwealth* (1975) 134 CLR 201 per Barwick CJ at pp 228-229; and *Queensland v Commonwealth* (1977) 139 CLR 585 at pp 617-618 per Aickin J). The possible application of the nexus requirements in section 24 to the new State's representation is discussed after Option 4 below.

Options

Upon a grant of Statehood there would be four basic options in respect of Northern Territory representation in the Federal Parliament as a new State:

Option 1

That the new State is granted the same representation in both Houses of Parliament as an Original State;

Considerations

It is clear that the Northern Territory as a new State would not be constitutionally guaranteed the minimum representation entitlements of an Original State in sections 7 (Senate) and 24 (House of Representatives) of the Constitution. This is notwithstanding the fact that the Northern Territory was formerly a part of the Original State of South Australia (up until 1911). In any event, the Northern Territory Government has indicated that it does not seek the constitutionally guaranteed minimum representation of an Original State in the House of Representatives of five members (section 24). It is content to accept membership in that House on the basis of the section 24 quota.

¹⁰*Queensland v Commonwealth* (1977) 139 CLR 585 at 617 per Aickin J.

Option 2.

That the Northern Territory is granted full Senate representation equal to a State, but House of Representatives representation to be on a quota basis only;

Considerations

This option would place the Northern Territory in a position of immediate equality with the existing States in relation to the Senate. Although the Northern Territory Government seeks ultimate equality in the Senate, it being the 'States' House', the former Chief Minister has clarified this by saying that the Northern Territory's position should not necessarily be read as a request for immediate full and equal representation upon the grant of Statehood. The Northern Territory Government would consider a formula for Senate representation (such as that set out in Option 3(a) below) which would ensure equality within a reasonable time, provided that such a formula was not linked to population size (see address to the Centenary of Federation Advisory Committee of 30 June 1994, referred to above).

Option 3

(a) *That Senate representation be granted on the basis of a formula designed to achieve equality with existing States within a reasonable period of time. House of Representatives representation to be based on quota; or*

(b) *that Senate representation be granted on the basis of a formula related to comparative population (increases). House of Representatives representation to be based on quota.*

Considerations

The Commonwealth Parliament could prescribe the new State's level of Senate representation by reference to a formula which is tied to the new State's population or to its population relative to that of another State such as Tasmania. The Parliament could also prescribe a formula which would see the new State's representation automatically increase at specified intervals.

For example, the Parliament could confer four senators on the Northern Territory forthwith upon a grant of Statehood, one half of them having up to a three year term coinciding with the next half Senate election and the other half a six year term in order to commence the section 13 rotation, with a further four senators similarly rotated in, say, six or twelve years time, and a further four senators similarly rotated in a further six or twelve years time. This would then result in equality with the Original States based on the present figure of twelve senators for each State and is consistent with the Northern Territory Government's stated position.

The Constitutional Commission in its Final Report (1988) noted that there were sound historical reasons for conferring a guarantee of equivalent Senate representation on the Original States, and that none of these considerations apply to new States. In the Commission's view, population size is the most rational basis for determining representation entitlement of new States in both Houses, subject

to a guaranteed minimum representation of one member in the House of Representatives and two senators, and a maximum of 12 senators. The Northern Territory has consistently indicated strong opposition to this proposal. It would mean a grant of Statehood on terms of inequality and would result in a second class grant of Statehood with minimal Senate representation. Provided that there was a firm and reasonable timetable in which full representation would occur, the Northern Territory would consider a proposal that would provide less than equal initial representation.

Option 4

The existing level of representation to continue.

Considerations

A majority of the Joint Select Committee on Electoral Reform in its report, *Determining the Entitlement of Federal Territories and New States to Representation in the Commonwealth Parliament* recommended at p.45 that 'no new State should be admitted to the Federation on terms and conditions as to representation in the Parliament, more favourable than those prescribed for representation of Territories in the *Electoral Act*'. However it is highly unlikely that any potential new State would support this view.

Effect on Nexus Between Senate and House of Representatives

Section 24 of the Constitution says, among other things, that the number of members of the House of Representatives shall be, as nearly as practicable, twice the number of Senators. The High Court held in *Attorney-General (NSW); Ex rel McKellar v Commonwealth* (1977) 139 CLR 527 that members and senators representing the Northern Territory and the A.C.T. are not to be counted for the purpose of determining this 2:1 nexus.

The issue arises whether the members and senators of a new State must be counted in determining the nexus. If they must, then it will probably result in some extra members of the House of Representatives for some, at least, of the existing States. For example, assume that Statehood is conferred and the Northern Territory is given 2 members for the House of Representatives and 4 Senators. If the nexus provisions of section 24 apply it would be necessary to have 6 members in the House of Representatives distributed among the Original States in accordance with section 24.

The weight of opinion on this matter favours an interpretation of section 24 which would confine the operation of the nexus requirement to the Original States - see Professor Zines, *Representation of Territories and New States*, paper prepared for Standing Committee D of the Australian Constitutional Convention; opinion of Dr Gavan Griffith QC, Solicitor-General of the Commonwealth, 15 August 1984. The basis for Dr Griffith's view is that the continued application of the nexus requirement to the new State would, in his opinion, constrain the otherwise unlimited power of Parliament under section 121 to determine the extent of the representation of the new State in either House of Parliament. Despite these

considerations the matter is not free from doubt (see opinion of Sir Maurice Byers QC of 12 March 1981).

7. Other Terms and Conditions Upon a Grant of Statehood

Terms and conditions may be made or imposed by the Commonwealth Parliament on a grant of Statehood to the Northern Territory by use of its express power under section 121 of the Constitution. At the same time, the Northern Territory proposes to adopt its own constitution as a new State in accordance with its own processes, which will contain matters of relevance to the Commonwealth. The question is where the new State's constitution should finish and the terms and conditions under section 121 should begin. In some cases, e.g. those presently within the reserve powers of the Commonwealth under self-government, there is likely to be some over-lap in this regard. Thus, in relation to Aboriginal land rights, if there is agreement to patriate the *Aboriginal Land Rights (Northern Territory) Act 1976* to become a law of the new State, there would probably need to be provisions in both the Commonwealth Act enacted under section 121 and in the new State constitution on this matter (see "*Exposure Draft - Parts 1 to 7 : A New Constitution for the Northern Territory and Tabling Statement*", June 1995).

Terms and Conditions under Section 121 of the Constitution

Section 121 of the Constitution confers a discretion on the Commonwealth Parliament to make or impose terms and conditions upon a grant of Statehood. The scope of the Parliament's power to make or impose terms and conditions under section 121 is untested and uncertain. Accordingly, few observations can be made with any degree of confidence.

There are some matters which clearly could be the subject of terms and conditions (for example transitional matters, some financial arrangements and a possible North-South Railway). The question becomes more controversial if the terms and conditions would seek to place the Northern Territory, as a new State, in a different constitutional position to that of the other States. It seems unlikely that the general power to make or impose terms and conditions under section 121 would allow the Commonwealth Parliament to qualify those express and specific provisions of the Constitution which by their terms apply, *prima facie*, to both Original and new States (see "*New States and the Constitution: An Overview*" by Justice John Toohey in "*Australia's Seventh State*", at p. 8-10). On this view, the Parliament could not, for example, alter the ordinary application of section 128 to provide that a new State was not to be counted for the purpose of determining whether a majority of States had approved a referendum proposal. Nor could a new State and its people be excluded from the ordinary operation of provisions such as section 51 (xxxi) (acquisition of property by Commonwealth legislation must be on just terms) or section 92 (trade, commerce and intercourse among the States must be absolutely free).

It does not, however, seem appropriate to import USA constitutional doctrine that new States must be admitted to the Federation on an equal footing

with existing States. The application of this doctrine, which has not been implied in Canada under its federal system, would significantly limit the terms and conditions which the Commonwealth could make or impose upon the grant of Statehood. The principal reason why a broader scope should be given to the Commonwealth Parliament's power is that, unlike the relevant USA provisions, the Parliament has an express power under section 121 to make or impose terms and conditions. The conferral of this express power suggests that the Commonwealth may make or 'impose such stipulations as it thinks fit, unhampered by considerations of equality of Original States' - Quick and Garran, annotated Constitution of the Australian Commonwealth, at page 970, although Professor Howard has taken a narrower view (see below).

It is true that the High Court has identified an implied restriction on Commonwealth power which ordinarily precludes the Commonwealth from discriminating against either the States generally or a particular State. But the Court has also recognised that a particular grant of legislative power may be such as to rebut the assumption that such discrimination is impermissible. As just noted, section 121, by its express reference to terms and conditions, would appear to be such a grant.

This still leaves many questions about the proper scope of the Parliament's power to impose terms and conditions. The issues which are likely to be of the greatest practical relevance for present purposes are:

- (i) the extent to which Parliament may limit the power which a new State would otherwise have to make laws for the peace, order and good government of the new State;
- (ii) the extent to which the Commonwealth Parliament can retain legislative power over matters in relation to which it would otherwise have no constitutional power; and
- (iii) the extent to which the Commonwealth Parliament could qualify the implied limitation on its legislative power which the High Court has determined is necessary to protect the existence of the States and their capacity to function as governments.

These issues are considered more fully below.

(i) *Restricting Legislative Power of the New State*

There is nothing in the Constitution which expressly confers on each State the power to make laws for the peace, order and good government of its respective State, although the Constitution does protect the States' constitutions and those State constitutions incorporate a plenary legislative power for each State. The *Australia Acts 1986* confer on each State (including new States) plenary power over certain matters, but these powers are express to be subject to the Constitution. Accordingly, it can be argued that unless one adopts an approach based on an implied requirement of 'equal footing', the Commonwealth

Parliament could restrict the legislative power of the new State by making or imposing a particular term and condition under section 121.

On the other hand, Professor Howard has expressed the view, without adopting the full “equal footing” doctrine, that section 121 does not empower the Commonwealth to reduce the legislative power of a new State to anything less than the legislative power enjoyed by the Original States. As a general proposition, his view of the scope of terms and conditions is that “the expression is intended to do no more than make clear that the Commonwealth Parliament has the 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.”

(ii) *Conferring Legislative Power on the Commonwealth*

Restricting the legislative competence of the new State in relation to a matter which the Commonwealth Parliament may ordinarily regulate under the Constitution would effectively allow the Commonwealth Parliament to exercise exclusive power over that matter. If, however, the legislative power denied to the new State relates to a matter which is otherwise outside Commonwealth constitutional power (e.g. the resolution of intrastate industrial disputation), then the question arises whether the Commonwealth can confer that power on itself under section 121. Unless it can, restricting the new State's power on a particular topic will result in no legislature having power to legislate on that topic.

Even those who take a broad view of the Commonwealth's power under section 121, such as Sir Maurice Byers QC, recognise that this is a more doubtful case than that discussed under *Restricting Legislative Power of the new State*. After reviewing the various opinions which have been given on the issue, including those by Sir Maurice Byers and Professor Colin Howard, and after consulting its own legal advisers, the Committee finds itself unable to express a confident view on the matter. The Committee's uncertainty stems principally from the imprecise terms of section 121, the diversity of views which have been expressed on this issue, and the absence of any judicial consideration of the question. In summary, while there are arguments that would permit the Commonwealth Parliament to retain legislative power over particular matters after Statehood, the possibility of the High Court taking the contrary view is unable to be ruled out.

It has been suggested that one means of avoiding these doubts would be for the new State parliament to refer specified powers back to the Commonwealth under section 51(xxxvii) of the Constitution after the grant of Statehood. It should be noted that any prior undertaking to refer such powers would not be legally enforceable.

(iii) *Qualifying Implied Limitation on Commonwealth Power*

As noted previously, the High Court has identified certain implied limitations, derived mainly from the federal structure of the Constitution, on the Commonwealth's legislative powers in relation to the States. One of these implied

limitations prevents the Commonwealth from passing legislation which destroys or curtails the continued existence of the States or their capacity to function as governments. The High Court has recently held that this implied limitation prevents the Commonwealth under its conciliation and arbitration power from determining the number and identity of persons to be employed by State governments.

Assuming the Commonwealth Parliament wished to retain power over all aspects of public sector employment in the new State, the question would arise whether it could do so, given that it would be inconsistent with the implied restriction which would ordinarily apply. Again, the Committee finds itself unable to express a confident view on this matter. For its part, the Northern Territory Government firmly opposes any attempt in relation to the Northern Territory as a new State, to water down the Constitutional protections, express or implied, extending to the States generally. It is possible to argue that any implication which is based on the necessity of maintaining the integrity of a State in the federal system should apply to all States, original and new. Alternatively, it could be argued that section 121 expressly recognises that the new State may be treated as a special case, and that, accordingly, there is no prohibition on the Commonwealth regulating specific matters in a way which would ordinarily be beyond power. The options available to deal with the doubts in relation to these constitutional issues are discussed in this Chapter at Section 8 "Means to Clarify Uncertainty as to Legal and Constitutional Implications".

Implications of Equality

As mentioned previously, the Commonwealth Parliament presently has, under section 122 of the Constitution, a plenary legislative power over the Northern Territory which is subject only to any limitation that may be expressed or implied elsewhere in the Constitution. If the Northern Territory were to become a State, the constitutional power to pass laws having effect in the new State would be divided between the new State and the Commonwealth Parliament. Assuming the grant of Statehood were made on the basis that the new State should, vis-a-vis the Commonwealth, enjoy equality with the Original States, the grant of Statehood would remove the Commonwealth's legislative power in relation to all those subject matters which are not expressly or by implication conferred on it by the Constitution other than under section 122. The Commonwealth would, for example, have no specific power over environmental matters in the new State in the same way as it does not have that power in the existing States.

This raises the issue of whether Commonwealth legislation which is in force at the time Statehood is conferred would continue in force in the new State. To the extent that the legislation can be supported by the constitutional power of the Commonwealth otherwise than under section 122 (e.g. under section 51(xxvi) - race power in relation to Aboriginal land rights) there seems no constitutional reason why the legislation could not continue to operate. With respect to legislation which is unable to be so supported, it would be necessary to make

express provision at the time of granting Statehood to make clear what continuing operation, if any, that legislation was intended to have.

Under Northern Territory proposals, the Northern Territory and Commonwealth Governments would enter into a Heads of Agreement prior to the grant of Statehood which could incorporate arrangements, at least on a transitional basis for the continuance of specified Commonwealth legislation after the grant of Statehood. The provisions so agreed could then be included in the terms and conditions of the grant under section 121. Another option would be to 'patriate' such legislation so that it became legislation of the new State. Specific matters that would need to be considered in this context include those matters presently reserved to the Commonwealth under self-government arrangements, such as uranium and other prescribed substances, national parks, and industrial relations.

Powers referred to the Commonwealth by the States under Section 51 (xxxvii)

The operation of some Commonwealth legislation in the States depends wholly or partly on powers which have been referred to the Commonwealth by State Parliaments under section 51 (xxxvii) of the Constitution - e.g. *Mutual Recognition Act 1992*; the application of the *Family Law Act 1975* to ex-nuptial children. The application of this legislation to the Northern Territory is presently derived from section 122 of the Constitution. Its continued application to the Northern Territory post-Statehood would require some specific action - e.g. a term and condition under section 121 which either confers power on the Commonwealth in relation to these matters (assuming this is legally permissible - see "Conferring legislative powers" above) or preserves the operation of the laws at least on a transitional basis.

There are also a number of cooperative schemes based on mutually supporting Commonwealth/State/Territory legislation (e.g. Corporations Law legislation, the Jurisdiction of the Courts (Courts Vesting) legislation, the National Environment Protection Council legislation and the National Crime Authority legislation). The continued operation of these schemes within the new State could probably be achieved by transitional provisions deeming the relevant legislation of the Northern Territory to be laws of the new State. Various consequential amendments to Commonwealth legislation might be required.

Status of Legislation enacted under Section 51 (xxxviii)

The Commonwealth has also enacted laws pursuant to section 51 (xxxviii) of the Constitution. This provision allows the Commonwealth, at the request or with the concurrence of all the States directly concerned, to exercise any power which was in 1901, exercisable only by the British Parliament. Two significant Acts have been passed by the Commonwealth Parliament under section 51 (xxxviii). The first is the *Australia Act 1986*. That Act expressly applies to all the States including 'new States' (see definition of 'State' in section 16 of the *Australia Act*). This, together with the fact that an Act in the same terms was passed by the British Parliament (the *Australia Act 1986* (UK)), means that it would probably not

be necessary to make special provision in relation to the Act's application to the new State.

The other significant Act passed under section 51 (xxxviii) is the *Coastal Waters (State Powers) Act 1980*. This Act, which was the subject of the High Court's decision in the Port MacDonnell case, confers on a State legislative power over a number of matters including coastal waters of the State. (Corresponding powers are conferred on the Legislative Assembly by the *Coastal Waters (Northern Territory Powers) Act 1980*). It may be that the Act now has little practical effect given the High Court's views on the powers of the States to legislate extraterritorially and the express power conferred on the States in this respect by section 2(1) of the *Australia Act* - see generally *Union Steamship Co. v King* (1988) 166 CLR 1. Nevertheless, it would seem appropriate to extend the application of the Act to the new State. It may be that it will be necessary to make special provision in this respect, either by prescribing a term and condition under section 121 of the Constitution or by amending the Act in accordance with a request from the new State's Parliament under section 51 (xxxviii).

