

**Northern Territory  
Statehood Steering Committee  
2005-2010**

**Information Paper**

***What Might the Terms and  
Conditions of Northern Territory  
Statehood be?***

## Northern Territory Statehood Steering Committee

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# **Statehood Steering Committee Information Paper: the Terms and Conditions of Northern Territory Statehood**

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## INTRODUCTION

Under its Terms of Reference, the Northern Territory Statehood Steering Committee must provide advice and assistance to the Legislative Assembly Standing Committee on Legal and Constitutional Affairs on matters concerning the Northern Territory's constitutional development and develop strategies and programs for educating the community<sup>1</sup>. The Statehood Steering Committee has no role in direct negotiations or discussions with the Commonwealth Government about the Northern Territory becoming a State.

The Statehood Steering Committee (SSC) conducted its final meeting on 6 December 2010 where the Committee decided to release this Information Paper to inform discussion for the next phase of the Statehood Program.

During the life of the Committee, from 2005 to 2010, the Committee delivered a range of information and education programs across the community. These programs covered many of the issues outlined in this Paper. During 2010 the Committee undertook a program of 50 public information and listening forums called [NT 2011 Towards State 7](#).

This Paper is aimed at promoting community consideration of the kind of State the Northern Territory may become and the role the Commonwealth Parliament and Government has in deciding that.

As part of the SSC's consultation and education program, the Committee understands that people in the Northern Territory may have a limited understanding of the terms and conditions of Statehood.

This is because no government has ever said what these terms and conditions will be.

Will we be an equal State?

Will we have the same level of representation in the Commonwealth as the existing States?

These are questions many people want answered before they decide if they want the Northern Territory to become a State.

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<sup>1</sup> Terms of Reference Northern Territory Statehood Steering Committee 17 August 2004 as amended 24 March 2005 and 30 November 2006 Clause 3.

# PART ONE - Background

## 1. S.121 of the Australian Constitution

New States may be admitted or established under s.121 of the Australian Constitution or by using s.128 of the Australian Constitution to hold a national referendum.

Section 121:

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

The section gives the Commonwealth a very broad power using ordinary legislation passed by both houses of the Australian Parliament to create or admit a new State and decide the terms and conditions upon which that new State may be permitted to be part of the Australian Federation as it 'thinks fit'.

The Statehood Steering Committee took the view that s.121 is the best approach for the Northern Territory to attain Statehood<sup>2</sup>.

Section 121 requires an Act of the Commonwealth Parliament. The alternative is a nation-wide referendum. Section 128 of the Australian Constitution would require a national referendum with a majority of electors in a majority of states agreeing to the proposal with the added complication of a necessary majority in any state that would have its own representation levels in the Commonwealth Parliament impacted upon due to Northern Territory Statehood<sup>3</sup>.

The question remains untested as to whether using s.121 would allow the Commonwealth to reserve (or keep) powers to itself that in the current constitutional arrangements belong to the Original States.

Plainly speaking we need to ask: *Can the Commonwealth make the Northern Territory an 'unequal state'?*

This section looks at the issue of the representation in either House of the Australian Parliament (also referred to as the Commonwealth Parliament).

There has been previous Territory discussion concerning the meaning and interpretation of s.121, but the only way to really test s.121 will be to create or admit a new State. It is feasible (whether likely or not) for the Commonwealth Parliament to create or admit a State with the only terms and conditions being that the new State has the exact same powers and status as an Original State<sup>4</sup>.

It is anticipated however, that the Commonwealth may want to set some terms and conditions that make the Northern Territory different from the Original States, yet

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<sup>2</sup> Submission to the Northern Territory Government May 2006.

<sup>3</sup> Likely as a result of the operation of s.24 of the Australian Constitution.

<sup>4</sup> Creation or admission is covered in detail in Australia's Seventh State by Peter Loveday & Peter McNabb 1988. It is generally considered the Northern Territory will be admitted as a new State rather than established (created) by the Commonwealth.

despite some previous requests, no detail has ever been provided by the Commonwealth.<sup>5</sup>

The previous Sessional Committee of the Northern Territory Legislative Assembly<sup>6</sup> identified two concurrent courses of action for a grant of Statehood to the Northern Territory.

The first was the preparation and adoption by Territorians of a Constitution for the new State and the second was the negotiation of a Memorandum of Understanding between the Territory Government and the Commonwealth Government on the terms and conditions of the new State. The second part remains incomplete, however the first part will commence during 2011 under the stewardship of the Legislative Assembly Standing Committee on Legal and Constitutional Affairs' Constitutional Convention Organising Committee.

It was the role of the Statehood Steering Committee to consider what is acceptable to Territorians and make appropriate recommendations to the Standing Committee on Legal and Constitutional Affairs, a Committee of the Northern Territory Legislative Assembly.

To commence that part of the process, the Statehood Steering Committee published a Discussion Paper in May 2007 entitled *Constitutional Paths to Statehood* where Territorians were asked to comment by the end of 2008. A range of submissions were received, however the Committee determined that the level of community understanding required further effort and the Roadshow Forums were developed for delivery during 2010 ahead of the Constitutional Convention in 2011.

## **2. The Limitations of Self Government as Demonstrated by s.35 of the Self Government Act, s. 50A of the Self Government Act and the Commonwealth's Intervention of June 21 2007**

When it comes to a Territory in the Australian Federal system, what the Commonwealth gives, the Commonwealth may also take away.

Limited self government was granted to the Northern Territory from July 1 1978. This was the day the *Northern Territory (Self Government) Act* came into effect. It is an ordinary law of the Commonwealth Parliament subject to change or repeal at any time by that Parliament.

Since 1978, the *Self Government Act* has been changed on numerous occasions. Some of these are consequential changes, for example the 2006 Work Choices policy was underpinned by new legislation that also amended the *Self Government Act* to give the policy effect in the Northern Territory. In 2009 this was superseded by a new regime called Fair Work Australia. Other changes came about in August 2007 as a result of legislation to support the Commonwealth Government's intervention into 73 Aboriginal Communities in the Northern Territory.

Amendments may also be very direct and aimed specifically at overturning laws that have been passed in the Northern Territory.

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<sup>5</sup> See Media Release issued by the Prime Minister on 11 August 1998 *Statehood for the Northern Territory* which states: "The Federal Government has agreed in principle that Statehood should be granted to the Northern Territory, subject to terms and conditions to be determined by Federal Parliament."

<sup>6</sup> 1989-1997

The *Northern Territory (Self-Government) Regulations 1978* at Regulation 4 spell out the matters in respect of which Ministers of the Territory have executive authority under section 35 of the *Northern Territory (Self-Government) Act 1978*. The existence of the list in the *Regulations* provides an example of the limitations of self government. While it gives the Territory many State like areas of responsibility some normal State areas of responsibility remain only for the Commonwealth when it comes to the Northern Territory.

The Regulation makes it clear that any reference made to mining or land shall not be construed as including or relating to the mining of uranium or other prescribed substances within the meaning of the *Atomic Energy Act 1953* and regulations under that Act as in force from time to time; or rights in respect of Aboriginal Land under the *Aboriginal Land Rights (Northern Territory) Act 1976*.<sup>7</sup>

The passage of an amending Act in 1997 to insert s.50A into the *Northern Territory (Self Government) Act* is an example of a direct intervention to overturn Northern Territory made law. In that instance the Commonwealth Parliament changed the *Self Government Act* to make invalid the Northern Territory *Rights of the Terminally Ill Act* and create an ongoing prohibition so the Northern Territory Parliament may not re-enact such a euthanasia law.

The passage of the *Commonwealth Radioactive Waste Management Act* in 2005 and the newer version in early 2010 is similar in that it cancels Territory law. But it is not precisely the same because it also cancels State law and the construction of a radioactive waste facility for the storage of waste generated by the ANSTO<sup>8</sup> and the transportation of radioactive waste produced by the Commonwealth could occur in any State if the Commonwealth decided to do so.

As stated, the Commonwealth's *Northern Territory National Emergency Response Act 2007* is an example of the Commonwealth using its constitutional powers to amend Northern Territory law and alter Territory Government policy. Powers it does not hold over a State (except for laws within the Commonwealth's legislative power under s51 of the Australian Constitution).

### **3. The 1996 Working Group**

In 1996, a joint Commonwealth/Territory Statehood Working Group, set up to prepare a report on the terms and conditions of the grant of Statehood, delivered the Northern Territory version of its Report to the Territory Government. The *1996 Report*<sup>9</sup> analyses the issues but does not make firm recommendations on terms and conditions.

The *1996 Report* envisages a negotiated settlement on each matter, except possibly for industrial relations where the existing system could continue by way of a referral of power back to the Commonwealth.

The issues explored in the 1996 Report are detailed in Section Six of Part One of this Paper below.

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<sup>7</sup> Sub Clauses 2(a) and 2(b) of *The Regulations*.

<sup>8</sup> Australian Nuclear Science Technology Organisation – which operates the country's sole reactor at Lucas Heights in Sydney.

<sup>9</sup> Northern Territory Statehood Working Group, Final Report. Northern Territory Edition May 1996

It is 15 years since the Northern Territory Government received the Report. The *1996 Report* outlined the then Northern Territory Government's known views on a range of issues including control of uranium mining, control of Uluru and Kakadu national parks and royalty equivalency arrangements upon Statehood.

While there are constitutional doubts as to whether the Commonwealth can continue its present controls in matters such as uranium mining, land rights and some national parks following a grant of Statehood, there is no doubt the Commonwealth will enjoy control of these so long as the Northern Territory remains a Territory.

The *1996 Report* provides a basis for consideration of how to re-commence discussion with the Commonwealth about these key issues. It also reminds us that the views of the Northern Territory Government may be different in 2011.

In 2006 the SSC asked the Northern Territory Government to re-visit its policy stance on these matters. Since then the Minister for Statehood has commenced discussions with the Government in Canberra.

Despite interim changes to Commonwealth legislation impacting on the Territory under the Self Government arrangements<sup>10</sup>, the *1996 Report* contains information on a range of matters which is remarkably current.