Northern Territory's Views on Appropriate Terms and Conditions under Section 121

Whatever the constitutional position in relation to the Commonwealth's power to impose terms and conditions, one view is that a grant of Statehood must be made on the basis of constitutional equality with the existing States. While this may not exclude appropriate and reasonable transitional arrangements, the eventual goal should be that of equality, otherwise the grant of Statehood will not be politically acceptable. Territorians assert that they should have the same constitutional rights and privileges as the residents of the other States (see Steve Hatton, "Towards Statehood" in "Australia's Seventh State", Appendix 11). This view is supported by the Sessional Committee (see "Discussion Paper on a proposed New State Constitution for the Northern Territory", July 1995, Second Edition). The Northern Territory Sessional Committee has also indicated a view that there are a number of matters which are within the sole prerogative of the Northern Territory to decide in developing its own new State constitution rather than be imposed on the Northern Territory by the Commonwealth Parliament under the terms and conditions power in section 121. This extends to the matter of the head of state of the new State (and see the *Exposure Draft-Parts 1 to 7*, previously referred to).

Other Possible Policy Considerations in Determining Appropriate Terms and Conditions

It is difficult to identify any sound reason why residents of the new State should not enjoy the same constitutional rights and privileges as those enjoyed by residents of the other States, subject to the issue of Senate representation. Indeed it seems unlikely that the Commonwealth Parliament could constitutionally deprive a resident of a new State of the protection conferred by provisions such as section 80 - trial by jury. On the other hand, the Commonwealth raises the question whether the Parliament and the Executive of the new State should have precisely the same powers vis-a-vis the Commonwealth as those of the other States. For example, the Commonwealth might argue that there is no compelling

reason to maintain strictly a demarcation of power prescribed in 1901 when subsequent developments have rendered that demarcation artificial and created practical problems. The Commonwealth suggests that this means that there may be considerations other than the concept of 'equality' which are relevant to determining what terms and conditions should be made or imposed on the conferral of Statehood. The Northern Territory is opposed to this view.

8. Means to Clarify Uncertainty as to Legal and Constitutional Implications

It is clear from what has already been said that there are substantial areas of uncertainty over issues which would or may be important to any conferral of Statehood. The two most significant issues in this respect are :-

- (i) the scope of the Commonwealth's power to make or impose terms and conditions under section 121; and
- (ii) the application of the nexus requirement in section 24 to the parliamentary representation of the new State.

The two options for dealing with this uncertainty are to :

- (i) enact the Commonwealth legislation conferring Statehood and then delay the proclamation of Statehood to allow time for the High Court to pronounce on the various issues (see opinion of Professor Howard of 31 October 1986); or
- (ii) amend the Constitution.

With respect to option (i), the High Court does not have jurisdiction under the Constitution to give advisory opinions. It has, however, on several occasions been prepared to consider the validity of legislation which has been enacted but which has not yet come into force. Option (i) appears to have clear advantages over proceeding with the grant under the section 121 method without seeking prior clarification in the High Court. First and foremost, it would allow remedial action to be taken in the event of any unexpected answers by the Court. There are obvious dangers if litigation was to occur after the grant and resulted in any aspect of the grant being invalidated or otherwise adversely affected.

If the High Court were to decide that any of the proposed arrangements needed adjustment, this may require some renegotiation involving additional time and expense and possibly a reference back to Territory electors.

The only realistic alternative to option (i) is to seek a national referendum under section 128 of the Constitution, to deal either with specific points of uncertainty (for example, the federal representation of the new State), or the grant of Statehood itself and to deal with all aspects of the grant. Such a referendum question, if adequately expressed and if successful, would remove any doubts.

The drawbacks in pursuing a referendum have already been adverted to - expensive, complex procedure, and a real possibility that the referendum will be defeated.

9. Outstanding Executive Powers

Under Northern Territory self-government arrangements, two categories of executive authority are reserved to the Commonwealth - those matters not coming within the various specific items listed in the *Northern Territory (Self-Government) Regulations*, and those matters expressly excluded from the executive authority of Ministers of the Territory in those Regulations (rights with respect to Aboriginal land and the mining of uranium and other prescribed substances).

Were there to be a grant of Statehood, the options in respect of executive authority appear to be:

- (a) maintain the status quo;
- (b) some other division of executive authority negotiated between the Commonwealth and the Territory; or
- (c) a general grant of plenary power subject to Constitutional limitations.

Currently the Northern Territory Administrator has dual authority. He or she is subject to the direction of the relevant Commonwealth Minister on reserved powers, but in all other matters, follows the advice of Ministers of the Territory.

Regardless of which option might be adopted in regard to the executive authority of the new State, the functions of the Head of State would need to be reviewed. The question arises as to whether the head of state of any new State (the "Governor" or however otherwise described) should continue to have a split function after a grant of Statehood or whether the only source of advice to that head of state of the new State should be the new State Ministers. The Northern Territory is opposed to having a new State Governor with split functions for many reasons including that this would be inconsistent with executive arrangements in existing States. Any executive matters not transferred to the responsibility of the new State should be dealt with by the Governor-General and/or Commonwealth Ministers, and not by the head of state of the new State acting at the direction of the relevant Commonwealth Minister in the manner presently applying to the self-governing Northern Territory.

If there is a grant of executive authority to the new State expressed in general terms, then there would be no option but to deal with any powers and functions that might be reserved to the Commonwealth by way of Commonwealth legislation (perhaps by Commonwealth legislation enacted under section 121), including by way of legislatively conferring Commonwealth executive authority

in relation to those reserved matters. A strict demarcation of new State and Commonwealth executive authority seems inevitable in this situation.

10. Appointment of Administrator/Head of State

The present position as to the Administrator as head of government under self-government has already been discussed. It seems clear that this office would disappear if there was a grant of Statehood. This raises the question as to whether there is to be:

- (a) an independent head of state in the new State, separate from the political head exercising substantive power; or
- (b) no separate head of state (except in so far as the Governor-General has any residual functions) (see Northern Territory Sessional Committee *Discussion Paper No 7* and see the approach taken in the self-governing ACT).

One view is that there should be an independent head of state with, in most cases, that person being required to act on the advice of responsible Ministers on the Westminster model (see Discussion Paper on "*Proposed new State constitution for the Northern Territory*", (July 1995, Second Edition), Discussion Paper No 7 "*An Australian Republic? Implications for the Northern Territory*" (March 1994), "*Exposure Draft-Parts 1-7, A New Constitution for the Northern Territory and Tabling Statement*" (June 1995). The Northern Territory Sessional Committee on Constitutional Development supports this view and has indicated that even if Australia (including the Northern Territory) were to become a republic, that there should still be an independent head of state, although recognising that this would require a new method of appointment. In any event, the Sessional Committee took the view that this would be a matter for the new Territory constitution, to be developed by Territorians.

11. Reservation and Disallowance

The existing provisions as to reservation and disallowance of Territory Bills passed by the Legislative Assembly are outlined at the beginning of this Chapter. There continues to be the capacity for significant Commonwealth control of Territory legislation under these provisions, qualified by the developing conventions of self-government.

On one view the legislative powers of a new State parliament in respect of a new State should be the same as for other State parliaments. Subject to normal Constitutional limitations and limitations under the *Australia Act 1986*, the legislation of existing States is not subject to Commonwealth reservation and disallowance.

SCHEDULE 1

List of Commonwealth legislation which applies specifically to the Northern Territory or which applies generally throughout Australia but has an extended application to the Northern Territory

1. *Northern Territory (Self Government) Act 1978 and Regulations*
2. *Aboriginal Land Rights (Northern Territory) Act 1976 and Regulations*
3. *National Parks and Wildlife Conservation Act 1975 and Regulations*
4. *Atomic Energy Act 1953*
5. *Industrial Relations Act 1988*
6. *Trade Practices Act 1974*
7. *Commonwealth Electoral Act 1918*
8. *Ashmore and Cartier Islands Acceptance Act 1933*
9. *Administrative Decisions (Judicial Review) Act 1977*
10. *Environment Protection (Alligator Rivers Region) Act 1978*
11. *Environment Protection (Northern Territory Supreme Court) Act 1978*
12. *Lands Acquisition Act 1989, section 124*
13. *Coastal Waters (Northern Territory Powers) Act 1980*
14. *Coastal Waters (Northern Territory Title) Act 1980*
15. *Bankruptcy Act 1966, section 28*
16. *Judiciary Act 1903*
17. *Commonwealth Grants Commission Act 1973*
18. *Air Services Act 1995*
19. *Family Law Act 1975*
20. *Affirmative Action (Equal Opportunity for Women) Act 1986*
21. *Australian Industry Development Corporation Act 1970*
22. *Australian Nuclear Science and Technology Organisation Act 1987*
23. *Australian Sports Commission Act 1989*
24. *National Occupation Health and Safety Commission Act 1985*
25. *Meat Inspection Act 1983*
26. *Removal of Prisoners (Territories) Act 1923*
27. *Northern Territory (Commonwealth Lands) Act 1980*
28. *Acts Interpretation Act 1901, sections 17(pc),(pe)*

Note: There will be a variety of miscellaneous minor amendments to other Acts required.

CHAPTER 2

FINANCIAL AND ECONOMIC IMPLICATIONS OF A GRANT OF STATEHOOD TO THE NORTHERN TERRITORY

1. *Current Arrangements*

The powers and obligations of the Northern Territory in fiscal affairs are equivalent to those of the States. The arrangements for self government that were established for the Northern Territory in 1978 include responsibility for the management of its own budget, the provision and management of the same types of public services that are provided by State governments and an operational environment which includes the monitoring of borrowings by the Loan Council.

The Northern Territory was first included in the pool of Commonwealth general revenue assistance to the States in 1988-89 as part of the Territory's transition to State like funding arrangements. The size of the general revenue assistance pool is determined at the annual Premiers' Conference in the light of an offer from the Commonwealth Government. The current arrangements involve the indexation of the existing pool, both for inflation as measured by the Consumer Price Index, and for population growth. At the 1995 COAG meeting the Commonwealth agreed to guarantee that this arrangement would be continued on a rolling three year basis.

The distribution of the general revenue assistance pool among the States and Territories is determined at the annual financial Premiers' Conference in the light of per capita relativities recommended by the Commonwealth Grants Commission (CGC). The CGC's per capita relativities seek to achieve a measure of horizontal fiscal equalisation (HFE) in the so called 'standard budget' by providing all the States and Territories with the capacity to provide an average standard of State-like public services, assuming that their taxes and charges are imposed at average rates and their affairs are conducted with an average level of efficiency.

Through the operation of the HFE process, the Northern Territory has a relatively high dependence on general revenue assistance from the Commonwealth in providing services to its residents at the average Australian standard. This reflects the size of the Northern Territory's economy, its geography and the composition and distribution of its population. Nevertheless, the financial arrangements which apply between the Commonwealth and the Northern Territory are fundamentally the same as those which currently apply to the States and the ACT. Only three of the other jurisdictions are currently not recipient of the funding which is redistributed as a result of the HFE process. A grant of Statehood to the Northern Territory would not have any implications for these general arrangements which give effect to policy objectives determined from a national perspective.

The relativities adopted by the 1995 Premiers' Conference for 1995-96, in accordance with the CGC's recommendations, will result in the Northern Territory receiving around five times the Australian average per capita amount of general revenue assistance. This is higher than the per capita amount of general revenue assistance received by other jurisdictions. The next highest per capita amount is received by Tasmania at around 1.5 times the State and Territory average.

So long as the current HFE arrangements remain in force, the Northern Territory will continue to receive a relatively large per capita share of Commonwealth general revenue assistance irrespective of its status as a self-governing Territory or a State. The CGC assessments have established that the Territory faces significant cost disabilities in nearly all of the areas of expenditure that are covered by the HFE processes. This is mainly due to diseconomies of scale which reflect the higher administrative overheads experienced by the less populous States and Territories and dispersion which involves the higher costs of providing standard services to rural or remote communities. Some notable areas of expenditure disadvantage for the Northern Territory are in Aboriginal community services; housing; administration of justice; and national parks and wildlife. These disabilities are likely to continue in the foreseeable future. The Northern Territory's expenditure disabilities vastly outweigh a slightly above standard per capita own-revenue raising capacity, as assessed by the CGC (mainly in the areas of stamp duty on motor vehicle registrations, business franchise fees, mining revenue and electricity and gas).

The Northern Territory economy has generally grown at a much faster rate than the national average since the mid-1980s but with a considerable degree of volatility. Based on Gross Standard Product measures, strong growth in the Northern Territory economy through the late 1980s was followed by a deeper and more prolonged recession than for Australia as a whole in the early 1990s. Since then the Northern Territory economy has grown more strongly than the national economy.

The Northern Territory's budget deficit has been reduced significantly in recent years, with a small surplus being achieved in 1993/94. This has allowed the Northern Territory's net debt to be stabilised. It has been achieved notwithstanding reduced Commonwealth funding and reflects the Territory's efforts to contain real outlays growth and initiatives to increase own-source revenue.

Since the Northern Territory's inclusion in the general revenue assistance pool in 1988-89, the general revenue assistance received by the Northern Territory has been supplemented in each year by the provision of special revenue assistance (SRA). The most significant amounts of SRA were provided in the years immediately following the Territory's inclusion in the pool. This reflected the Commonwealth's policy of easing the Territory's transition to State-like funding arrangements. Since 1988/89, the level of SRA to the Northern Territory has

decreased by approximately 83% to \$10m in 1995/96. In the absence of this transitional assistance, the application of the CGC's recommended relativities would have caused a more significant fall in funding for the Northern Territory.

Additional funding has also been provided to other jurisdictions from time to time to assist them in making adjustments. For example, the ACT is currently also receiving transitional assistance to assist it to adjust to State-like levels of funding while South Australia has been receiving temporary assistance related to problems arising from the former State Bank of South Australia. The provision of transitional assistance of this kind consequently does not carry any implications for the granting of Statehood.

The Northern Territory receives specific purpose payments (SPPs) on the same terms as the States and the ACT. That is, the allocation of SPPs is determined in accordance with the Commonwealth's national policy objectives, or with national policy objectives agreed between the Commonwealth and the States and Territories. As is the case for the other States and Territories, the largest SPPs are for funding in the areas of health, education, housing and community amenities. However, the Northern Territory also receives above average amounts of SPP funding in areas such as Aboriginal education and roads. In 1995-96 the Northern Territory is estimated to receive around \$1704 per head in SPPs as against the Australian average of around \$995 per head. The estimated per capita amount for 1994-95 is 1.7 times the average per capita share of the States, but is well below the overall 2.7 per capita expenditure disability assessed by the CGC within the standard budget.

About half of all SPPs take the form of recurrent expenditure, most of which fall within the CGC's standard budget assessment procedures. The Northern Territory also receives a substantial amount of funding from the Commonwealth in areas that are outside the HFE process. The level of capital purpose SPPs is around 2.8 times higher than the State and Territory average.

In a number of key areas the Northern Territory economy benefits from a relatively large share of Commonwealth own-purpose outlays. These include payments that are related to services for Aboriginals and defence. It has been estimated that in the next five to seven years the number of Commonwealth defence personnel in the Northern Territory is expected to grow by around 3,000 to 11,000 (or to around 9 per cent of total Northern Territory employment) and the construction of new defence facilities, and associated repairs and maintenance, is expected to provide an estimated \$500-700m boost to building activity in the Northern Territory. The impact of extra defence personnel on the Northern Territory's fiscal position is difficult to quantify: there are additional expenditures in providing general public services (for example, health, education and policing) while the higher population will assist in achieving greater economies of scale. Both of these factors are taken into account by the CGC.

Under the *Financial Agreement Between the Commonwealth, States and Territories*, which commenced on 1 July 1995, the Northern Territory and the ACT

became full members of the Loan Council and parties to the Financial Agreement. They had previously been accorded observer status. This change formally recognised the Territories' long standing position as parties to voluntarily agreed arrangements for the coordination of public sector borrowings through Loan Council.

2. Other Significant Factors

The following matters could have some ramifications for the Northern Territory's budgetary responsibilities, own-revenue capacity and funding from the Commonwealth. These matters were previously identified in the Territory's submission to the Commonwealth in 1989 in the context of the transfer of powers to the Northern Territory.

URANIUM MINING

The Commonwealth has retained ownership and control of uranium resources in the Northern Territory. In contrast to the arrangements which apply in the States, the Northern Territory Government does not therefore, determine the nature of the royalties levied on uranium mining in the Territory or directly receive revenue from them. However, the Northern Territory does receive payments from the Commonwealth in lieu of uranium mining which are taken into account in the HFE processes.

The Commonwealth levies royalties on Northern Territory uranium mining at the rate of 5.5 per cent of gross proceeds of sales (less minor deductions). In 1994-95, the amount of Northern Territory uranium royalties received by the Commonwealth was \$4.6m.

Commonwealth payments to the Northern Territory Government and the Aboriginal Benefits Trust Account (ABTA) fully account for the amount raised by royalties on Northern Territory uranium mining. A grant in lieu of uranium royalties is provided to the Northern Territory Government at the rate of 1.25 per cent of gross proceeds of sales (estimated to have amounted to \$1.25m in 1993-94) and a grant equivalent to 4.25 percent of gross proceeds of sales is provided to the ABTA. The ABTA funds are distributed on the following basis - 40 per cent to the Northern, Central, Tiwi and Anindilyakwa (Groote Eylandt) Land Councils; 30 per cent to the traditional land owners; and 30 per cent is retained by the ABTA for administration expenses and for the benefit of all Aboriginal people in the Northern Territory. The Land Councils can and do apply to share in this money to obtain additional funding for their administrative expenses.