The Statehood Steering Committee's previous Legal Adviser Mr Graham Nicholson stated in a brief to the Committee in 2007:

*The Final Report of the NT Statehood Working Group remains the most comprehensive document discussing possible terms and conditions of Statehood and related issues, but there is no draft Memorandum of Understanding on same nor any informal agreement between the two Governments on same. Virtually all such issues have yet to be politically discussed and resolved by agreement between the two Governments. The Final Report is largely still relevant today, and forms a good basis for new negotiations with the Commonwealth, but it is only a first step to resolving the outstanding issues.*

#### **4. 1998 Statements by the Minister for Territories**

On August 11 1998 then Minister for Territories, Mr Alex Somlyay, addressed the Northern Territory Legislative Assembly about the Commonwealth's plans for Statehood in the Northern Territory.

The speech was intended to lay the foundations for a forthcoming referendum; however it received some criticism by then Northern Territory Opposition members for its lack of detail about the terms and conditions of Statehood.

Mr Somlyay said:

*At this very moment in Canberra, our national capital, the Prime Minister, Hon John Howard, and the Chief Minister of the Northern Territory, Hon Shane Stone, are jointly announcing that the Commonwealth government has agreed, in principle, that Statehood should be granted to the Northern Territory. This is a historic announcement, not just for those Territorians who, for many years, have been striving for Statehood, but for all Australians. This announcement represents the first*

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<sup>10</sup> 'Workchoices' for example amended the *Self Government Act*.



*occasion, since federation, when real steps have been taken towards the creation of a new state. It is a moment of which we should all be proud*<sup>11</sup>.

The Statehood Steering Committee took the view that 'in principle support' for Statehood is not going to be enough for Territorians to be in a position to make an informed decision about becoming a State. How the place looks, works and performs as a political entity is a crucial element of the decision making that needs to take place.

The Statehood Steering Committee noted the then Minister took the view: *The Commonwealth government's preferred process for the grant of statehood is by an act of the Commonwealth parliament in accordance with section 121 of the Constitution. This section of the Constitution empowers the Commonwealth to establish new states and to impose such terms and conditions, including the extent of representation in either House of the federal parliament, as it thinks fit.*

As indicated in Section One above, this approach appears to be the most desirable method rather than attempting to achieve nationwide support for a s.128 referendum.

Then Minister Mr Somlyay's next words indicate much more work was required in 1998, just as it is today:

*I assure all members and all Territorians that any terms and conditions of statehood will be subject to full consultation and negotiation. As honourable members will be aware, there are many conflicts and sensitive issues that need to be debated and negotiated as we enter this final phase. These are issues such as Aboriginal land rights, the payment of mining royalties, the ownership of uranium, environmental control of uranium mining, the management of the 2 Commonwealth national parks, industrial relations powers, Senate representation and the future government's arrangements for the Indian Ocean territories.*

In response to the Commonwealth Minister's statement, then Territory Opposition Leader Ms Maggie Hickey said:

*The Minister mentioned the key issues that are left outstanding in relation to the terms and conditions upon which statehood will be granted by the Commonwealth. I had hoped that the minister would use this opportunity today to shed some light on the status of these discussions. The terms and conditions of the grant of statehood are crucial. Notwithstanding the minister's speech, there is still no detail on what the proposed terms will be*<sup>12</sup>.

History tells us that plans to continue discussions between the Territory and the Commonwealth were not advanced by the time the people of the Territory were asked to vote on Statehood in a three part question at a referendum in 1998. The Statehood Steering Committee has noted the then Minister's comments below and at its final meeting in 2010 re-stated its position that the consultation and negotiation to which he referred must be completed ahead of any future referendum.

Mr Somlyay:

*I look forward also to consulting with the Northern Territory community and negotiating with the Northern Territory community and the Northern Territory government over the coming months. These discussions are very important as, in*

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<sup>11</sup> Eighth Assembly First Session 11/08/98 Parliamentary Record No:8

<sup>12</sup> Northern Territory Legislative Assembly Hansard 11 August 1998

*many respects, they will be the foundation of statehood. The discussions will address in precise terms the process for achieving statehood, the timetable for achieving statehood, possible terms and conditions of statehood, and the draft constitution for the new state.*

There has been little public comment from the Commonwealth since that time. During July 2008, then Commonwealth Minister for Home Affairs the Hon Bob Debus attending the launch of a Statehood awareness campaign in conjunction with 30 years of Self Government restated the view that the people of the Territory need to demonstrate their support for Statehood before the Commonwealth will come on board.

## **5. The 1998 Statehood Referendum**

A thorough analysis of the 1998 referendum was published by the Legislative Assembly Standing Committee on Legal and Constitutional Affairs in 1999<sup>13</sup>.

The referendum question put to the voters of the Northern Territory on 3 October 1998 was as follows:

*Now that a constitution for a State of the Northern Territory has been recommended by the Statehood Convention and endorsed by the Northern Territory Parliament: Do you agree that we should become a State?*

The referendum was conducted on the same day as the 1998 federal election, thus requiring the permission of the Governor General of the day to hold it in conjunction with a national poll to elect a Federal Government.

The referendum was not accompanied by a published 'No Case' as there had been no official negative position taken by any member of the Northern Territory Legislative Assembly.

The question was ratified by the Assembly some months prior. During the debate the Assembly rejected a proposal the question be broken into three distinct questions and instead opted for one question which in essence was made up of three parts.

In order to receive a 'yes' vote the question assumes support not just for Statehood as a concept, but also for a draft constitution that had been formulated in controversial circumstances as well as support for the Statehood convention process that developed the draft constitution which itself had attracted a great deal of criticism about the representatives appointed to attend.

Whilst the 'no' vote was not a resounding defeat (51.3%) it nevertheless demonstrates the difficulty of a multi faceted question receiving widespread support when aspects of the process remained controversial and unresolved and were well scrutinised by media and interest groups leading up to the final poll.

The Statehood Steering Committee held the view that the next referendum on Statehood should not seek approval for a multi faceted question.

Between May and August 2007, the SSC ran a mock referendum on the Territory Show Circuit. The Australian Electoral Commission conducted the poll for the

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<sup>13</sup> *Report Into Appropriate Measures to Facilitate Statehood* April 1999 Printed by the Legislative Assembly on 27 April 1999

Committee asking three separate questions. The Committee published a yes case and a no case and asked over 800 Territory residents to vote on the questions.

The Committee was interested in how the exercise would be received and trialling potential questions that would not necessarily be the form of questions that may be asked in the future on Statehood.

The 2007 Mock Referendum process and results are examined in more detail in Part Three of this Paper

## **6. Statehood Steering Committee Submission to the Northern Territory Government**

The Statehood Steering Committee made a submission to the Northern Territory Government in 2006 which suggested the Territory Government commence government to government discussion in order to engage the Commonwealth on developing and delivering on the policy of the terms and conditions of Statehood.

This approach bore fruit with the creation of the portfolio of Minister for Statehood, with the Hon Syd Stirling MLA taking on the role of Minister from 1 September 2006 until his retirement from the position on 26 October 2007. The subsequent Minister for Statehood was the Hon Paul Henderson MLA as Minister for Territory Federal Relations followed by the existing Minister, the Hon Malarndirri McCarthy MLA.

During May 2006 the Statehood Steering Committee formally proposed to the Standing Committee on Legal and Constitutional Affairs that they recommend the Territory Government take the lead in approaching the Commonwealth on the s.121 terms and conditions of Statehood.

It is hoped this paper will not only inform Territorians, but also support the Government's development of policy positions on the terms and conditions issues.

As outlined previously, s.121 allows the Commonwealth Parliament to admit to the Commonwealth or establish new States; *on the terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit.*

The Committee advised the Territory Government that the Territory Government should consider its own position and that it should formally state the first principle upon which Territory Statehood is established should be future (or eventual) equality with the existing States.

The Committee was concerned that the Commonwealth has not moved past a position it reached in 1998, which necessitates the Territory taking a lead role on this front.

The position since 1998 arose from the following process:

On 5 March 1997, the then Minister for Territories advised then Chief Minister Stone an Interdepartmental Committee (IDC) had been established chaired by the Secretary of the Department of Sport and Territories with representatives from the Prime Minister's and Attorney General's Departments.

Seven specialist taskforces were established to assist the IDC:

1. Legal and Constitutional Affairs (including representation)

2. Indigenous Issues
3. Environment, National Parks and Commonwealth Land
4. Uranium Mining
5. Commonwealth Territories
6. Industrial Relations
7. Financial Implications

The proposal was for the taskforces to report to the IDC and for the IDC to in-turn brief the Cabinet later in 1997. The information was gathered to assist with establishing the Commonwealth's position and provide the basis for the Commonwealth to engage in formal discussions with the Territory Government.

As noted above, the 1998 statements by the Commonwealth left many details unattended to, and it is unfortunate the Commonwealth thought the people of the Northern Territory could vote in a vacuum about Statehood when the people clearly were voting for the unknown.

### **7. Statehood Steering Committee Submission to Commonwealth Committee and Commonwealth Committee Report 2006/2007**

At its fifth meeting for the session (1 March 2006), the Legislative Assembly Standing Committee on Legal and Constitutional Affairs requested the Northern Territory Statehood Steering Committee prepare a submission to the House of Representatives Committee on Legal and Constitutional Affairs in relation to the Commonwealth Committee's reference on the Federal implications of Statehood for the Northern Territory.

As a result the Statehood Steering Committee took the following positions to the Commonwealth:

1. The Northern Territory is not democratically governed because of the ability of the Commonwealth to override decisions of an elected Northern Territory Government.
2. Statehood for the Northern Territory must mean eventual equality with the existing States. Anything less than an equal partnership with the other States in the federation would be unacceptable to most Territorians.
3. Territorians want to know exactly what they would be agreeing to in any future plebiscite or referendum about Statehood.
4. An agreed process to determine any terms and conditions is important and should be adopted. The process should include realistic time frames for planned outcomes. Such an agreement will assist the Northern Territory to make budget allocations for timely education programs, plebiscites and other requirements and will identify benchmarks against which citizens may assess the progress being made. The previous Northern Territory Committee recommended the negotiation process should go hand in hand with Territory constitutional development.
5. The SSC wants the Commonwealth to be clear about its intentions for Northern Territory Statehood. Does the Commonwealth agree the Northern Territory should become a State? There is no point raising awareness and expectations of Territorians if there is nothing to be gained.

It is apparent from the process in the 1990's that the Commonwealth anticipates there will be some terms and conditions differentiating the Northern Territory from the original States, however, as mentioned, the Commonwealth has never disclosed any detail.<sup>14</sup>

The Commonwealth may decide to retain some of their existing powers without relying upon the s.121 terms and conditions power. If the Commonwealth determines to do this under other heads of constitutional power, it is submitted that the Commonwealth should disclose this during negotiations on the terms and conditions of Statehood.