If there were an extension of State-like rights to the Northern Territory, new royalty arrangements would need to be implemented having regard to existing contracts. Current arrangements exclude the Northern Territory raising additional above standard revenue in this area. If the Northern Territory were to maintain the same uranium taxation regime as the Commonwealth currently does, there would be a net increase in the Northern Territory Government's own source

revenue capacity and an offsetting reduction in general revenue assistance as a consequence of the HFE process. On this basis there would be no net benefit to the Northern Territory Government. Consideration would need to be given to the future arrangements for payments to the ABTA.

NATIONAL PARKS

The national parks of Kakadu (which includes the township of Jabiru) and Uluru, are controlled by the Commonwealth under the *National Parks and Wildlife Conservation Act 1975* and the associated regulations. With the exception of Jervis Bay National Park, no other parks are administered under these arrangements in mainland Australia.

A transfer of the control of Kakadu and Uluru to the Northern Territory would involve a financial cost for the Northern Territory. The Australian Nature Conservation Agency (ANCA) estimates that the administration costs for these parks was around \$20.3m in 1994-95 (not including support provided by the Darwin and Canberra offices of ANCA). Against this, the Northern Territory could receive revenue in areas such as fees for park entry and camping, asset sales, publications and staff rental charges. The ANCA estimates that these revenue items totalled around \$5.7m in 1994-95. The recurrent costs and own-revenue source capacity would be recognised in the HFE process.

ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) ACT 1976

Approximately 40 per cent of the Northern Territory's land area is held as Aboriginal freehold under the *Aboriginal Land Rights (Northern Territory) Act 1976* and a further 8% is currently under claim. The Act provides for the land owners to exercise a power of veto over mining exploration activities and the capacity to claim pastoral leases in which they hold all estates and interests other than those held by the Crown. Several studies have supported the claim that elements of the Act, particularly the provisions relating to exploration and mining agreements, are not working well and should be re-examined.

In view of the importance of pastoralism and mining to the Northern Territory economy, the operation of the Act may have a significant influence on the capacity of the Northern Territory Government to obtain revenues and has the potential to affect economic activity and growth within the Northern Territory. While the operation of the Act is therefore of particular interest to the Northern Territory Government, the degree to which the patriation of the Act to the Territory might alter this capacity would depend on the policies adopted by the Northern Territory Government. Improvements in the operation of the Act are not dependent on the transfer of responsibility for the legislation to the Northern Territory.

THE ISLAND TERRITORIES OF ASHMORE AND CARTIER

Prior to 1978, the uninhabited island territories of Ashmore and Cartier were legislatively deemed to be part of the Northern Territory. On self-government, the Commonwealth assumed responsibility for these territories under the *Ashmore and Cartier Islands Acceptance Amendment Act 1978*. These territories included an

area (the Ashmore Reef) declared under the *National Parks and Conservation Act 1975*. Commonwealth legislation provides for the application of most of Northern Territory laws as at the time of acceptance in the Island territories and for the Northern Territory to administer laws in adjacent areas that are covered by the Commonwealth's offshore petroleum legislation.

If the Commonwealth were to agree to the re-incorporation of the island territories of Ashmore and Cartier into the Northern Territory there would be some increase in administration costs for the Northern Territory. The amount of these costs would depend on arrangements reached with the Commonwealth on the management of the Ashmore Reef reserve and the adjacent areas covered by the Commonwealth's offshore petroleum legislation. The administrative costs and any revenues accruing from royalties associated with the minerals and energy found within the Northern Territory territorial zone would be taken into account automatically in the HFE processes on the basis of the CGC's current methodology.

3. Conclusion

Each of the four other matters described above raises policy issues which are discussed elsewhere in this report. The net impact of any changes in these areas on the Northern Territory's financial position may not be significant provided that there is no significant change in the HFE process. For example, an increase in the revenue capacity of the Northern Territory in the mining sector through access to higher uranium royalties would be likely to reduce the CGC's assessment of the Territory's relative fiscal disability because the Northern Territory would have an increased capacity to raise own-revenue for the funding of State-like services. This would then result in a lower per capita relativity for the Northern Territory and a fall in the Territory's share of Commonwealth general revenue assistance. Similarly, an increase in the Northern Territory's administration costs would tend to increase the CGC's assessment of the Northern Territory's relative fiscal disability and produce a rise in the Northern Territory's share of Commonwealth general revenue assistance.

Thus while there are a number of areas in which the current arrangements between the Commonwealth and the Northern Territory differ from those between the Commonwealth and the States and elements of these may effect the rate of economic development, it is apparent that the operation of the HFE processes result in their having little impact on the financial position of the Territory. Given the continuation of the current HFE processes, the current financial arrangements in relation to uranium mining, national parks, the operation of the *Aboriginal Land Rights (Northern Territory) Act 1976*, and the status of Ashmore and Cartier Islands, do not carry any significant implications for the question of Statehood. Unless there were to be a fundamental change to the HFE processes, any change to these arrangements would appear to depend on factors other than economic and financial considerations.

CHAPTER 3

RESERVED POWERS

PART A - IMPLICATIONS FOR THE INDIGENOUS RESIDENTS

1. *Past Consultations with Indigenous People and the Options for Future Consultation Processes*

Background

Over one quarter of the Northern Territory's population is made up of Aboriginal people. Involvement of this significant portion of citizens of the Northern Territory in constitutional development is considered essential.

Approximately 60 per cent of Aboriginals in the Northern Territory reside outside the main urban areas. Many maintain a lifestyle where there is a high level of retention of Aboriginal languages and culture. Accordingly there is a need for appropriate consultation strategies which can adequately translate complex constitutional notions into ideas that match Aboriginal concepts and for a process that allows for a variety of views to be articulated and considered.

Current Responsibility for Aboriginal Affairs

Under the *Aboriginal and Torres Strait Islander Commission Act 1989*, ATSIC has a dual responsibility to its constituency and is the primary source of advice to the Commonwealth on indigenous issues. In addition, the Northern Territory Land Councils have specific responsibilities under the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) to express the views of Aboriginal people on Aboriginal land management and legislation concerning that land; to protect the interests of traditional landowners; and to consult with traditional landowners over land use proposals.

The *National Commitment to Improved Outcomes in the Delivery of Services and Programs for Aboriginal Peoples and Torres Strait Islanders* acknowledges that the responsibility for Aboriginal affairs is shared between the Commonwealth and the State and Territory Governments. This national commitment reflects the division of responsibility in the Australian Constitution. Upon a grant of Statehood for the Northern Territory, the constitutional sharing of responsibility will remain unchanged in the absence of any wider Commonwealth constitutional change.

It follows from this that a variety of agencies will have responsibility for consulting with Aboriginal people in respect of constitutional development. The States and the Northern Territory have responsibility for all residual matters not otherwise dealt with by specific Commonwealth legislation. The Northern Territory also has a complementary responsibility under specific Commonwealth

legislation and programs, and corresponding Northern Territory legislation, for a number of related matters. ATSIC, the Land Councils and Aboriginal community councils in the NT also have special roles and specific responsibilities in representing the views of Aboriginal people on key issues of concern in this process.

Aboriginal people resident in the Northern Territory are integral to its development and accordingly look to a constitutionally secure place upon a grant of Statehood. This imposes a special responsibility on the Northern Territory to seek acceptable negotiation processes between it and its Aboriginal residents.

The NT Sessional Committee on Constitutional Development

On 28 August 1985, the Northern Territory Legislative Assembly established the Select Committee on Constitutional Development (later a Sessional Committee) to inquire into, report and make recommendations to the Legislative Assembly, on matters connected with a possible grant of Statehood and a new State constitution, and to promote awareness of constitutional issues. The Terms of Reference of the Sessional Committee are reproduced at Appendix A of this report.

The Committee has proceeded on the basis that it is essential for Aboriginal people to be involved in the process of constitutional development. An extensive information and consultation program has been carried out in the general community, including the release of information papers, public hearings and submissions, and extensive community visits. The community visits were primarily aimed at the Aboriginal communities and were carried out utilising interpreters and "plain English" material. All of the major and many of the smaller isolated Aboriginal communities were visited. A detailed summary of the level and scope of ongoing consultation is contained in the section of this report on 'Popular Support' and a list of Information and Discussion Papers, and other material produced by the Sessional Committee to date is included at Appendix B.

Issues dealt with by the Committee to date, in consultation with Aboriginal communities, include Aboriginal customary law, traditional rights to land, sacred sites and self determination. As a result, the Committee has produced two Discussion Papers dealing with these issues (See:-Discussion Paper No.4; *Recognition of Aboriginal Customary Law*, and Discussion Paper No. 6; *Aboriginal Rights and Issues - Options for Entrenchment*).

In recognition of Aboriginal concerns that specific rights require constitutional protection, the *Exposure Draft - Parts 1 to 7: A new Constitution for the Northern Territory*, released by the Sessional Committee on 22 June 1995, includes acknowledgment of Aboriginal prior occupation in the Preamble, provisions for the recognition of Aboriginal customary law and for Organic Laws, and some constitutionally entrenched provisions in respect of land rights and sacred sites. This Exposure Draft is not yet complete on Aboriginal issues. Following the release, the Committee is carrying out a further process of consultation, leading to public hearings in July 1995 and further hearings scheduled for 1996. Once the

Committee has reported to the NT Legislative Assembly on a draft constitution, it is proposed to put this draft before a public convention comprising elected and nominated representatives of community interests. This process is outlined more fully in the section of this paper dealing with 'Popular Support'.

Other Promotional Activities

Other promotional activities have included:-

- Statehood Executive Group - Advisory body to the Chief Minister responsible for research, publication and wide circulation of a number of papers. See for example "*Australia's Seventh State*" (infra) Appendices 13 and 14 - Options Papers;
- Towards Statehood Conference 1987 - Sponsored by the Law Society of the Northern Territory and the North Australian Research Unit (ANU) - See published papers "*Australia's Seventh State*", Loveday and McNab (Eds);
- "*Towards Statehood*" - Ministerial Statement by the Chief Minister on Statehood for the Northern Territory - August 1986 (Published);
- 1992 Constitutional Conference, Darwin - Papers "*Constitutional Change in the 1990s*" (Eds Gray, Lea and Roberts) published by the Sessional Committee on Constitutional Development and the North Australia Research Unit (ANU);
- Constitutional Centenary Foundation (NT Chapter) - promoting constitutional issues, including 1st Annual Schools Constitutional Convention, August 1995;
- Northern Territory University
 - Centre for Aboriginal Youth law
 - Faculty of Law - Constitutional Law Units include statehood aspects;
- Submission by the former Chief Minister, the Hon Marshall Perron MLA to the Centenary of Federation Advisory Committee;
- Northern Territory Government financial support to the Central Australian Aboriginal Legal Service (CAALS) to host the Aboriginal Constitutional Development Conference, in Tennant Creek (1993);
- Sessional Committee participation in and financial support of CAALS Conference, Alice Springs;
- Northern Territory Government financial and logistical support to the 2nd Indigenous Youth Forum, Darwin (as part of the International Year of Indigenous People).

Matters for Consideration

Throughout the constitutional history of Australia and its States, Aboriginal people have been given virtually no consideration or opportunity to participate in the constitutional processes, either as part of the general community or as a specific group with their own interests and concerns. The Northern Territory has been the only jurisdiction in modern times where constitutional development involving consultation with Aboriginal communities and specifically addressing Aboriginal issues, has been actively pursued. The consultation processes to date involving Aboriginal people have been, however, necessarily evolutionary in scope.

The consultation process has embraced several initiatives in cross cultural communication and has enabled the development of ideas about practical proposals for change. It is acknowledged that more needs to be done to allow Aboriginal people to formulate their views. In particular, the necessarily general nature of consultations to date has limited the specificity of discussions. A package of firm, practical and integrated proposals is being developed so that more meaningful consultations can take place.

Aboriginal statutory bodies such as ATSIC and the Land Councils have an important and responsible part to play to ensure consultations are constructive and effective in eliciting the views of Aboriginal residents of the Northern Territory. In addition, ATSIC, its Regional Councils and the Land Councils on behalf of traditional owners, may wish to put particular views to Governments and the Sessional Committee, arising out of their statutory responsibilities.

ATSIC advise that there needs to be an appropriate education campaign for indigenous residents to explain basic concepts, the implications of NT Statehood and possible patriation of the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA). Some work has already been done towards this end. The NT accepts the need for an education process and, in cooperation with Aboriginal interests, is preparing a strategy to implement such a program.

Proposals for Future Consultation

The Sessional Committee is still developing proposals and programs for:

- the further use of promotional material in Aboriginal languages (including the promotional video “*Vital Step to Statehood - A Northern Territory Constitution, Have Your Say*”);
- further dialogue with Aboriginal institutions;
- further public hearings and workshops (including in Aboriginal languages);
- eliciting further discussion and responses to the Exposure Draft Constitution as it is developed;
- the staging of the Constitutional Convention; and

- encouraging Aboriginal participation in the proposed Constitutional Convention.

The Northern Territory Government's future work may include the following:

- (a) complementing the work of the Sessional Committee;
- (b) establishment of the Constitutional Convention and assisting in its running; and
- (c) promoting involvement in the Convention.

In particular, the Northern Territory Government would harness certain Government resources to promote and assist awareness by indigenous residents of Statehood issues. Examples of initiatives which may be included in a Northern Territory Government strategy are:

- (a) the use of Local Government field officers to brief communities and disseminate material;
- (b) programs through the Local Government Association (dominated by Aboriginal community interests);
- (c) provision of a Government Information Package and Ministerial Statement to all Northern Territory electors;
- (d) provision of logistic support to certain Aboriginal communities to enable participation in the consultative process; and
- (e) development of a Public Awareness Program.

Implications

In the move towards Statehood in the Northern Territory, in depth, comprehensive consultation with the Territory community will be required and in respect of Aboriginal Territorians, special measures are required in the consultation process to take account of their distinctive needs and circumstances. For the process to be meaningful and practical, Aboriginal representative organisations, notably ATSIC and the Land Councils, will need to participate in, and be supportive of, the consultative process.

As advised by the NT Sessional Committee, it is absolutely essential for Aboriginal people to be involved in the process of further constitutional development in the Territory. Without such involvement the prospects of achieving major constitutional reform are negligible.

The negotiation process needs to reflect a sense of "ownership" and participation by Aboriginal people and their representative organisations, notably ATSIC, the Land Councils and the community councils.

For the negotiation process to be meaningful, a practical and comprehensive package of legislative and constitutional proposals is necessary and is being developed as a basis for discussion.

There may be some additional resource implications flowing from any added costs of specific consultations with Aboriginal Territorians. This could include the cost of providing resources to Aboriginal organisations to enable them to participate in consultations.

2. *Aboriginal Land Rights (Northern Territory) Act 1976*

Background

The *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) is a Commonwealth Act introduced prior to Self-government and applicable only in the Northern Territory. This Act continues to be administered by the Commonwealth and the Northern Territory Legislative Assembly is unable to legislate inconsistently with it. In addition, pursuant to the *Self Government (Northern Territory) Act 1978* (Regulation 4(2)(b)), Ministers of the Northern Territory have no executive authority in respect of Aboriginal land.

Under the Act, Aboriginal Territorians have gained substantial land ownership. Some 40 per cent of the Territory is now held as Aboriginal freehold, and a further 8 per cent of the Territory is under claim. A further 2 per cent is also held by Aboriginal people under other tenure.

Under the ALRA the Commonwealth makes grants of Crown land to Land Trusts for the benefit of traditional owners. The Act provides for the establishment, functions and funding of Land Councils and the appointment of Aboriginal Land Commissioners to hear and make recommendations to the Governor-General on claims for land. It regulates exploration and the development of mining on Aboriginal land and provides traditional owners with the right to refuse consent to mineral exploration and other developments on that land. It also has provisions relating to access to sacred sites, and to wildlife and fisheries resources, and defines the powers of the Northern Territory Government to make laws in these areas.

The ALRA also provides for the establishment and operation of the Aboriginals Benefit Trust Account (ABTA). Under the Act, the Commonwealth makes royalty equivalent payments to the ABTA in respect of both uranium (Commonwealth owned) and other minerals mined on Aboriginal land (ie. minerals owned by the Northern Territory Government). The royalty regime and the Aboriginals Benefit Trust Account are discussed more fully in the section

Uranium Mining and Royalty Equivalent Payments for Other Minerals (see heading 3 below).

Under the ALRA some 40 per cent of the amount paid to the ABTA is paid to the Land Councils for administrative costs, and 30 per cent is distributed to Aboriginal landowners in the area where the mine exists. The balance is available for distribution for the benefit of Aboriginal people in the Northern Territory although Land Councils may apply for additional moneys from this pool if they are unable to meet administrative costs from within their allocation.

There is widespread support among Aboriginal people for the concept of Aboriginal land with guaranteed legislative protection. The Northern Territory Government also supports most of the provisions of the Act, although considers that it has some problems which require rectification. The Northern Territory's concerns include access to Aboriginal land for exploration and development of mineral resources, capacity to compulsorily acquire interests in land for public purposes, application of Northern Territory laws to Aboriginal land, and the economic development of land.

Consistent with the situation that exists in the States, ie that land administration is primarily a matter for the States and State law, the Northern Territory sees patriation of the ALRA as integral to a grant of Statehood in order to place the Territory in a position of equality with existing States in terms of constitutional autonomy. The application of the ALRA exclusively to the Northern Territory, rather than on a Commonwealth wide basis, has no parallel in any Commonwealth/State relationship. However, it is acknowledged that the unique circumstances and complexities of the Territory require that special arrangements be negotiated.

Indigenous people have expressed concern over the future integrity of the ALRA, particularly the mining exploration veto, if it were to come under Northern Territory administration. One view is that integrity of the Act can best be guaranteed by retention of the ALRA as an ordinary Commonwealth Act even after Statehood. For example, the Northern Land Council's recent submission on social justice measures recommended that Commonwealth jurisdiction be maintained, in the event of NT Statehood. The alternate view is that the provisions of the ALRA can be protected upon Statehood by patriation of the Act with appropriate constitutional guarantees.

Matters for Consideration

Continued Commonwealth jurisdiction after Statehood under an ordinary Commonwealth Act would mean that the present regime would continue and that Aboriginal interests would look to the Commonwealth Parliament and Government for the protection of their interests in Aboriginal land. However, it provides no constitutional guarantees.

Patriation of the ALRA as a new State law on the same terms as the present Commonwealth Act, except for amendments agreed with the Commonwealth at

the time of the grant of Statehood, accompanied by appropriate entrenched guarantees of Aboriginal land in the new State constitution, and/or in Organic Laws, could afford an extra measure of protection to Aboriginal owners depending on the extent of that entrenchment.

The *Exposure Draft Northern Territory Constitution* proposes the enactment of an Organic Law substantially embodying the current ALRA but with modifications to be agreed by the Commonwealth. Amendments would require a specified majority in the Legislative Assembly. The constitution would in addition provide guarantees (subject to the normal constitutional amendment process, probably requiring a referendum) of perpetual Aboriginal freehold, and protection against Crown resumption of land, except in cases involving less than freehold interest.

Patriation is an issue yet to be considered in detail by Aboriginal people and it requires further consultation in the Northern Territory (see also: Sessional Committee Discussion Paper No. 6 - *Aboriginal Rights and Issues - Options for Entrenchment*). Patriation has, however, significant legislative and constitutional implications. The difficulties of reaching consensus between Aboriginal peoples and the two Governments should not be underestimated.

Options

- The patriation of the ALRA to the NT, with some form of constitutional entrenchment to protect key provisions.
- The status quo be continued, ie the Commonwealth retains jurisdiction over the ALRA.

If agreement is unable to be reached between the Commonwealth and the Northern Territory on either of these two basic options, then there may be a variety of intermediate options that could be negotiated either transitionally or on a permanent basis, and possibly involving collaborative arrangements, and included within the terms and conditions of the grant of Statehood.

In the event that there is a grant of Statehood, the Northern Territory is of the view that the Territory and the Commonwealth Governments should enter into a Heads of Agreement as to the terms and conditions of the grant. Such an Agreement may well include undertakings by the Northern Territory to protect the national and international interests of the Commonwealth in respect of the rights of indigenous people to self determination and land rights, including under international agreements. This may facilitate the implementation of the first Option.

Implications

Patriation of the ALRA would require consultations and negotiations between the Commonwealth and Northern Territory Governments and indigenous people to identify fundamental provisions which they consider require protection and the extent and nature of any constitutional protection.

Commonwealth legislation would be required in the event of patriation of the ALRA to the Northern Territory.

3. Uranium Mining and Royalty Equivalent Payments for Uranium and Other Minerals

Background

The Alligator Rivers Region (ARR) contains the only proven uranium deposits in the Northern Territory, including Nabarlek (being decommissioned), Ranger, and the North Ranger/Jabiluka and Koongarra ore bodies, which (apart from Nabarlek) are all enclaves within but are not a part of Kakadu National Park. Ranger is currently the only operative mine in the Northern Territory, under the former Commonwealth Government's three mine policy. (Uranium arrangements are examined in detail in Chapter 3, Part C.)

With the granting of self government, the Commonwealth retained ownership and control over uranium throughout the Northern Territory and uranium royalties are paid to the Commonwealth. In the ARR, the Commonwealth also re-acquired ownership of all minerals. In contrast, the State Governments have ownership of all minerals including uranium. While day to day administrative and environmental regulation of uranium mining is a matter for the Territory Government, ultimate powers are reserved to the Commonwealth.

Much of the ARR is either Aboriginal land or is under claim under the ALRA reflecting the area's rich cultural and environmental heritage which traditional owners are concerned to protect. The current Ranger arrangements operate under agreement with the traditional owners. There are also similar agreements for Jabiluka and Koongarra but those mines are not yet operative. These arrangements recognise traditional owners' financial and wider interests and were only arrived at after a difficult process of negotiation. Among issues requiring consideration were those arising from mining on Aboriginal lands, environmental issues, national parks, and uranium mining itself.

When uranium is mined on Aboriginal land in the Northern Territory as at Ranger, the Commonwealth pays royalty equivalents to the Aboriginals Benefit Trust Account (the ABTA) in accordance with section 63 of the *Aboriginal Land Rights (Northern Territory) Act 1976*, and an amount in lieu of royalties to the Northern Territory Government. Of total royalty payments of 5.5% on uranium sales, an amount equivalent to 1.25% is paid to the Northern Territory Government and the balance (4.25%) goes to the ABTA. As at 30 August 1995, the ABTA had received approximately \$113m from uranium sales under this arrangement since its inception.

Uranium mining at Ranger is subject to a complex series of arrangements between the Commonwealth Government, the operators and traditional owners.

These agreements govern royalty payments, environmental requirements, and specific issues relating to protection of traditional owners' interests. The Office of the Supervising Scientist has a statutory responsibility for monitoring environmental impacts.

The arrangements at Ranger provide for mining to cease in January 2000 unless new arrangements are previously negotiated. Negotiation of the new arrangements should commence by early 1996 and may result in some changes. Current agreements with traditional owners essentially ensure the continuation of royalty equivalent payments for mining of uranium and other minerals, at least in the period to 2005.

Matters for Consideration

The Northern Territory considers the transfer to the new State of ownership and control of all uranium and other minerals in the Northern Territory presently held by the Commonwealth, would place the Territory in a position of equality with existing States in regard to the ownership of mineral deposits.

In the event of uranium ownership transferring to a Northern Territory State Government, the Commonwealth would no longer receive royalties. This leaves the question of which government would assume ongoing liability for royalty equivalent payments to Aboriginal interests after the transfer and any possible implications for Aboriginal people flowing from that decision. This is necessarily associated with the question of what is to happen to the ALRA on Statehood as previously discussed. Financial implications are discussed in Chapter 2 of this report.

If the Northern Territory were to be paid full royalties from uranium mining, it would be in a position to pay the current level of royalty equivalents into the ABTA. However, the Northern Territory's position as stated in the Northern Territory Government submission to the Commonwealth on Full Self Government (June 1989) is that both prior to, and upon any patriation of the ALRA to the Northern Territory as a Northern Territory law, continuing liability for royalty equivalent payments in respect of mining on any Aboriginal land granted by the Commonwealth out of Northern Territory land, should lie with the Commonwealth.

The question of ownership and control of uranium in the Northern Territory and its impact on indigenous people is unable to be divorced from the wider issues of:-

- the ALRA and its possible patriation to the new State;
- National Parks and their possible transfer to the new State (Chapter 3 Part B);
- environmental concerns and the maintenance of existing standards; and

- Aboriginal concerns generally as to all of these matters.

Any transfer of ownership of uranium to the Northern Territory is unlikely to affect the negotiation of the new arrangements for mining at Ranger after 2000, as these arrangements are likely to be in place before any possible grant of Statehood. The legislation covering mining at Ranger provides a statutory basis for the process of negotiation of new arrangements. The Northern Territory's view is that it would seem reasonable for the Northern Territory to be included in the negotiations given the possibility of transfer of Ranger and the uranium agreements at Statehood.

Options

Chapter 3, Part C identifies the available options in relation to uranium mining, including:

- the transfer of ownership and management of all uranium to the Northern Territory;
- transfer to the Northern Territory excluding either Ranger or the entire Alligator Rivers Region; or
- continuance of the status quo.

In the event of uranium ownership and control being transferred to a new State of the Northern Territory, the options in relation to royalty equivalent payments for uranium (for which the Commonwealth has retained ownership throughout the Northern Territory) and all other minerals on Aboriginal land in the Alligator River Region (where the Commonwealth has retained ownership of all minerals) include:

- continued royalty equivalent payments by the Commonwealth to Aboriginal interests in respect of Aboriginal land granted by the Commonwealth; or
- assumption by the Northern Territory of responsibility for royalty equivalent payments to Aboriginal interests, either absolutely or subject to:-
 - (a) some form of constitutional or legislative provisions dealing with indigenous people's rights, in respect of royalty equivalent payments on Aboriginal land; and
 - (b) appropriate financial arrangements with the Commonwealth for any increased liability on the new State.

Implications

Any changes in current ownership and royalty regimes would require a full, open and transparent consultation process with indigenous people.

4. Opportunities for Recognition of Customary Law Upon a Grant of Statehood

Background

Indigenous customary law and tradition continues to play a real and governing role in the lives of many Aboriginal Territorians. There is functional recognition of Aboriginal customary law in current Northern Territory legislation in many areas, including sacred sites, heritage protection, traditional use of land and water, child welfare, tribal marriages and intestacy. Northern Territory Courts may take into account the existence of Aboriginal law, in determining procedures or outcomes. Apart from indigenous customary land tenure, dealt with by the High Court's native title decision, there has so far been no general recognition of Aboriginal customary law as an enforceable source of law anywhere in Australia.

In 1992, the Northern Territory Legislative Assembly Sessional Committee on Constitutional Development published Discussion Paper No 4: *Recognition of Aboriginal Customary Law*. It is acknowledged that Aboriginal customary law is a living system in many Aboriginal people's lives, and that many Aboriginal Territorians have expressed a desire for some form of formal recognition. This raises a number of issues for public debate, including:

- Should Aboriginal customary law be legally recognised in the Northern Territory?
- Should any such recognition be given constitutional force in a new Northern Territory constitution, should it be enforceable, and if so, how?
- What should be the scope of customary law if recognised eg. should recognition be limited to geographic areas under indigenous control, confined to people with traditional lifestyles, and should it be subject to overriding statute law or to exclusions for example in cases of conflict with international human rights provisions?

The report also canvassed a number of options in relation to customary law, including:

- recognition by incorporation in whole or part into the general body of the law, either by statutory codification, or by general reference (ie without specifying actual content);

- recognition by exclusion of customary law from the general law, allowing self regulation and possibly the establishment of tribal courts to administer a separate system of customary law;
- recognition by translation into western legal concepts and institutions;
- recognition by adjustment of the general law to take account of selected aspects of customary law, eg in sentencing options; or
- a more general form of constitutional recognition, including by way of a non-enforceable preamble in the new Northern Territory constitution.

The *Exposure Draft Northern Territory Constitution* provides preambular recognition of prior Aboriginal occupation of the Northern Territory, reinforced by Clause 2.1.1 of the *Exposure Draft* which provides for formal constitutional recognition of Aboriginal customary law as a source of law in the Northern Territory with two alternatives for the extent and scope of its application. One alternative would essentially provide for the status quo (ie. customary law would only be enforceable where it is recognised by the common law or the practice of the courts, the Constitution, an Organic Law or legislation). The other alternative makes clear that customary law may be enforced in respect of any person, but only where that person considers themselves bound by it. The *Exposure Draft* also makes provision for Organic Law protection of land rights and sacred sites.

In a submission to the Sessional Committee, ATSIC has put forward some preliminary views, noting the need for wider consultation. It noted that Aboriginal customary law is not only a matter of Aboriginal pride, heritage and custom but is also an issue of survival, with past traditional law having been replaced by what is for many an inadequate and bewildering system. It suggested that the lack of recognition of customary law has detrimentally affected all facets of Aboriginal community development in the Northern Territory, and has substantially contributed to many social problems and the varying degrees of lawlessness.

ATSIC has suggested that official recognition of customary law would not only benefit the Aboriginal communities, but the Northern Territory in general. It has supported constitutional recognition commensurate with the unique place of the Territory's indigenous peoples, backed by appropriate legislative and administrative arrangements, but noted that the final shape of reforms would be open to negotiation.

These are, of course, not issues unique to the Northern Territory. The question has arisen elsewhere in Australia whenever there has been a clash between Aboriginal customary law and Australian law.

Matters for Consideration

The last decade has seen considerable debate over the Northern Territory's future constitutional development, coinciding with debate in the Aboriginal

community over aspirations including the recognition of its unique status as Australia's indigenous people and indigenous rights to self determination, protection of heritage and recognition of customary law.

Any move to consider a grant of Statehood to the Northern Territory will provide both a catalyst and an opportunity for indigenous people, as they seek greater participation and recognition of their special interests and status by the wider community. The range of potential issues affected by customary law could include:-

- acknowledgment of the historical reality of prior occupation by Aboriginal people;
- recognition of traditional access and exploitation of land, sea and resources;
- protection of traditional culture and language; and
- legal recognition of traditional legal systems.

The recognition of Aboriginal customary law could be a starting point for the negotiation and definition of forms of local or regional autonomy within a new Northern Territory State.

Implications

In any moves towards Statehood, consultations between the Northern Territory Government and representatives of Aboriginal Territorians will need to address questions associated with the recognition of customary law in a Northern Territory constitution or legislative framework.

If customary law were to be recognised as a source of law in the Northern Territory, consideration would need to be given either upon or after the grant of Statehood, to a complex range of implications, including its enforceability and scope, and interrelationships with general law and international human rights.

5. *Any Other Implications and/or Opportunities for Indigenous Residents Upon a Grant of Statehood*

Background

There are a number of other issues relevant to Aboriginal people which require consideration upon a grant of Statehood. These include Aboriginal language, social, cultural and religious matters.

Other matters such as access to wildlife resources have already been covered in the context of discussion of the *Aboriginal Land Rights (Northern Territory) Act 1976* and customary law. Other provisions are already contained in Northern Territory legislation which will be continued upon a grant of Statehood.

The Sessional Committee Discussion Paper No. 6, *Aboriginal Rights and Issues - Options for Entrenchment*, raises the issues of: Aboriginal language; Aboriginal social and cultural matters; and Aboriginal religion, in the context of constitutional development and Statehood. The Paper notes the existing rights of indigenous residents flowing from various international treaty obligations, in particular the *International Covenant on Civil and Political Rights* and *ILO Convention No.169*, supported by Commonwealth legislation (ie. the *Human Rights and Equal Opportunity Commission Act 1986*).

The Discussion paper canvasses a number of options and opportunities for constitutional recognition of the above, including:

- formal recognition of a right of Aboriginal people to use their own indigenous languages within their own communities (and the concomitant issue of whether English should be recognised as the “official” language);
- whether there should be constitutional reference to Aboriginal social and cultural customs and practices beyond that discussed under Aboriginal customary law, and if so, whether such reference should be preambular or some form of enforceable constitutional right; and
- whether there should be a constitutional guarantee of religious freedom generally, or specifically in relation to Aboriginal religion beyond that reflected in other constitutional provisions in respect of Aboriginal land, custom and law; or preambular recognition of Aboriginal religion.

These issues are currently being considered by the Sessional Committee for the inclusion of appropriate options in the *Exposure Draft Northern Territory Constitution*.

Clause 7.2 of the *Exposure Draft Northern Territory Constitution* contains proposed provision for a constitutional obligation on the Parliament of the new State to have in place Organic Law to protect and prevent desecration to sacred sites in the Northern Territory.

Implications

As with the recognition of customary law, in any moves towards Statehood, consultations between the Northern Territory Government and representatives of Aboriginal Territorians will need to address questions associated with the recognition of these issues in a Northern Territory constitution or legislative framework.

PART B - IMPLICATIONS FOR THE ENVIRONMENT AND NATIONAL PARKS

1. *The Environment*

Background

In most areas of environmental policy making and inter governmental relations on the environment, the Northern Territory participates with the Commonwealth on the same terms as the States and the Australian Capital Territory. It is useful to give some examples.

With respect to the Inter Governmental Agreement on the Environment (IGAE) the Northern Territory has the same status as the States and the Australian Capital Territory.

This is also the case in Ministerial Councils and inter governmental policy making bodies, for instance, in the Australian and New Zealand Environment and Conservation Council (ANZECC), where the position of Chair rotates on an annual basis amongst the Commonwealth, States and Territories; in the Agriculture and Resource Management Council of Australia and New Zealand (ARMCANZ); and in the Inter Governmental Committee on Ecologically Sustainable Development (ICESD). The Northern Territory is a full member of COAG.

In the preparation and adoption of National Strategies such as those on ecologically sustainable development, greenhouse and biological diversity the Northern Territory has participated on the same terms as the States.

In the operation of such Commonwealth environmental legislation as the *Environment Protection (Impact of Proposals) Act 1974*, the *Australian Heritage Commission Act 1975*, the *Environment Protection (Sea Dumping) Act 1981* and the *Sea Installations Act 1987*, the Northern Territory is treated for practical purposes in the same way as the States and the Australian Capital Territory.

Regulation 4 (1) subject to regulations 4(2) and (4) of the *Northern Territory (Self Government Act) 1978* vests executive authority in respect of environment protection and conservation in the Northern Territory Government.

Implications

On general arrangements between the Commonwealth and Northern Territory in relation to environmental matters a possible grant of Statehood would have no major implications.