If a position of absolute equality was adopted, the process would involve handing over all powers currently reserved according to the *Northern Territory Self Government Act*, and the commencement of immediate planning for increased Commonwealth parliamentary representation for the Northern Territory.

Statehood related issues such as action taken with regard to the siting of a national radioactive waste facility in the Northern Territory and the legislation implementing the Commonwealth's intervention in the Northern Territory in August 2007<sup>15</sup> are politically sensitive and have resonated with the electorate.

Whilst an immediate adoption of absolute equality by the Commonwealth is unlikely<sup>16</sup>; the Statehood Steering Committee always contended that eventual equality should be the focus of any process toward Statehood for the Northern Territory

There is a clear difference between the processes for negotiating and implementing the terms and conditions of the proposed grant of Statehood on the one hand, and for preparing, adopting and implementing the new State Constitution on the other hand.

In accordance with democratic principles, Territorians should contribute to the formation and content of both the Constitution and the Terms and Conditions.

This should not be a matter for Commonwealth dictation. Once Territorians decide on the content of a new State Constitution in accordance with our own processes, it is then for the Commonwealth Government and Parliament to decide whether to accept or reject it.

There might be some potential for limited overlap between the content of the new State Constitution and the agreed terms and conditions of the Statehood grant. Any attempt by the Commonwealth to autocratically impose unacceptable terms and conditions, particularly if they are in conflict with the new State Constitution, would be undesirable.

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<sup>14</sup> See Media Release issued by the Prime Minister on 11 August 1998 *Statehood for the Northern Territory* which states: "The Federal Government has agreed in principle that Statehood should be granted to the Northern Territory, subject to terms and conditions to be determined by Federal Parliament."

<sup>15</sup> Northern Territory National Emergency Response Act 2007

<sup>16</sup> The Statehood Steering Committee holds copies of Commonwealth generated documents (such as media releases) referring to the need to resolve the terms and conditions, but no documents which indicate the principle of equality with the existing States is the objective.

## **8. The Minister for Statehood's Meeting with the Commonwealth Attorney General February 2007**

The then Northern Territory Minister for Statehood, the Hon Syd Stirling MLA and the then Shadow Minister for Statehood, Mr Terry Mills MLA<sup>17</sup> travelled to Canberra on 6 February 2007 to meet with then Commonwealth Attorney General the Hon Philip Ruddock MP and then Minister for Territories the Hon Jim Lloyd MP to commence discussions with the Commonwealth Government on the terms and conditions of Northern Territory Statehood under s.121 of the Australian Constitution.

The Minister for Statehood outlined the reasons for the joint meeting request making it clear the Northern Territory Government and Northern Territory Opposition have a bipartisan approach to Northern Territory Statehood. When Mr Ruddock asked what the prior approach was; the Minister and the Shadow indicated whilst notionally bipartisan, the fresh approach was a much stronger bipartisan approach.

The Territory Minister stated the Commonwealth must be a key player in the issue of Northern Territory Statehood and the Commonwealth should engage on the terms and conditions of what Statehood is at the same time as the Northern Territory works on local issues such as constitutional development.

The Shadow Territory Minister supported the Territory Minister's views.

Mr Ruddock indicated the Northern Territory needs to drive the process and the Commonwealth will need to be convinced that the Northern Territory wants Statehood. Mr Ruddock stated that the Commonwealth needs convincing that there has been a shift in the Northern Territory in favour of Statehood.

The Territory Minister indicated a need for a Commonwealth process to work in parallel with the Northern Territory process to ensure that Statehood could be achieved. This was not supported by the then Commonwealth Attorney. The serving Attorney General Mr Robert McClelland has not publicly indicated any progress on this matter.

Therefore the SSC decided that this is now up to Territorians.

At the time of writing, the Attorney General is the Hon Robert McClelland MP and while territories responsibility comes within the portfolio of the Minister for Home Affairs and Justice (Hon Brendan O'Connor MP), the Minister for Regional Development the Hon Simon Crean MP has responsibility for the *Northern Territory Self Government Act*. Former Statehood Steering Committee Chairman the Hon Malarndirri McCarthy MLA is the Territory Minister Statehood.

The terms and conditions of Statehood and discussions at the government to government level are in the hands of the two governments, but that does not mean Territorians should leave it to the governments. Territorians should have a role to get involved and influence the outcome.

It is hoped this document will assist government to government engagement and provide guidance on the issues to be resolved by the two parties in order for the

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<sup>17</sup> Also a member of the Statehood Steering Committee.

Northern Territory to eventually take its place as a partner in the Australian Federation.

## PART TWO Discussion Topics

### 1. 'New Federalism'

Australia's federal state relations have been in the spotlight in recent years due to high profile public policy debates such as the former Commonwealth Government's workplace relations laws.

On 24 November 2007, the incoming Prime Minister the Hon Kevin Rudd MP announced in his victory speech:

*I want to put aside the old battles of the past...the old and tired battles between federal and state...its time for a new page to be written in our nation's history.*

This stance reflects comments during the election campaign that the government was interested in cooperative federalism.