2. *Uluru-Kata Tjuta National Park and Kakadu National Park*

Background

The *National Parks and Wildlife Conservation Act 1975* provides for the declaration and management of parks and reserves on land owned or leased by the Commonwealth, in Commonwealth waters, and on certain areas of Aboriginal land leased to the Director of National Parks and Wildlife. (The Director of the Australian National Parks and Wildlife Service under the *National Parks and Wildlife Act* is the Chief Executive Officer of the Australian Nature Conservation Agency.) The Act also provides for co-operation with Aboriginal peoples in management of their land.

Uluru-Kata Tjuta National Park and Kakadu National Park were declared under the *National Parks and Wildlife Conservation Act 1975*, Uluru-Kata Tjuta in 1977 and Kakadu Stage I in 1979, Stage II was added in 1985 and part of Stage III in 1987 with subsequent parts up to 1992. Uluru-Kata Tjuta National Park and Kakadu National Park are two of only three such mainland parks managed by the Australian Nature Conservation Agency, all other mainland national parks in Australia are managed by the relevant State authority. Uluru-Kata Tjuta and Kakadu are inscribed on the World Heritage List but they are not the subject of proclamations under the *World Heritage Properties Conservation Act 1983*. All of Uluru-Kata Tjuta and over a third of Kakadu is Aboriginal land granted under the *Aboriginal Land Rights (Northern Territory) Act 1976* and leased back to the Director of National Parks and Wildlife. The Aboriginal Land Commissioner has recommended a grant of a portion of Kakadu Stage III to its traditional owners.

Kakadu National Park and Uluru-Kata Tjuta National Park have a rich cultural heritage and many sites of significance to Aboriginal people.

The Alligator Rivers Region in which Kakadu National Park is located is rich in natural resources and contains many physical and biological features of high conservation value. Large high-grade uranium deposits were discovered in the early 1970s and matters relating to these are dealt with in Chapter 3, Part C of this report.

In the States, virtually all land including national parks, belongs to the States. The Northern Territory's position in relation to Statehood is that it should be admitted as a new State on the basis of equality with existing States.

Options

- Transfer the two National Parks to the Northern Territory as a new state.
- The two National Parks continue under existing arrangements.

In addition, there are a variety of intermediate options that could be negotiated, either transitionally or on a permanent basis, and possibly involving collaborative arrangements, and included within the terms and conditions of the grant of Statehood. These include:

- Transfer the lease (where relevant), ownership (where relevant) and management of Uluru-Kata Tjuta and Kakadu from the Director of National Parks and Wildlife to the Northern Territory;
- Retain title under current Commonwealth legislation; the Director of National Parks and Wildlife to enter into contractual management arrangements with Territory Parks Authority and delegate powers for management of Uluru-Kata Tjuta and Kakadu;
- Transfer ownership of non-Aboriginal land to the Northern Territory and
 - (a) lease to the Director of the National Parks and Wildlife Service (now called the Chief Executive Officer, Australian Nature Conservation Agency (ANCA)); or
 - (b) arrange that the CEO of ANCA manage the land on behalf of the Northern Territory.

In the event of any grant of Statehood, it seems likely that the Northern Territory and Commonwealth Governments would enter into a Heads of Agreement as to the terms and conditions of the grant. Such an Agreement may well include undertakings by the Northern Territory to protect the national and international interests of the Commonwealth in respect of the National Parks including under international agreements.

Implications

Under the first option, existing leases and agreements with the Director of National Parks and Wildlife would need to be preserved by transfer or novation to the new State or to the appropriate new State authority. It is proposed by the Northern Territory Government that the Aboriginal freehold title to the land would be continued and constitutionally guaranteed.

The constitutionality of any of the options would need to be considered.

The Northern Territory view is that to transfer the management or ownership to the new State would require the support of Aboriginal traditional owners and enabling legislation by the Commonwealth and consequential amendments to other existing legislation. This includes amendment of the *National Parks and Wildlife Conservation Act 1975*, consequential amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* and a review of other relevant Commonwealth legislation.

Both Uluru-Kata Tjuta National Park and Kakadu National Park are listed in the Register of the National Estate. Should transfer of ownership of these places occur administratively other than by enabling Commonwealth legislation, section 30 of the *Australian Heritage Commission Act* would be triggered prior to a decision to effect this transfer.

There are financial and other resource implications of transfer from the Commonwealth to the Northern Territory. Consideration needs to be given to the implications of future arrangements for the township of Jabiru.

Matters for Consideration

In considering any possible future transfer of these two National Parks to the Northern Territory as a new State, the following matters would need to be considered:

- (a) the significance of the two National Parks to Aboriginal people, including the implications for Aboriginal ownership, current lease arrangements and joint management;
- (b) consultation and negotiation with the traditional Aboriginal owners concerning any proposed changes to arrangements between the Commonwealth and Northern Territory (notwithstanding the legal advice that consent of the traditional owners for transfer of Commonwealth title is not required by law);
- (c) the regional, national and international significance of the two Parks, in particular from a conservation and environmental point of view;
- (d) the economic significance of the two National Parks to the Region, the Northern Territory and nationally, in particular to the tourism industry;
- (e) the significance of the two National Parks from a natural resources point of view;
- (f) the fact that the two National Parks are on the World Heritage List;
- (g) the fact that both National Parks are located entirely within the Northern Territory and that Northern Territory laws apply therein consistently with Commonwealth laws; and
- (h) the Northern Territory has an existing legislative and administrative structure in place for managing parks and reserves which provides for Aboriginal ownership and joint management.

PART C - IMPLICATIONS FOR URANIUM MINING, MINING ON COMMONWEALTH LAND AND THE CONTROL OF PRESCRIBED SUBSTANCES

1. *Ownership and Management of Uranium and Prescribed Substances*

Background

Unlike the States, ownership of uranium in the Northern Territory is vested in the Commonwealth under the *Atomic Energy Act 1953*. The Alligator Rivers Region (ARR) of the Northern Territory is the location of Nabarlek (now being decommissioned), Ranger uranium mine and the North Ranger/Jabiluka and Koongarra uranium orebodies. These orebodies are on Aboriginal land and there are no other proven orebodies in the Northern Territory.

Ranger operates under a Commonwealth authority to mine. In contrast, Nabarlek, whose lease was granted in 1980 following the introduction of self-government, operated under a Special Mining Lease under the Northern Territory *Mining Act*. Other mines would similarly operate under a Northern Territory mineral lease (but this is restricted under the Commonwealth Government's uranium policy). The Northern Territory must act on the advice of the Commonwealth when setting the terms and conditions of a Northern Territory uranium mineral lease.

Control of exploration for uranium and other minerals in the Northern Territory is fragmented and determined according to the status of the land, that is:

- (a) exploration on land vested in the Northern Territory is controlled by the Northern Territory Government under the *Mining Act (NT)*;
- (b) exploration on Aboriginal land requires the consent of the Federal Minister for Aboriginal and Torres Strait Islander Affairs pursuant to the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cwlth)*. Once consent is obtained, the procedures of the *Mining Act (NT)* apply; and
- (c) exploration in national parks declared under Commonwealth legislation and in other Commonwealth owned land in the Northern Territory is controlled by the Commonwealth.

Due to the sensitive nature of the issue, special arrangements for environmental protection of the ARR exist including the establishment of the Office of the Supervising Scientist (OSS) under the *Environment Protection (Alligator Rivers Region) Act 1978*. Uranium mining in the ARR and the functions of the OSS have been subject to two major inquiries in recent times: the Review of the Office of the Supervising Scientist (the Taylor Review) in 1989, and the report by the Industry Commission on Mining and Minerals Processing in Australia (IC Report) in 1991. The Commonwealth Government addressed the findings of these reviews by implementing the following decisions:

- the Northern Territory was to retain the day to day regulation of mining in the ARR;
- the Commonwealth was to retain supervisory and research roles, but at a reduced cost by subsuming the OSS within the Environment Protection Agency (the EPA) and by refocussing the research program of the Alligator Rivers Research Institute, now called the Environment Research Institute of the Supervising Scientist (ERISS). The mandates of the OSS and ERISS extended outside the ARR to enable more effective use of their resources;
- an independent consultant was commissioned to identify the nature and priorities for research as a basis for maintaining a satisfactory level of environment protection in the ARR;
- the Co-ordinating Committee of the ARR was replaced by a Technical Committee to review research and an Advisory Committee (a policy information forum for community interest groups); and
- the uranium export levy was abolished from 1 July 1994 and replaced by an annual contribution (subject to a two yearly review) by Energy Resources of Australia Ltd towards research on the ARR.

Current relationships and arrangements

The Memorandum of Understanding in respect of Financial Arrangements between the Commonwealth and a self governing Northern Territory, entered into at self-government in 1978, provided that ownership of uranium would continue to be vested in the Commonwealth. However, the Commonwealth would make an additional grant to the Northern Territory of an amount in lieu of uranium royalties at the rate of 1.25 per cent, and where mining occurred on Aboriginal land, an amount as prescribed under the *Aboriginal Land Rights (Northern Territory) Act 1976* would be paid to the Aboriginals Benefit Trust Account (currently 4.25 per cent). In addition, the Commonwealth would reimburse the Northern Territory for additional capital or other expenditure arising from the proposed uranium developments in accordance with prior specific arrangements between the two governments. While the Memorandum of Understanding has been superseded in other respects, most of the arrangements relating to uranium continue.

When uranium is mined on Aboriginal land royalty equivalents are paid to the Aboriginals Benefit Trust Account in accordance with section 63 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA). The royalties are received by the Commonwealth before equivalent amounts are paid out of the Consolidated Revenue Fund to the Trust Account. The royalties for other minerals mined on Aboriginal land in the Northern Territory are paid to the Northern Territory. Equivalent amounts of these royalties are paid by the Commonwealth to the Trust Account, also in accordance with section 63.

In accordance with the Ranger Uranium Environmental Inquiry (the Fox Report) recommendation in 1977 that all further mining of uranium take place under Northern Territory Law, the Commonwealth and the Northern Territory agreed in 1978 that uranium mining would be regulated to the maximum extent possible through the laws of the Northern Territory. The *Mining Act* (NT) controls exploration and mining in the Northern Territory and the *Uranium Mining (Environmental Control) Act* (NT) controls environmental aspects of uranium mining in the ARR. Both Acts give effect to a number of Commonwealth requirements.

Matters for Consideration

The mining of uranium has a number of both real and perceived environmental risks associated with it. Radiological exposure during mining and milling operations are stringently monitored and kept well within relevant limits. Uranium mining must comply with standards prescribed in the *Uranium Mining (Environment Control) Act* (NT) which incorporates Commonwealth Codes of Practice relating to radiation protection, waste management and transport of radioactive materials.

In practice, most environmental impacts from uranium mining arise from non-radiological pathways and are similar to other mining operations (for instance, impacts associated with water management and tailings disposal are similar). However, the public perception of the risk associated with radiation and uranium is very high. This has heightened the public and political significance of both uranium mining and the long-term consequences of post-mining rehabilitation. This is the case with some Aboriginal traditional owners who perceive that radioactive material is detrimental to their land, whatever the quantity. There are other traditional owners in the ARR, however, who support the development of new uranium mines on their land.

Options

- The transfer of ownership of uranium and other prescribed substances to the Northern Territory as a new State.
- The ownership and management of uranium to remain with the Commonwealth.

In addition, there are a variety of intermediate options that could be negotiated, either transitionally or on a permanent basis, and possibly involving collaborative arrangements, and included within the terms and conditions of the grant of Statehood. These include:

- Transfer the ownership and management of uranium to the Northern Territory except at Ranger; or
- Transfer the ownership and management of uranium to the Northern Territory except uranium in the Alligator Rivers Region.

In the event of any grant of Statehood, the Northern Territory is of the view that the Territory and Commonwealth Governments would enter into a Heads of Agreement as to the terms and conditions of the grant. Such an Agreement may well include undertakings by the Northern Territory to protect the national and international interests of the Commonwealth in respect of uranium and other prescribed substances including under international agreements.

2. The Ranger Mine

Background

The Commonwealth's involvement with the Ranger project dates back to 1972 when the Commonwealth approved export contracts with Japan for uranium mined at Ranger. In November 1974, the Australian Atomic Energy Commission (AAEC) signed a Memorandum of Understanding for a joint venture with Peko-Wallsend Operations Ltd and Electrolytic Zinc Company of Australia Limited to develop the deposits. Following the findings of the Ranger Uranium Environmental Inquiry (the *Fox Report*, 1977) and self-government in the Northern Territory in 1978, the Ranger project began in 1981. In 1980 the Commonwealth sold its interest in the project to Energy Resources of Australia Ltd (ERA).

Energy Resources of Australia Ltd (ERA) operates the Ranger mine located on Aboriginal land eight kilometres east of the township of Jabiru. The mine lies within the 78 square kilometre Ranger Project Area and is located adjacent to Magela Creek, a tributary of East Alligator River. The Ranger Project Area is located within, but does not form part of, Kakadu National Park.

The arrangements for operating the Ranger mine are complex and the key instruments are:-

- (a) the "Ranger Uranium Project Government Agreement" of 1979 (amended in 1980). The agreement provides for the development of Ranger; sets out the rights and obligations of ERA and the Commonwealth in relation to the project; and it provides that when ERA pays royalties to the Commonwealth, the Commonwealth shall pay a set percentage into the Aboriginals Benefit Trust Account (currently 4.25 per cent) and the balance (currently 1.25 per cent) to the Northern Territory;
- (b) a "Section 44 Agreement" pursuant to the *Aboriginal Land Rights (Northern Territory) Act 1976 (ss 44(2))*, between the Commonwealth and the Northern Land Council which sets out in detail the obligations of the Commonwealth and the Manager of the project (ERA) in relation to Aboriginal issues. Litigation between the Northern Land Council and the Commonwealth concerning this agreement has now been settled;
- (c) an authority under section 41 of the *Atomic Energy Act 1953* granted to Peko Wallsend Operations Ltd, Electrolytic Zinc Company of Australia Limited and the Australian Atomic Energy Commission on 9 January 1979 to carry

out operations on the Ranger project. The authority sets out in detail the environmental requirements for the development of the project which are administered by the Northern Territory taking account of the advice of the Supervising Scientist; and

- (d) the 1978 agreement between the Commonwealth and Northern Territory governments to regulate uranium mining to the maximum extent possible through the laws of the Northern Territory. The main applicable law is the Northern Territory *Uranium Mining (Environment Control) Act* which includes the Commonwealth environmental requirements. In exercising powers under the Act, the Northern Territory Minister for Mines and Energy is required to have primary regard to the environmental requirements for the Ranger project.

Matters for Consideration

The Ranger project is likely to have a long duration and access to its uranium resources is critical. Under present arrangements, Ranger orebody number 3 is able to be mined under the former Commonwealth Government's three mines policy. Mining of the orebody will commence in 1996. Prior to the renewal of the authority under section 41 of the *Atomic Energy Act 1953*, due by the end of 1999, the agreement with the Northern Land Council will require renegotiation and any proposed change in the ownership or regulatory arrangements would need to be taken into account during these negotiations. Possible reaction on the part of some traditional owners and non-government organisations to any change in current arrangements in regard to environmental protection would need to be considered, including the issue of water release.

Options

- Transfer of all the Commonwealth's rights and obligations in relation to the Ranger Uranium project to the Northern Territory as a new State.
- Maintain the existing arrangements.

In addition, there may be a variety of intermediate options that could be negotiated, either transitionally or on a permanent basis, and possibly involving collaborative arrangements, and included within the terms and conditions of the grant of Statehood. For example, the matter could also be dealt with under a Heads of Agreement arrangement as previously suggested for the mining of uranium in general.

3. Uranium deposits in the Alligator Rivers Region other than Ranger

Background

Ranger is the only operating uranium mine in the Northern Territory. Other proven orebodies include Nabarlek, Jabiluka/North Ranger and Koongarra. The Nabarlek orebody has been mined out, the project is being decommissioned and the site rehabilitated. Jabiluka/North Ranger and Koongarra could proceed to mining if given relevant Commonwealth Government approvals. All three projects are within the ARR and are subject to the provisions of the *Environment Protection (Alligator Rivers Region) Act 1978*.

Development of the Koongarra deposit did not proceed under the former Commonwealth Government because of its three mines policy. An application for a mineral lease under the Northern Territory *Mining Act* has been lodged. Consent of the relevant Commonwealth Minister would be required for the lease to be granted. Under Commonwealth legislation a final Environmental Impact Statement (EIS) was approved in 1982 and the application for project development submitted to the Northern Territory Government in 1983. An agreement with traditional owners was approved by the Minister for Aboriginal Affairs in 1987. A revised agreement was submitted to the Minister in 1990 but has not been acted upon.

Development of North Ranger, formerly known as Jabiluka, has also not proceeded because of the former Commonwealth Government's three mines policy. A mineral lease under the Northern Territory legislation was granted in 1982. An EIS under the Commonwealth legislation was approved in 1979 but development plans have changed requiring a new EIS before the project can go ahead. An agreement with the traditional owners was signed in 1982. However, a new agreement would be necessary to take into account the new development plans.

Matters for Consideration

All mining operations in Kakadu National Park are prohibited under the *National Parks and Wildlife Conservation Act 1975* (Cwlth). Jabiluka and Koongarra are windows within the Park, however there are still limitations on any mining activity from the mines (eg. transportation) through the Park. In the event that the mining of the ore bodies requires the transportation of material between a mine site and milling place, appropriate consultation would have to take place with all affected traditional owners and suitable arrangements made.

Options

- Transfer the ownership and management of uranium to the Northern Territory as a new State, including uranium in the Alligator Rivers Region.
- Transfer the ownership and management of uranium to the Northern Territory except uranium in the Alligator Rivers Region.
- Maintain the current arrangements.

In addition, there may be a variety of intermediate options that could be negotiated, either transitionally or on a permanent basis, and possibly involving collaborative arrangements, and included within the terms and conditions of the grant of Statehood. For example, the matter could be dealt with under a Heads of Agreement as previously recommended.

4. *Implications in regard to the ownership of uranium and prescribed substances upon a grant of Statehood*

Transfer of ownership of uranium and other prescribed substances to the Northern Territory as a new State would place the Territory in a position of equality with the existing States in respect of ownership of mineral deposits. Substantial Commonwealth control of uranium mining in the Northern Territory after any transfer to a new State could be maintained under the Trade and Commerce power and through the Foreign Investment Review Board (FIRB) and export controls in the same way as in the States.

The constitutionality of withholding any transfer of ownership of uranium and other minerals to the Northern Territory on a grant of Statehood would need to be considered.

The interests of the other stakeholders, including existing tenement holders, would need to be considered. The implications for existing undertakings and formal agreements between the Commonwealth and traditional owners need consideration.

The monitoring functions and role of the Office of the Supervising Scientist, and other environmental controls including related financial and resource implications, would need to be considered.

Existing royalty and trust fund arrangements (Chapter 3, Part A also refers) would require re-negotiation if ownership of uranium is transferred to the Northern Territory. The financial implications of the transfer of uranium royalties, and the resource implications of the transfer of remaining management and monitoring functions from the Commonwealth to the Territory would need to be considered.

Transfer of the Ranger Uranium project to the Northern Territory would require enabling Commonwealth legislation and the effect of this option, whether it occurs before or after the extension of the authority from the Commonwealth under the *Atomic Energy Act 1953*, or renegotiation of the “Section 44 Agreement” with the Northern Land Council under the *Aboriginal Land Rights (Northern Territory) Act 1976*, would need to be considered.

The implications of a transfer of the financial arrangements for the Jabiru town site would also need to be considered.

There is a question as to whether the Ranger authority issued under the *Atomic Energy Act 1953* should become a lease under the Northern Territory's *Mining Act* on the same terms and conditions and held from the Northern Territory.

In the event that there may be a Heads of Agreement between the Northern Territory and the Commonwealth prior to a grant of Statehood, such an agreement could deal with matters such as:-

- the financial implications of the transfer of uranium royalties;
- the resource implications of a transfer of remaining management and monitoring functions from the Commonwealth to the Northern Territory;
- consideration of the effects on any Commonwealth undertakings and formal agreements (including references therein to the Commonwealth and/or the Supervising Scientist) with traditional owners; and
- consideration of environmental and conservation issues including mining in national parks.

Under any of the options, indirect forms of Commonwealth control would continue to exist through FIRB, export and World Heritage controls.

5 The Role of the Supervising Scientist

Background

As a prerequisite for uranium mining operations to proceed, and in recognition of the unique environment of the ARR and the interests of the Aboriginal people in the area, the Fox Report recommended a complex package of environmental protection measures to be implemented. These included the establishment of the Kakadu National Park and the appointment of a "Supervising Scientist", with direct responsibilities to a Commonwealth Minister (now the Minister for the Environment, Sport and Territories) to supervise the integration of research and monitoring programs needed to protect the environment of the ARR from the effects of uranium mining.

Under the *Environment Protection (Alligator Rivers Region) Act 1978*, the statutory position of the Supervising Scientist was established. The objective of the Supervising Scientist is to ensure that the environmental protection regime and regulatory arrangements established for the protection of the environment of the ARR from the effects of uranium mining operations, are adequate to meet the high standards of environmental protection for the region. The Northern Territory Government is responsible for the day to day regulation of uranium mining operations in accordance with standards prescribed under the Northern Territory's *Uranium Mining (Environment Control) Act*. The Supervising Scientist (through the Office of the Supervising Scientist (OSS)) reviews environmental

performance and provides environmental standards and procedures for assessing environmental impact.

In 1979 working arrangements were agreed between the Commonwealth and the Northern Territory Governments to cover co-ordination of activities for the regulation of environmental aspects of uranium mining in the Alligator Rivers Region. The working arrangements established procedures for consultation between the Supervising Scientist and the relevant Northern Territory Government Departments (mainly the Department of Mines and Energy).

The Environmental Research Institute of the Supervising Scientist (ERISS) provides research into appropriate monitoring, assessment and remediation techniques. In February 1994 the Act was amended to allow the Supervising Scientist to provide advice outside the ARR at the request of the Environment Minister. As a result, some of the role of the Supervising Scientist does not directly relate to operations in the Northern Territory (eg. nuclear and radiation issues relating to the environment, wetlands research).

The working arrangements are currently under review to reflect the more recent role of the OSS as an oversight organisation and the Northern Territory Department of Mines and Energy is responsible for the day to day regulation of the mine. The environmental requirements are under review to reflect more accurately the current mining operation.

Matters for Consideration

The public concern with mining (particularly of uranium) in the ARR (including the World Heritage Listing of some of the region) remains an important consideration when dealing with environmental issues. Regard would need to be paid to the attitude of non government organisations and traditional owners in the event of reduction of involvement by the Commonwealth.

Options

- Transfer of responsibility for the role of the Supervising Scientist with regard to environmental protection in relation to the ARR to the Northern Territory as a new State.
- Develop new Commonwealth/Northern Territory arrangements for environmental protection in relation to the ARR.
- Maintain the current arrangements.

In addition, there may be a variety of intermediate options that could be negotiated, either transitionally or on a permanent basis, and possibly involving collaborative arrangements, and included within the terms and conditions of the grant of Statehood, for example, the matter could be dealt with under a Heads of Agreement.

Implications

In the event that there may be a Heads of Agreement between the Northern Territory and the Commonwealth prior to a grant of Statehood, such an Agreement could deal with matters such as:-

- the need to ensure adequate standards for continued environmental protection in the ARR if any change is made to current arrangements;
- possible reaction on the part of traditional owners and non-government organisations to any change in current arrangements, especially in relation to the maintenance of adequate standards;
- financial and other resource implications of transfer from the Commonwealth to the Northern Territory; and
- consideration of the effects on any Commonwealth undertakings and agreements with traditional owners.

A change in arrangements has the potential to influence negotiations for the extension of the Ranger Mining Authority. If Option 1 is implemented before the extension, then the implications on extension of the authority would need to be considered.

One new arrangement that could be developed would be for the Northern Territory to engage the services of the OSS on a contractual basis.

The role of the OSS includes functions outside the Northern Territory which would not be affected by any change to current arrangements with the Northern Territory.

6 Other matters of relevance

The other matters of relevance to be considered in this report are the legal status of the Nabalco Bauxite Mine on Gove Peninsular and the Commonwealth ownership of land and of minerals on Commonwealth land in the Northern Territory.

Nabalco Bauxite Mine - Gove Peninsular

The Nabalco bauxite mine on the Gove Peninsula in the Northern Territory was established pursuant to an Agreement between the Commonwealth and Nabalco Pty Ltd prior to self-government and prior to the grant of the land as Aboriginal land under the ALRA. That Agreement is Scheduled to the *Mining (Gove Peninsula Nabalco Agreement) Act* (formerly *Ordinance*) of the Northern Territory and is still in force. The Gove Agreement was subsequently amended to introduce the present joint venturers, but the latter Act has not been amended to reflect this.

Upon self-government in 1978, the land and minerals, plus the leases and mining tenements held for the purposes of the mine, were by operation of the *Self-Government Act* transferred to the new Northern Territory Government. That land is now also held as Aboriginal land in escrow. However, the Gove Agreement remains in force between the Commonwealth and the miners and has not been novated.

The Northern Territory Government takes the view that this arrangement is inconsistent with self-government. However, it has not since been possible for the parties to agree on novation of the Gove Agreement to the Northern Territory Government. This is an issue that would need to be resolved upon a grant of Statehood, if not by further agreement of the parties, then as part of the terms and conditions under section 121 of the Constitution without such agreement.

Commonwealth Land and Other Minerals in the Northern Territory

Under section 69 of the *Self-Government Act*, all land and minerals in the Northern Territory (other than uranium and other prescribed substances) were vested in the new Northern Territory Government as from 1 July 1978. Under section 70 of that Act, the Commonwealth had one year within which it could resume any of that land (including the minerals) from the Northern Territory at no cost.

While most of the areas of the land resumed by the Commonwealth under section 70 comprised small areas for specific Commonwealth purposes similar to in the States, one very large re acquisition area was that of the Alligator Rivers Region to the west of Arnhem Land, expressed to be in freehold for the purposes of a national park. Most of that area has since been incorporated into Kakadu National Park and is either Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act 1976*, and leased by the relevant Land Trust to the Director under the *National Parks and Wildlife Conservation Act* for the purposes of that Park, or is vested directly in the Director for the purposes of that Park. Some of the re acquisition area remains outside the Park (primarily in three mining windows), and some of it is not Aboriginal land. However, all of the minerals in the whole area remain vested in the Commonwealth (except for some small areas where the Commonwealth has voluntarily transferred the minerals back to the Northern Territory), and all operations for the recovery of minerals in the Park are prohibited under the *National Parks and Wildlife Conservation Act*.

In the Submission by the Northern Territory to the Commonwealth, *Full Self-Government, The Further Transfer of Power to the Northern Territory* (June 1989), the Northern Territory Government proposed the transfer by the Commonwealth to the Northern Territory, at no cost to the Northern Territory, of all land held by the Commonwealth except those areas which the Commonwealth and the Northern Territory agreed were reasonably required for the Commonwealth's own purposes. It was proposed that this should also apply to any other Commonwealth land when the Commonwealth need for that land had ceased.

In the case of uranium and other prescribed substances the same submission advocated a transfer to the Northern Territory of ownership and control.

There is evidence of other valuable minerals on Commonwealth-owned land in the Northern Territory that do not necessarily appear in their natural state in association with uranium and other prescribed substances. This includes minerals in the Alligator Rivers Region re-acquisition area. In the case of these minerals the Territory has advocated that they be transferred to and controlled by the Northern Territory.

The transfer back of all such land and minerals would be consistent with the position in the existing States, where the Commonwealth does not own or hold large areas of land.

PART D - IMPLICATIONS FOR INDUSTRIAL RELATIONS AND TRADE AND COMMERCE

1. Industrial Relations

Background

Section 122 of the Commonwealth Constitution (the Constitution) gives the Commonwealth Parliament power to make laws for the government of any Territory. The *Northern Territory (Self-Government) Act 1978* (Cwlth) is such a law - section 6 confers general law making powers on the Northern Territory Legislative Assembly.

Section 51(xxxv) of the Constitution gives the Commonwealth Parliament power to make laws with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State". The *Industrial Relations Act 1988* (Cwlth) is such a law. Amongst other things, it gives the Australian Industrial Relations Commission award-making powers in respect of "industrial disputes", which are defined so as to incorporate a necessary element of interstateness.

Section 53 of the *Northern Territory (Self Government) Act 1978* determines the application of the *Industrial Relations Act 1988* (Cwlth) (IR Act) in the Northern Territory:

- it provides an alternative meaning of the term "industrial dispute" in the *IR Act* in relation to industrial disputes in the Territory, which removes the requirement for interstateness;
- it prevents the Australian Industrial Relations Commission from regulating employment in respect of which a Northern Territory tribunal, established before 1 July 1978, has power to determine relevant disputes etc (until provision to the contrary is made by a Commonwealth Act);
- it expresses that the Legislative Assembly is unable to legislate to confer power to determine disputes etc relating to terms and conditions of employment, except for Northern Territory public sector employment and judicial functions generally; and
- it expresses that federal awards and orders under the *IR Act* prevail over enactments and determinations under the *Northern Territory (Self Government) Act 1978*, to the extent of any inconsistency.

The scope which the *IR Act* would otherwise have, derived from section 51(xxxv) of the Constitution, is extended through the exercise of power derived from section 122 of the Constitution which would cease to operate on a grant of Statehood.

The situation contrasts with that which applies in the States. The States have plenary powers to legislate on matters not reserved to the Commonwealth and so can make laws on industrial relations generally. In the event of any inconsistency between a federal award and a State law, the federal award prevails by section 152 of the *IR Act* and section 109 of the Constitution. Broadly, interstate disputes are regulated federally and other matters, including intrastate disputes, are regulated by the States.

It should be noted that employment within the limits of one State is capable of forming part of an interstate dispute. In particular, employment in a State public sector is capable of forming part of an interstate dispute.

However, there are some limitations on the scope of the conciliation and arbitration power under section 51(xxxv), arising from the implied limitation on the legislative power of the Commonwealth under the Constitution, which protects the existence of the States and their capacity to function as governments - *Re Australian Education Union and ors; ex parte State of Victoria and anor* (1995) 128 ALR 609 (the AEU case). The decision of the High Court in this case does not prevent the regulation of the terms and conditions of employment of State public servants under the *IR Act*. However, it does restrict the scope of awards which the Industrial Relations Commission can make, as a State must have the right to determine:

- the number and identity of persons whom it wishes to employ;
- the term of appointment;
- the number and identity of persons whom it wishes to dismiss on redundancy grounds; and
- for persons employed or engaged at the highest levels of government only, all the terms and conditions on which these persons shall be engaged.

Options

- The status quo to be continued (if it is constitutionally available) with the Commonwealth retaining jurisdiction over those aspects of industrial relations which it presently controls.
- Transfer of industrial relations powers to the new State (subject to section 51(xxxv) of the Constitution). Upon transfer the new State parliament to decide upon:
 - i) establishment of its own State industrial relations system;
 - ii) referral of the industrial relations power back to the Commonwealth pursuant to section 51(xxxvii) of the Constitution; or
 - iii) any range of intermediate options.

In addition, there may be a variety of intermediate options that could be negotiated between the Commonwealth and Northern Territory Governments

before a grant of Statehood, either transitionally or on a permanent basis, and possibly involving collaborative arrangements and included within the terms and conditions of a grant of Statehood under section 121 of the Constitution.

Implications

The first option raises complex issues of constitutional law. As indicated in Chapter 1, Section 7 of this Report, it is not entirely clear that the Commonwealth could retain jurisdiction over all aspects of industrial relations within the new State consistently with the Constitution. Specifically, there are some doubts over whether the Commonwealth could indefinitely retain power in relation to intrastate industrial disputation or various aspects of public sector employment.

The second option will place the Northern Territory in a position of constitutional equality with the existing States in relation to industrial relations and will open up a range of options to be decided by the new State parliament. Although not binding on the new State parliament, the Northern Territory Government has previously expressed the view in its submissions to the Committee of Review into Australian Industrial Relations Law and Systems (the Hancock Committee) 1985, that it does not desire to have parallel jurisdictions in the industrial relations arena and that it supports the introduction, either phased or complete, of one industrial relations jurisdiction/system in Australia.

Following a grant of Statehood, there would still be a need to continue the existing industrial relations regime until a new State parliament considers and decides the issue. Transitional arrangements could be made by agreement and implemented under section 121 of the Constitution.

Under the second option the special positions of the Territory's Police and Prisons arbitral tribunals need to be considered.

2. Trade and Commerce

In regulating trade and commerce within Australia generally, the Commonwealth relies primarily on its powers under section 51(i) (interstate and overseas trade and commerce) and section 51 (xx) (trading, financial and foreign corporations). The restricted reach of these powers means that often the Commonwealth is unable to directly regulate non-corporations (eg people) engaged in interstate trade. There are, of course, no such restrictions on the Commonwealth's power under section 122, and the Commonwealth has used this power to give an extended operation in the Territories to certain pieces of Commonwealth legislation dealing with trade and commerce. Traditionally, it has also been thought that the Commonwealth's legislative power in relation to the Territories is not limited by provisions such as section 99 which prohibits the Commonwealth in a law of revenue, trade or commerce, from giving preference to a State or part of a State over another State or part of a State. Although provisions such as section 99 do not by their terms apply to the internal Territories, there is now some possibility in light of the High Court's reasoning in *Capital Duplicators*

(No 1) that those provisions will nevertheless be held to restrict Commonwealth power (see second para on 'Constitutional Position of Northern Territory Residents' at Chapter 1, Section 1).

The most important example of a Commonwealth trade and commerce law having an extended operation in the Northern Territory is the *Trade Practices Act 1974*. In contrast to its application in the States, significant portions of this Act apply to individuals engaged in trade and commerce within the Northern Territory (see section 6(2) of the Act). The recent enactment of the *Competition Policy Reform Act 1995* will probably lead to fewer provisions of the *Trade Practices Act* having an operation in the Northern Territory different from its operation in the States. Specifically, the cooperative scheme of the new Competition Code on restrictive trade practices will, in all likelihood, result in Part IV of the Act no longer having a broader operation in the Northern Territory (see section 6(2)(a) of the *Trade Practices Act*.) The new Part IIIA of the *Trade Practices Act*, which deals with access to services, will also have the same application in the Northern Territory as in the States.