Statehood for the Northern Territory represents a key opportunity for the people of the Northern Territory to continue to test the Commonwealth Government on productive partnerships in the Australian federal system by assisting the Territory make its own decisions about Statehood based on an informed policy position developed by the Commonwealth and made known to all Australians about what the terms and conditions of Northern Territory Statehood would be.

Federalism works and works well when it is allowed to promote regional and local solutions for local and regional problems and allows policy innovation to flourish within a unified but diverse structure.

Deciding who does what best and how the States and the Commonwealth determine their roles and responsibilities is a key opportunity provided by our consideration of Statehood.

The head of the Commonwealth Attorney Generals Department, Mr Roger Wilkins a former senior executive with *CitiGroup* and a member for the Forum of Federations<sup>18</sup> wrote in October 2007:

*Currently the roles and responsibilities of federal and state levels of government are unclear. This is a function of two long term trends. First in a series of decisions the High Court has removed any real restrictions or limits on Commonwealth power...Second, politicians, both state and federal have not been prepared to address this issue in any sort of principled or systematic way<sup>19</sup>.*

Mr Wilkins advocates a process for clarifying the role through concerted policy action at the Council of Australian Governments (COAG) level rather than a more abstract 'grand plan'. The principle that government is accessible and accountable to those affected by its decisions should have a key role to play in determining who is responsible for service delivery.

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<sup>18</sup> International think tank based in Ottawa Canada [www.forumfed.org](http://www.forumfed.org)

<sup>19</sup> Australian Review of Public Affairs University of Sydney  
[www.australinreview.net/digest/2007/election/wilkins.html](http://www.australinreview.net/digest/2007/election/wilkins.html) 10 October 2007.



The Statehood Steering Committee considered this a key part of the Territory taking responsibility at the local level in the devolution of some federal powers to the Territory level upon Statehood, whilst at the same time building on the Australian nation building principle of working cooperatively.

Professor Anne Twomey says Australians have been brought up to regard federalism as an archaic, inefficient and uncompetitive encumbrance that is holding us back economically and socially, yet elsewhere in the world federalism is considered flexible and competitive in a global economy<sup>20</sup>.

The key to good federalism is to satisfy local needs in a cohesive and efficient structure. The SSC believed Statehood for the Northern Territory will strengthen Australia's federalism for the 21<sup>st</sup> century.

## **2. The Demise of the States?**

The Statehood Steering Committee was asked on numerous occasions why the Territory would seek Statehood in an increasingly "centrist" environment where the Commonwealth Government appears to be moving to take over more power from the States.

A range of examples such as the Commonwealth seeking to assume central power of the water flows of the Murray River, the Commonwealth taking over control of the Mersey Hospital in Tasmania in 2007 (which was being closed by the State Government after a review of local needs) and the 2010 announcements about taking more control of health funding and the introduction of a national curriculum and student testing.

The simple answer is the Northern Territory should aim to be an equal partner in Australian federalism.

Abolition of the States would require enormous constitutional shifts and whilst feasible, it is unlikely to gain widespread support in the short to medium term. On that basis, the Committee took the view that Territorians should work with the structures we have and improve on them.

At the moment, the Territories have no constitutional power to be a player in the decisions, negotiations and battles that may see states' powers decrease further in our federal system.

The book *Restructuring Australia*<sup>21</sup> details a range of plans for the abolition or re-formation of the States. However the consideration of such concepts fell outside the Terms of Reference of the Statehood Steering Committee.

## **3. Commonwealth Interventions in States**

On 21 August 2007, then Prime Minister Hon John Howard in a key pre-election campaign speech talked about embracing: *a sense of inspirational nationalism to guide relations between different levels of Government in Australia.*<sup>22</sup>

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<sup>20</sup> Anne Twomey *Federalism – The Good, the Bad and the Opportunities* Australian Policy On-Line 26 April 2007.

<sup>21</sup> Citation Needed - Federation Press

<sup>22</sup> Speech published in the Sydney Morning Herald 21 August 2007: *A New Creed: Nationalism, Aspirations and Fairness*

The then Government's actions in the Northern Territory were fresh as the *Northern Territory Emergency Response Bill* had only just passed through the Commonwealth Parliament and the action taken to acquire the Mersey Hospital in Tasmania was then very recent.

The hospital takeover and the Commonwealth Intervention in the Northern Territory saw the Commonwealth taking direct service delivery responsibility for a number of services traditionally within the responsibility of the States and self-governing Territories.

Time will tell whether the Commonwealth has the capacity to undertake efficient service delivery in these areas. On 3 March 2010 then Prime Minister Rudd announced a new policy on Health to require either all States to agree or a referendum under S.128 for the people to give the Commonwealth the power to directly administer hospitals instead of the States. All States except for Western Australia eventually agreed to the proposal. At the time of writing there is speculation that a new Government in Victoria may not proceed with their part of the agreement.

A very famous example of Commonwealth intervention into a State was the Franklin Dam case in the early 1980's. The new Commonwealth Government took office in March 1983 with a commitment to prevent Tasmania building a dam that would flood an environmentally significant river valley and caves with Aboriginal artistic and cultural significance.

The State Government fought the intervention through the High Court and lost. The High Court accepted the Commonwealth's constitutional powers over heritage and external affairs overrode State power.