Despite this, significant parts of the Act (eg part V dealing with consumer protection, Part VA dealing with manufacturer's liability) will continue to have an extended application in the Northern Territory to the extent described in the previous paragraph. The effect which this has on the legislative powers of the Legislative Assembly is mitigated by the fact that, subject to section 109 of the Constitution, the *Trade Practices Act* expressly preserves the concurrent operation of State and Territory laws in relation to such matters as consumer protection and manufacturer's liability. Accordingly, in effect, the Legislative Assembly is only prevented from passing laws which are inconsistent with the relevant provisions of the *Trade Practices Act*.

There are other Commonwealth Acts in relation to trade and commerce which have an extended application in the Northern Territory. For example, by virtue of section 52 of the *Northern Territory (Self-Government) Act*, the *Secret Commissions Act 1905* applies generally in the Northern Territory and not simply to dealings related to trade and commerce with other countries and among the States. Apart from this, in relation to most other matters affecting trade and commerce, the Northern Territory is in the same position as the States. For example, the Corporations Law applies to the Northern Territory in the same way as it applies throughout Australia - ie. by the Legislative Assembly adopting uniform law.

Options similar to those expressed in the section on Industrial Relations appear to be available in respect of the extended application of Commonwealth commercial laws to Territories. To place the new State of the Northern Territory in a position (sought by the Northern Territory) of constitutional equality with existing States, amendment of certain Commonwealth legislation would be required. The new State parliament would have the opportunity to continue participation in cooperative schemes and uniform laws.

CHAPTER 4

THE IMPLICATIONS OF A POSSIBLE GRANT OF STATEHOOD TO THE NORTHERN TERRITORY FOR THE OTHER COMMONWEALTH TERRITORIES

Background

The possible grant of Statehood for the Northern Territory raises a number of issues in relation to the other Commonwealth Territories. These include electoral implications, environmental implications and the specific relevance of the Territory of Ashmore and Cartier Islands (TACI) and the Indian Ocean Territories (IOTs) (ie Cocos (Keeling) Islands and Christmas Island Territories), to the constitutional development of the Northern Territory.

1. *Ashmore and Cartier Islands*

These atoll Islands came under British control last century. In 1931 they were placed under the control of the Commonwealth as a territory of the Commonwealth (see the *Ashmore and Cartier Islands Acceptance Act 1933*). By Commonwealth legislative amendment in 1938, the Islands were expressed to be annexed to, and deemed to form part of, the Northern Territory and Northern Territory laws were extended to them (new section 6). There is a difference of views as to whether this action amounted to full integration or merely an administrative union.

Contemporaneously with the grant of Northern Territory self-government in 1978, sections of that Act were replaced, with the effect of terminating the status of the Islands' annexation to the Northern Territory, but still continuing the existing Northern Territory laws at that time subject to any later Ordinances made by the Governor-General. The Islands therefore did not come under the jurisdiction of the new Northern Territory Government, although Northern Territory courts have jurisdiction in respect of them. This continues to be the current status of the Islands, except that a 1985 Amendment to the Act has facilitated the further delegation of administrative powers and functions to the Northern Territory. There is some debate about the present adequacy of the legal and administrative regime applicable to the Islands.

The Northern Territory Government has argued that the Islands were 'disannexed' from the Northern Territory without any consultation within the Northern Territory and that they should be re-incorporated with the Northern Territory (see the Submission of the Northern Territory of Australia to the Commonwealth *Full Self-Government, the Further Transfer of Power to the Northern Territory* (June 1989)). The Northern Territory Government still maintains this view.

There are national and international considerations in relation to these Islands. They include the bilateral fisheries arrangements with Indonesia and also as to petroleum exploration in the Timor Gap. The Australia-Indonesia Petroleum Zone of Cooperation overlaps slightly with the adjacent marine boundaries of the Islands. Under a Memorandum of Understanding (MOU) signed by Australia and Indonesia in 1974, Indonesian traditional fishermen are allowed access to the West Island lagoon and the fresh water supply on West Island. Access to East and Middle Islands, the main seabird breeding areas, is by permit only.

The House of Representatives Standing Committee on Legal and Constitutional Affairs, in its Report *Islands in the Sun* (AGPS, March 1991) suggested that incorporation of the Islands into the Northern Territory would not itself affect Australia's international arrangements, but that the changes would have to be made in a way that did not prejudice Australia's understandings with Indonesia. The Committee recommended the incorporation of the Islands into the Northern Territory. The Commonwealth's response to this recommendation was that incorporation of Ashmore and Cartier Islands into the Northern Territory would be considered in the context of Statehood proposals for the Northern Territory.

Ashmore Reef National Nature Reserve is situated in the Timor Sea some 800 kilometres west of Darwin, 610 kilometres north of Broome and some 144 kilometres south of the Indonesian Island of Roti. It was declared a National Nature Reserve under the *National Parks and Wildlife Conservation Act 1975* in 1983 and is managed by the Australian Nature Conservation Agency (ANCA). To manage this remote Nature Reserve, ANCA charters a vessel under contract to maintain a presence at Ashmore between March and November each year. Regular patrols are carried out by Darwin ANCA staff for the purposes of wildlife monitoring and law enforcement. In addition ANCA officers visit the Islands with transport provided by the Australian Navy.

Cartier Island has been identified by ANCA for declaration as a National Nature Reserve under the *National Parks and Wildlife Conservation Act 1975*.

The Islands and the seabed area around them are defined as the Territory of Ashmore and Cartier Islands Adjacent Area in the *Petroleum (Submerged Lands) Act 1967*. Petroleum activities in the area are under the control of the Commonwealth but are administered by the Northern Territory Department of Mines and Energy under an agency agreement with the Commonwealth. The petroleum reserves are substantial and include three petroleum producing fields and a major new discovery. The closest field is about 90 kilometres from the Islands and the existing reserves provide significant revenue to the Commonwealth through 'resource rental tax'.

There are other atolls and cays outside of the Ashmore and Cartier Islands territory which are subject to joint management agreements between ANCA and the West Australian conservation management authority.

Options

The options for dealing with the Islands in the event of a possible grant of Statehood to the Northern Territory include:-

- reincorporate them into the Northern Territory, either before or upon a grant of Statehood;
- leave them as a separate Commonwealth territory without further change; or
- attach them administratively to Western Australia.

If agreement cannot be reached between the Commonwealth and the Northern Territory on the first two options above, then there may be a variety of intermediate options that could be negotiated, either transitionally, or on a permanent basis, and possibly involving collaborative arrangements, and included within the terms and conditions of a grant of Statehood.

If the Northern Territory and Commonwealth Governments enter into a Heads of Agreement as to the terms and conditions of a grant of Statehood, this Agreement could include undertakings by the Northern Territory to protect the national and international interests of the Commonwealth in respect of the Islands, including under international agreements.

Implications

There are no constitutional difficulties with reincorporating one Commonwealth territory with another - the Territories power under section 122 would allow the Commonwealth Parliament to do this. There are constitutional difficulties with incorporating a Commonwealth territory into an existing State of Australia - specifically, section 123 of the Constitution would require the consent of the relevant State Parliament and a majority of the electors of that State before the Commonwealth Parliament could incorporate the territory into the State. It seems, however, that these difficulties would not extend to the situation where two Commonwealth territories were combined, and then immediately after that, as a single political entity, granted Statehood. The Territories power in section 122 and the terms and conditions power in section 121 of the Constitution should enable this to be accomplished.

The Commonwealth's obligations and responsibilities relating to the MOU with Indonesia - including the regulation of traditional fishing rights, the monitoring and management of the environment and wildlife, and intensive surveillance and law enforcement activities - are vital to the continuation of that MOU and good relations with the Indonesian Government and people. Consideration of a transfer of ownership and management of the Territory of Ashmore and Cartier Islands to the Northern Territory would need to include the continuation of these activities. The maintenance of these obligations carries significant resource implications and would need to be considered.

Having regard to a possible Heads of Agreement between the Northern Territory and the Commonwealth prior to a grant of Statehood, the Heads of Agreement could deal with matters such as:

- i) the existing Memorandum of Understanding between Australia and Indonesia;
- ii) transport arrangements; and
- iii) financial and other resource implications.

The Commonwealth, Northern Territory and West Australian Governments could consider joint management options on a grant of Statehood to achieve compatible management arrangements with the Indian Ocean Territories.

A grant of Statehood to the Northern Territory need not include the transfer of ownership and management of the Islands to the new State. Nor would a grant of Statehood to the Northern Territory necessarily need an alteration to the current arrangements for the administration and management of the Territory of Ashmore and Cartier Islands. Northern Territory laws could continue to apply as could administrative arrangements struck between the Northern Territory and the Commonwealth prior to Statehood. On the other hand, the Commonwealth's interests in the Ashmore and Cartier Islands could be addressed through means other than the retention of the area as a distinct Commonwealth Territory but they would need to be the subject of detailed bilateral negotiations, including consideration of appropriate financial and resourcing agreements between the Northern Territory and Commonwealth Governments and their relevant line agencies.

Any such transfer would also have to take into account the existing marine reserve established under the *National Parks and Wildlife Conservation Act 1975* and abutting the Islands. It may be that this arrangement could be maintained by way of agreement between the Commonwealth and the Northern Territory even after Statehood.

Australia proclaimed a 12 nautical mile territorial sea in 1990. However, under the *Offshore Constitutional Agreement*, the States and the Northern Territory have only been granted jurisdiction by the Commonwealth, within a three nautical mile territorial sea (ie their 'coastal waters'). To be consistent with this principle, any transfer of the Islands to the Northern Territory should include a grant of legislative powers and title to the seabed within the three nautical mile territorial sea.

Transfer of the Islands to the Northern Territory would require a change to Commonwealth offshore legislation and may have financial benefits for the Northern Territory, particularly in terms of a share of petroleum royalties in the 'coastal waters' area under the *Offshore Constitutional Agreement*. However, the financial impact of any access for the Northern Territory to petroleum royalties is

unlikely to be significant because, under the horizontal fiscal equalisation (HFE) processes, the Northern Territory would be assessed as having higher own-source revenue capacity and a reduced fiscal need for general revenue assistance from the Commonwealth. There would be no "State" petroleum royalties if the fields are outside the three nautical mile limit.

If the Commonwealth were to agree to the re-incorporation of the island territory of Ashmore and Cartier into the Northern Territory there would be some increase in the administration costs for the Northern Territory. The amount of these costs and the manner in which they might be funded would depend on arrangements reached with the Commonwealth on the management of the Ashmore Reef reserve and the adjacent areas covered by the Commonwealth's offshore petroleum legislation. Any revenue accruing from royalties associated with the minerals and energy found within the Northern Territory territorial zone and any administrative costs associated with those areas within the Northern Territory territorial zone would be taken into account automatically in the HFE processes on the basis of the Commonwealth Grant's Commission's current methodology.

2. Cocos (Keeling) Islands and Christmas Island (IOTs)

Background

The IOTs were accepted as Territories by the Commonwealth in 1955 (Cocos (Keeling) Island) and 1958 (Christmas Island). Both had previously been colonies of Britain and the laws of the former British Colony of Singapore applied to them.

The Government has pursued a policy of extending Commonwealth and applied WA law to the IOTs and upgrading the living standards and conditions of residents of the IOTs to those of comparable communities elsewhere in Australia. Under the relevant Commonwealth legislation (see the *Cocos (Keeling Islands) Act 1955* and the *Christmas Island Act 1958*) the Islands have significant legal connections with Western Australia whilst retaining the status of Commonwealth territories.

The IOTs have locally elected Shire Councils but are not represented and are unable to vote at the State level. Federally, they are represented by the Northern Territory's single Member of the House of Representatives and two Senators. The Governor-General appoints an Administrator for each of the IOTs who is, subject to the direction of the relevant Commonwealth Minister, responsible for the law, order and good government of the particular Territory.

A range of government services are provided directly by the Administration, the Shire Councils and WA Government Agencies under a series of individual Service Delivery Arrangements negotiated between the WA and Commonwealth Governments.

In the event of a grant of Statehood to the Northern Territory, legal advice from the Commonwealth Attorney-General's Department indicates that, constitutionally, existing arrangements for Federal representation of the IOTs through the Northern Territory could not continue unless the IOTs were integrated into the new State of the Northern Territory (see also opinion by Dr Gavan Griffith QC of 14 August 1984).

Options

The following options are available for the Indian Ocean Territories:

- attach the IOTs to the Federal Electorates in the ACT;
- create a new electoral division that would enable participation by the residents of the IOTs;
- integration of the IOTs with another State, presumably Western Australia; or
- integration of the IOTs into the Northern Territory.

Implications

Attachment of the IOTs to the ACT federal electorates is the same mechanism used for the residents of the Jervis Bay Territory and Norfolk Island. Such a move would impact on electoral numbers (and possibly breadth of representation) in the ACT.

The creation of a new electoral division could be limited to the IOTs or extended to accommodate the residents of other Territories. Current advice from the Commonwealth's Attorney-General's Department and the Australian Electoral Commission indicates that the creation of a new federal electoral division to cater specifically for the IOTs (or a number of Territories) might be constitutionally possible. However, the desirability of pursuing such an approach would need further consideration.

The option to integrate the IOTs with another State (possibly WA) could occur under s123 of the Constitution which enables the alteration of State boundaries but would depend upon a successful WA-wide referendum and extensive multilateral and bilateral negotiations between the Commonwealth and other States and Territories.

3. *Australian Capital Territory (ACT)*

Implications

Statehood for the Northern Territory may not necessarily have any implications for the ACT. However, it could:

- precipitate further consideration of the role of the Commonwealth in the ACT; and
- have repercussions if a decision were made to replace the IOT/Northern Territory federal electoral connection with an IOT/ACT connection (ie if eligible IOT residents voted in ACT Federal Electorates and were represented in Parliament by the Federal Members and Senators of the ACT).

4. *Norfolk Island Territory*

Implications

In relation to the Norfolk Island Territory, Statehood for the Northern Territory could:

- raise the nature of the relationship between the NIT and the Commonwealth;
- raise the issue of Statehood for the NIT itself; and
- have repercussions if a decision was made to create a Territorial federal electoral division to cater for the federal electoral interests of the IOTs.

5. *Jervis Bay Territory (JBT)*

Implications

Statehood for the Northern Territory does not have any obvious implications for the Jervis Bay Territory other than if a decision was made to create a Territorial federal electorate.

CHAPTER 5

THE LEVEL OF POPULAR SUPPORT FOR STATEHOOD IN THE NORTHERN TERRITORY

Issues

The major issues relevant to the level of popular support for a grant of Statehood to the Northern Territory include:

- 1 **The extent of consultation and education to date** including:
submissions already made to the Northern Territory Legislative Assembly Sessional Committee;
public information programs for Territorians on Northern Territory Statehood; and
consultation with the Aboriginal community and other ethnic populations.
- 2 **Past poll results and their value as a measure of popular support.**
- 3 **The best available means of assessing popular support** including:
identification of the diverse community groups within the Northern Territory;
the current level of understanding concerning Statehood;
available options; and
consultative mechanisms already available in the Territory.

1. *Extent of Consultation and Education to Date*

Activities of the Northern Territory Legislative Assembly Sessional Committee on Constitutional Development

On 28 August 1985 the NT Legislative Assembly, by resolution, established the Select Committee on Constitutional Development. This bipartisan committee is comprised of three Government and three Opposition members. In November 1989 the Assembly resolved to amend the Committee's Terms of Reference, changing its status from a select committee to a sessional committee.

The terms of reference of the Committee (reproduced in full at Appendix A) include, *inter alia*, inquiring into, reporting on and making recommendations in relation to:

- a constitution for the new State and the principles upon which it should be drawn;
- the method to be adopted to have a draft new constitution approved by or on behalf of the people of the Northern Territory; and

- the issues, conditions and procedures pertinent to the entry of the Northern Territory into the Federation as a new State.

In addition, the Committee is charged with undertaking a role in promoting the awareness of constitutional issues to the Northern Territory and Australian populations.

The Committee has prepared a number of information and discussion papers (listed at Appendix B together with other promotional material and videos produced by the Committee) on relevant constitutional issues and has invited public comment and submissions. So far, 133 written submissions have been received and an extensive mailing list developed of over 3000 addresses targeting specific groups including federal and state politicians and government departments, academic institutions, local government, legal organisations, Aboriginal and ethnic organisations, pressure groups and private individuals.

The Committee has conducted an extensive program of community consultation within the Northern Territory, on matters that could be dealt with in a Territory or new State constitution. Since 1988, programs to promote public awareness have been carried out including numerous public hearings and meetings held in major centres throughout the Northern Territory and a Conference on "Constitutional Change in the 1990's" organised by the Committee.

In June 1995 the Committee tabled the *Exposure Draft on Parts 1 to 7 of a Northern Territory Constitution* and in November 1995 *Additional Provisions to the Exposure Draft on a new Constitution for the Northern Territory* was also tabled. Submissions have been called for and public hearings were held in July 1995 and more are scheduled for 1996.

A second promotional video has recently been produced by the Committee explaining the proposed process for developing a Northern Territory constitution. The video screened at all major centres on the Northern Territory 1995 show circuit in conjunction with a display stand. It has also been distributed to schools for use as an educational tool and is available for use by other Northern Territory organisations.

To date, consultation by the Committee has essentially been on broad issues as part of a policy development process to address the need for a new Northern Territory constitution and its possible content, public participation in its preparation and how it should be implemented in conjunction with a grant of Statehood. The process has not focussed on the wider policy issue of the merits of Statehood.

Consultation with the Aboriginal Community

Aboriginal people comprise approximately 26.2 per cent of the Northern Territory population, and have a strong and distinctive cultural heritage. They strongly support land rights and the maintenance of Aboriginal language and culture. While some representative organisations strongly express aspirations for

regional and/or local autonomy and self determination, some Aboriginal groups wish to achieve this within a Northern Territory framework, availing themselves of the opportunities in the mainstream economic, social and political structures. Although ATSIC and Land Councils have statutory roles to represent the views of Aboriginal people, Aboriginal community councils, other community organisations, traditional landowner groups and individuals also have varied views on Statehood issues.

In the Northern Territory, some 65 per cent of Aboriginal people reside outside of the main urban areas, often in small and remote out stations. Aboriginal languages are spoken in the home by 70 per cent of Aboriginal people and around 33 per cent report that they speak English "not well" or "not at all". These factors have implications for the future consultation process.

The concepts and ideas involved in constitutional change are complex and difficult to adequately comprehend. For Aboriginal people there is the added difficulty of translating these ideas to match Aboriginal cultural concepts.

The special needs of Aboriginal Territorians, stemming from their distinctive culture and history, require a consultation strategy premised on appropriate cross cultural techniques to assure the participation of Aboriginal people in the process of further constitutional development in the Northern Territory and the eventual outcome.

The Northern Territory Government considers the involvement by Aboriginal people in the process to be essential if major constitutional reform is to be achieved. During 1989 and 1990 the Sessional Committee conducted ninety community visits and public hearings at various locations throughout the Northern Territory. Seventy of these visits were to Northern Territory Aboriginal communities and approximately 300 Aboriginal people have made oral submissions to these hearings. Many of the participants spoke in their own Aboriginal language which was translated into English and incorporated into the Hansard transcripts of the meetings.

An illustrated plain English booklet entitled "Proposals for a New State Constitution for the Northern Territory" was produced to promote awareness of constitutional issues and 20,000 copies printed for wide distribution to all schools and to Aboriginal communities. This was followed by an advertising program and visits to major Aboriginal communities utilising Aboriginal interpreters in promoting the booklet. The Institute for Aboriginal Development has assisted in promoting the booklet through the provision of interpreters to accompany the Committee on its community visits, by providing English translations of the Aboriginal content of meetings and the development of audio tapes in various Aboriginal languages and English to complement the booklet.

The Committee also has a proposal to approach the Central Australian Aboriginal Media Association and the Institute for Aboriginal Development for Aboriginal language subtitles to be inserted into the promotional 'constitutional

process' video for broadcast through *Imparaja* and the Broadcasting for Remote Area Communities Scheme.

Consultation with Ethnic Organisations

The main ethnic communities in the Northern Territory comprise people from Chinese, Greek, Italian, Philippine, Malaysian, Indonesian, Portuguese, Timorese, Vietnamese and Spanish origin, and are represented by the Northern Territory Ethnic Communities Council (a voluntary organisation). As with other community organisations, the Council is on the Sessional Committee's mailing list and has been targeted in general consultation processes and public hearings concerning Statehood and constitutional issues. The Council advises that the level of literacy and understanding of many people within the Territory's ethnic groups is often limited, even in their own language.

In consultation with the Council and with the Assistance of the Northern Territory Office of Ethnic Affairs the 'plain English booklet' has now been translated into seven languages (Chinese, Greek, Italian, Indonesian, Portuguese, Vietnamese and Thai) and will shortly be printed for distribution to the ethnic community.

Other Public Information Programs

A number of activities involving the publication and dissemination of submissions, papers and other forms of information concerning Statehood have been initiated both within the Northern Territory and nationally. These have included, for example, the "Towards Statehood Conference" (1987) sponsored by the Law Society of the Northern Territory; Northern Territory Government support and assistance to the Aboriginal Constitutional Development Conference in Tennant Creek (1993); the first Annual Schools Constitutional Convention (August 1995); as well as numerous submissions and addresses by Northern Territory Government Ministers and Committee members to conferences, schools, committees and other government forums. A detailed list of promotional activities relating to Aboriginal issues is included in Chapter 3, Part A, Section 1.

2. *Past Poll Results*

While accepting that polls provide a general indicator of trends rather than an accurate measure of actual support, statistical analysis of the results of a number of opinion polls carried out in the Territory over the past 20 years indicates a substantial increase in the awareness on the part of Territorians, of the Statehood issue and of growing support (in principle) for Statehood both nationally and within the Northern Territory.

Most recently, two Newspolls released in April 1995 showed that 86 per cent of Australians supported the move to Statehood "if most Territorians were in favour" while 68 per cent of Territorians polled supported Statehood. Due to the inability to include remote area residents without telephone access, qualitative research work was carried out in January and February 1995 to evaluate the

current attitudes among Territorians towards the concept of full Statehood for the Northern Territory. Of the 16 group discussions held, 4 were specifically with Aboriginal people in Alice Springs, Tennant Creek, Katherine and Nhulunbuy, with three of the Aboriginal groups "generally favouring Statehood".

The qualitative research also revealed a genuine demand for a public information campaign on the subject of Statehood that is factual rather than party political. The people surveyed expressed a desire for "an assessment of the advantages and disadvantages to be presented in an impartial manner ideally by someone who is not seen to be strongly identified with any one side of politics". (Qualitative Assessment: Community Attitudes towards Northern Territory Statehood - Newspoll Market Research 1995).

3. Assessing Popular Support

Current level of understanding by Indigenous residents

In July 1995, the Northern Territory Statehood Working Group was discussed at the Aboriginal and Torres Strait Islander Commission's (ATSIC) Combined Zone Meeting of the four northern Regional Councils and three southern Regional Councils. The meeting was unanimous in its support for appropriate education programs on the implications of Statehood to precede any consultation with the indigenous population of the Northern Territory. The meeting identified the need for an independent body to explain to indigenous residents what Statehood means, its implications for Aboriginal people and its implications for the *Aboriginal Land Rights (Northern Territory) Act 1976* (the *Land Rights Act*). Such an explanation would need to be modulated to the needs of the community, taking into account the levels of literacy and that for many people, English is a second language.

The Sessional Committee has recently met with ATSIC Commissioners and Land Council Chairs concerning the development of a series of workshops in regard to constitutional issues. Planning is under way to commence these now that the *Exposure Draft Northern Territory Constitution* has been tabled in the Legislative Assembly.

Until firm constitutional proposals became available, it was not possible to ascertain the level of indigenous support. However, now that the *Exposure Draft Northern Territory Constitution* has been tabled and widely distributed to Aboriginal communities, and the development of public awareness programs is under way, the Northern Territory Government believes that it will shortly be possible to ascertain more accurately the views of Aboriginal people.

Ethnic Groups

The Northern Territory Ethnic Community Council considers the level of understanding of Statehood issues among the ethnic communities could be greatly increased through public education programs tailored to meet the needs of

particular ethnic communities and aimed at the level of understanding of the individuals in those communities.

Consultative Mechanisms Already Available for Public Awareness Programs

The level of popular support for Statehood in the Territory can only be properly assessed when the residents of the Northern Territory have developed a basic level of understanding of what Statehood means and its implications for them as Territorians. The ongoing consultation and public awareness initiatives outlined in the foregoing, together with widespread dissemination of the Legislative Assembly Sessional Committee's Discussion Papers and *Exposure Draft Northern Territory Constitution* should go some way toward achieving this.

In keeping with its role, the Sessional Committee has worked towards promoting community awareness, discussion and debate of constitutional reform. The bipartisan nature of the Sessional Committee has been a factor in its ability to involve many sectors of the community in its activities and to recognise and accept the need for further development of appropriate programs targeting the needs of specific sectors. However, there is a need for greater involvement and participation by other interest groups, forums and stakeholder representatives if the objective of strong public awareness and understanding of the issues is to be fully realised. These parties would include:

- NT Legislative Assembly Sessional Committee on Constitutional Development;
- NT Office of Aboriginal Development;
- NT Office of Ethnic Affairs;
- Aboriginal and Torres Strait Islander Commission;
- ATSIC Regional Councils;
- NT Land Councils;
- NT Ethnic Communities Council; and
- Local Government Councils (including Aboriginal Community Councils).

The Northern Territory's view is that the process would also be enhanced by the direct and visible involvement of the Commonwealth.

4. Options for Assessing Popular Support

Opinion Polls and Surveys

Notwithstanding perceptions as to their credibility, there is clearly a place for objective polling and independently conducted surveys as a means of measuring the performance of, and obtaining feedback on, community education and awareness initiatives used by the various stakeholders and organisations to promote the Statehood issue.

Such polls or surveys could be conducted at strategic intervals, by an agency such as the Australian Bureau of Statistics, during the period leading up to a full Northern Territory referendum in order to determine the level of awareness

of Statehood issues (and therefore whether alternative public education strategies are required) and also to provide an indication of the level of support for Statehood both generally and amongst specific population groups.

Population Survey Monitor

This household survey is conducted by the Australian Bureau of Statistics every three months and collects information from around 2000 households throughout Australia. It is a fast and efficient means of obtaining data with results available six weeks from the time of the survey. Professional assistance is available to facilitate question development, with an opportunity for pilot testing of questions before data collection. The Population Survey Monitor is currently being used by government Departments to ascertain awareness, use and evaluation of Government programs and services, as well as public opinion.

In the event that the issue of Statehood for the Northern Territory was proposed to be put to a national referendum, the Population Survey Monitor may be suitable to ascertain the level of national awareness of proposed Statehood for the Territory and the related issues. Such a survey may be of assistance to ascertain the necessity and scope of information programs which may be required to ensure an informed decision on Northern Territory Statehood on the part of all Australians.

Northern Territory Referendum

The Northern Territory Government is currently considering the recommendations of the Sessional Committee on Constitutional Development for the establishment of a Constitutional Convention as part of a three-stage process for the making of a new State constitution. The final stage of the proposed process is to put the proposed constitution of the Northern Territory, as adopted by the Convention, to a referendum of Northern Territory electors prior to a formal approach to the Commonwealth seeking a grant of Statehood.

Such a referendum appears necessary in the event of the possible grant of Statehood to the Northern Territory, as the ultimate measure of the level of popular support for Statehood, and from a Northern Territory Government perspective, as a means of reassuring Territorians that Statehood is an issue to be collectively decided by Territorians.

5. Summary

The Sessional Committee on Constitutional Development has consulted widely in relation to the complicated issue of Statehood and constitutional development.

With the ideal for Northern Territory residents being an understanding, not just of the constitutional position, but of the basic concept of Statehood and its implications, the consultation process is as yet incomplete and may not have met the needs of all Territorians. Full consultation is not possible unless and until

there are clear proposals for Statehood. Promulgation of clear proposals for Statehood is not as yet possible because:

- (a) the final form of the proposed constitution has not been determined; and
- (b) the terms and conditions upon which Statehood might be available have yet to be determined. Those conditions will depend upon the outcome of negotiations with the Commonwealth.

It is considered essential that all processes leading to Statehood for the Territory are open, frank and honest to ensure not only the support of Territorians but the support of all Australians.

A need has been identified, particularly by the Aboriginal community, for more basic education programs on the meaning of Statehood and its possible direct effects on Northern Territory residents. Education and public awareness programs are essential to ensure all Territorians are in a position to make an informed decision on Statehood.

Aboriginal, ethnic and general community groups must be involved in the development of these programs to ensure they meet the specific and special needs of the various communities, are culturally appropriate and create a sense of "ownership" on the part of all Territorians of the move towards Statehood.

The current level of popular support for Statehood within the Northern Territory is not known with any accuracy. The level of popular support should be assessed with some degree of accuracy prior to the Northern Territory formally seeking Statehood from the Commonwealth.

APPENDIX A

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

SESSIONAL COMMITTEE ON CONSTITUTIONAL DEVELOPMENT TERMS OF REFERENCE

THAT, WHEREAS this Assembly is of the opinion that when the Northern Territory of Australia becomes a new State it should do so as a member of the Federation in terms resulting in equality with the other States with its people having the same constitutional rights, privileges, entitlements and responsibilities as the people of the existing States;

AND WHEREAS in so far as it is constitutionally possible the equality should apply as on the date of the grant of Statehood to the new State;

AND WHEREAS it is necessary to draft a new State constitution;

(1) during the present session of this Assembly - a committee to be known as the Sessional Committee on Constitutional Development, be established to inquire into, report and make recommendations to the Legislative Assembly on:

(a) a constitution for the new State and the principles upon which it should be drawn, including:

(i) legislative powers;

(ii) executive powers;

(iii) judicial powers; and

(iv) the method to be adopted to have a draft new State constitution approved by or on behalf of the people of the Northern Territory;

(b) the issues, conditions and procedures pertinent to the entry of the Northern Territory into the Federation as a new State;

(c) such other constitutional and legal matters as may be referred to it by:

(i) relevant ministers, or

(ii) resolution of the Assembly.

(2) the Committee undertake a role in promoting the awareness of constitutional issues to the Northern Territory and Australian populations;

(3) unless otherwise ordered, the Committee consist of Mr Bailey,

Mr Baldwin, Mr Hatton, Mrs Hickey, Mr Mitchell and Mr Rioli;

(4) the Chief Minister and the Leader of the Opposition, although not Members of the Committee, may attend all meetings of the Committee; may question witnesses; and may participate in the deliberations of the Committee, but shall not vote;

(5) the Chairman of the Committee may, from time to time, appoint a Member of the Committee to be the Deputy Chairman of the Committee and that the Member so appointed shall act as Chairman of the Committee at any time when there is no Chairman or when the Chairman is not present at a meeting of the Committee;

(6) in the event of an equality of voting, the Chairman, or the Deputy Chairman when acting as Chairman, shall have a casting vote;

(7) the Committee have power to appoint subcommittees and to refer to any such subcommittee any matter which the Committee is empowered to examine;

(8) four Members of the Committee constitute a quorum of the Committee and two members of a subcommittee constitute a quorum of the subcommittee;

(9) the Committee or any subcommittee have power to send for persons, papers and records, to adjourn from place to place, to meet and transact business in public or private session and to sit during any adjournment of the Assembly;

(10) the Committee shall be empowered to print from day to day such papers and evidence as may be ordered by it and, unless otherwise ordered by the Committee, a daily Hansard shall be published of such proceedings of the Committee as take place in public;

(11) the Committee have leave to report from time to time and any Member of the Committee have power to add a protest or dissent to any report;

(12) the Committee report to the Assembly as soon as possible after 30 June each year on its activities during the preceding financial year;

(13) unless otherwise ordered by the Committee, all documents received by the Committee during its inquiry shall remain in the custody of the Assembly provided that, on the application of a department or person, any document, if not likely to be further required, may, in the Speaker's discretion, be returned to the department or person from whom it was obtained;

(14) members of the public and representatives of the news media may attend and report any public session of the Committee, unless otherwise ordered by the Committee;

(15) the Committee may authorise the televising of public hearings of the committee under such rules as the Speaker considers appropriate;

(16) the Committee shall be provided with all necessary staff, facilities and resources and shall be empowered, with the approval of the Speaker, to appoint persons with specialist knowledge for the purposes of the Committee;

(17) nothing in these Terms of Reference or in the Standing Orders shall be taken to limit or control the duties, powers or functions of any Minister of the Territory who is also a Member of the Sessional Committee;

(18) the Committee be empowered to consider the minutes of proceedings, evidence taken and records of similar committees established in the previous Assembly; and

(19) the foregoing provisions of this Resolution, so far as they are inconsistent with Standing Orders, have effect notwithstanding anything contained in the Standing Orders.

APPENDIX B

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

SESSIONAL COMMITTEE ON CONSTITUTIONAL DEVELOPMENT PUBLICATIONS AND PROMOTIONAL MATERIAL

Discussion Paper on a Proposed New State Constitution for the Northern Territory, October 1987.

Discussion Paper on Representation in a Territory Constitutional Convention, October 1987.

Discussion Paper No.3, Citizens' Initiated Referendums, August 1991.

Discussion Paper No.4, Recognition of Aboriginal Customary Law, August 1992.

Discussion Paper No.5, The Merits or Otherwise of Bringing an NT Constitution into Force before Statehood, March 1993.

Discussion Paper No.6, Aboriginal Rights and Issues - Options for Entrenchment, July 1993.

Discussion Paper No.7, An Australian Republic? Implications for the Northern Territory, March 1994.

Discussion Paper No.8, A Northern Territory Bill of Rights?, March 1995

Discussion Paper No.9, Constitutional Recognition of Local Government, June 1995.

Information Paper No.1, Options for a Grant of Statehood, September 1987.

Information Paper No.2, Entrenchment of a New State Constitution, October 1989.

Interim Report No.1, A Northern Territory Constitutional Convention, February 1995.

Exposure Draft - Parts 1 - 7: A New Constitution for the Northern Territory and Tabling Statement, June 1995.

Additional Provisions to the Exposure Draft on a new Constitution for the Northern Territory, November 1995.

Proposals for a new State Constitution for the Northern Territory - Have Your Say!, October 1988, (Illustrated plain English booklet).

Vital Step to Statehood, June 1995 (8 part leaflet series).

Constitutional Change in the 1990s - Proceedings of the 1992 Constitutional Conference held in Darwin, Eds: R Gray, D Lea and S Roberts. Published jointly by the Sessional Committee on Constitutional Development, Legislative Assembly of the Northern Territory and North Australian Research Unit, Australian National University, Darwin 1994.

Promotional Video - Untitled, 1989.

Promotional Video - *Vital Step to Statehood - A Northern Territory Constitution, Have Your Say*, June 1995.