In 2006 the High Court also accepted the constitutional validity of the Commonwealth's take-over of State industrial relations powers, under the constitutional power of legislating for 'corporations'.

Interestingly, the Commonwealth declined to pursue further action in June 2004 after losing a fight in the Federal Court to acquire land for the site of a radioactive waste facility in South Australia. The Commonwealth lost because it had not followed the correct process for acquisition under the *Land Acquisition Act 1989* not because of any State supremacy. The Commonwealth has power to acquire land through just process within the States and must pay fair compensation. When it comes to the acquisition of Territory land it has recently been decided this also applies here<sup>23</sup>.

The Commonwealth's power to intervene in States is strong but not limitless, whereas in a Territory that power would appear to be almost without limit (as to subject matter) by virtue of s.122 of the Australian Constitution<sup>24</sup>.

#### **4. Commonwealth interventions in Self Governing Territories**

During 2005 the Commonwealth legislated to place a radioactive waste facility in the Northern Territory despite the wishes of the Territory Government and a Territory law

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<sup>23</sup> The High Court decided in the case of *Wurridjal v Commonwealth* in February 2009 that notwithstanding this power the Commonwealth has an obligation to pay 'just terms' compensation for the acquisition of land in the Northern Territory (at least from non-government entities).

<sup>24</sup> As per FN 22.

called the *Nuclear Waste Transport Storage and Disposal (Prohibition) Act 2004* which prohibits such a facility.

The *Commonwealth Radioactive Waste Management Act 2005* allowed the Commonwealth to by-pass the Northern Territory Government and deal directly with Northern Territory Land Councils about the site of a proposed radioactive waste facility. The legislation also specifically removed any right to judicial review of Commonwealth decisions under the new law. In March 2010 the Minister for Energy and Resources Hon Martin Ferguson MP announced that the Government would place the facility at Muckaty Station near Tennant Creek.

The 2010 change to the Commonwealth law repeals the 2005 Act and designates Muckaty Station as the site for the facility and negates all Territory law that would inhibit that decision.

Statehood may not prevent radioactive waste being placed in a State; however States may have some capacity to prevent the storage of overseas waste on their land<sup>25</sup>.

It is worth noting that the original decision not to proceed with South Australia was taken a few months out from a Federal Election and South Australia as a State has 12 Senate and 11 Representative seats. Marginal seat considerations may have influenced the Commonwealth's decision. The Northern Territory's two Senate and two Representative seats make the Territory an easier political target for unpopular measures.

In May 2006, the Australian Capital Territory legislated to recognise same sex relationships. The Commonwealth soon after had the ACT legislation disallowed by the Governor General. A further attempt at a modified Bill in 2007 was abandoned by the ACT Assembly after the Commonwealth told them it would respond in the same manner. A subsequent ACT initiative to introduce a relationships register has been allowed to stand.

The Australian Constitution gives power over marriage to the Commonwealth<sup>26</sup>. The Commonwealth has legislated that marriage is between a man and a woman. The ACT proposal argued its policy did not mimic marriage and was well within power but the Commonwealth determined not to support the proposal as a matter of policy. The ACT Government argued that they had disclosed to the electorate their intentions to legislate to recognise same sex relationships prior to the previous ACT general election.

During 2006 a proposal that the administrative arrangements for Norfolk Island would see Islanders paying tax and losing their duty-free status was considered but abandoned by Government at the last minute. The Commonwealth looked certain to intervene into the governance of the island based on an analysis of the island's system of governance as being unsustainable, as it has no capacity to service its health and education requirements from its tax base. The Commonwealth wanted to see Norfolk Island's contribution to revenue put on par with the rest of Australia.

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<sup>25</sup> See Statehood Steering Committee Fact Sheet 22 at [www.statehood.nt.gov.au](http://www.statehood.nt.gov.au) (publications)

<sup>26</sup> Constitutional Law expert Professor George Williams has argued that same sex marriage may be within power for the States given there was no contemplation of same sex marriage at the time of the drafting of the Australian Constitution.

The Commonwealth introduced a Bill into the Parliament in 2010 to limit Norfolk Island Self Government. The Bill implements many of the proposed 2006 reforms.

The wishes of the Northern Territory have not always been respected in terms of Commonwealth decisions over our administration. Without any consultation, the Commonwealth announced a significant intervention on 21 June 2007.

The subsequent *Northern Territory National Emergency Response Bill* passed through Parliament in August that year and cemented Commonwealth powers over a range of normally State-like functions in the Northern Territory.

On its face the legislation requires Territory Public servants to be subject to direction by the Commonwealth as well as Territory Ministers with Commonwealth direction prevailing. In practice the process is less confusing than this appears, however part of the intent of the legislation might be seen as a clear indication of superior power from the Commonwealth to remind the Territory jurisdiction of the ability of the Commonwealth to enter the field when it thinks fit to do so and with no consultation required. This is a take over of areas of responsibility which the Commonwealth could not so easily undertake in a State.

**Comment [b1]:** As a broad and general statement, this has the potential to mislead. More detailed reference to the effect of the legislation as regards “Territory Public servants” and “Territory Ministers” is appropriate.

As the then Prime Minister said the day after the announcement: *Why now and why in the Northern Territory? ....because we can*<sup>27</sup>.

## 5. Land Matters in the Northern Territory

The Northern Territory Government in its 1989 submission to the Commonwealth on the further transfer of power to the Northern Territory took the view that all land held by the Commonwealth in the Northern Territory should be transferred to the Northern Territory Government at no cost with the Commonwealth only retaining land as agreed between the parties where it was required for Commonwealth purposes<sup>28</sup>.

The Statehood Steering Committee has previously advised the House of Representatives Standing Committee on Legal and Constitutional Affairs that it takes the view the Territory and Commonwealth Governments should negotiate an in-principle agreement on future ownership of Commonwealth land in the Northern Territory immediately and well in advance of anticipated Statehood.

There has been a long history of discussion about which jurisdiction should exercise legislative power over Aboriginal land currently administered under the *Aboriginal Land Rights (Northern Territory) Act (ALRA)*.

During the 1980s the then Northern Territory Government published an options paper entitled *Towards Statehood: Land Matters upon Statehood*<sup>29</sup> which reflected their policy of patriation<sup>30</sup> of the ALRA upon Statehood. The options paper outlined three ways of patriating the ALRA.

The first was to provide the ALRA becomes a law of the new State upon Statehood, the second was to repeal the ALRA in the Commonwealth Parliament and to enact a

<sup>27</sup> See Statehood Steering Committee Newsletter no 2 July 2007. [www.statehood.nt.gov.au](http://www.statehood.nt.gov.au) (publications)

<sup>28</sup> Background Brief refers to Page 67 of the *1996 Report*.

<sup>29</sup> Northern Territory Government, November 1986

<sup>30</sup> The term patriation is used to indicate the natural ‘home’ of the law is the Northern Territory, however it cannot be ‘re-patriated’ as it has never been located as part of the local law.

revised ALRA in the Northern Territory Assembly with transitional provisions as required and the third was to allow for continued Commonwealth administration for a specified period of time to enable the Territory Assembly to pass its own laws and then move the administration of Aboriginal land in the Territory to the Territory Government.<sup>31</sup>

The previous Sessional Committee of the Territory Assembly published a discussion paper examining Aboriginal land issues in 1993.<sup>32</sup> The Sessional Committee took the view: *that no lasting constitutional settlement can occur in the Territory without some appropriate recognition of the importance of land to Aboriginal people in the Territory as the indigenous inhabitants.*<sup>33</sup> Things have moved on in the past 18 years, with the commencement of the *Native Title Act* which has a national application.

After dismissing the notion that all Aboriginal land should be absorbed into ordinary freehold title, the Sessional Committee examined patriating the ALRA.<sup>34</sup> The Sessional Committee took the view that patriation of the ALRA should not occur without adequate constitutional guarantees sufficient to protect Aboriginal interests. However, the Sessional Committee was adamant that subject to such guarantees, the Commonwealth should treat the Northern Territory on an equal basis with the existing States, so that once power was transferred, the new State constitutional provisions would apply and the Territory Parliament could legitimately alter the ALRA subject to the accepted constitutional requirements.

The *1996 Report* examined the need for more education and information for Aboriginal Territorians about these issues: *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. 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*<sup>35</sup>.

The position of the Territory Government in 1996 was to take part in an inclusive and consultative process. The Statehood Steering Committee took the view the subsequent 1998 Constitutional Convention process was unfortunately deficient in implementing that intention.

The intentions of the Northern Territory Government today in relation to Aboriginal participation in the Statehood process have been expressed in the reference provided to the Standing Committee on Legal and Constitutional Affairs on 18 June 2003 where the then Chief Minister stated: *A central principle for the Northern Territory to achieve Statehood is the respect for and proper recognition of the indigenous people of the Territory and that the indigenous people are to be involved in all stages of the process.*<sup>36</sup>

Aboriginal organisations in the Northern Territory, particularly the land councils have however indicated to the SSC that the 1998 *Indigenous Constitutional Strategy*

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<sup>31</sup> Ibid p 6-7

<sup>32</sup> Legislative Assembly of the Northern Territory Sessional Committee on Constitutional Development Discussion Paper No 6 *Aboriginal Rights and Issues – Options for Entrenchment* July 1993

<sup>33</sup> Ibid p 12

<sup>34</sup> Ibid p 13

<sup>35</sup> *1996 Report* page 41

<sup>36</sup> Terms of Reference Northern Territory Statehood Steering Committee 17 August 2004 paragraph (d) page i

Document<sup>37</sup> arising from the Aboriginal Constitutional Conventions at Kalkaringi and Batchelor is very much a living document and the Government's lack of action on a number of fronts concerns them.

The *Constitutional Strategy* specifies the need for a 'framework agreement' as a prerequisite to further constitutional advancement.

Whilst it appears the land councils are willing to revisit the requirements stated in that document as a prerequisite to Statehood,<sup>38</sup> the statements contained therein appear to remain their starting position. These matters were discussed at many of the 2010 Roadshow Forums.

The *Indigenous Constitutional Strategy* states: *That the Aboriginal Land Rights Northern Territory Act 1976 must remain Commonwealth legislation administered by the Commonwealth.*<sup>39</sup>

The Committee did not seek the views of the Territory Government as to whether they feel the ALRA must be patriated to the Territory upon Statehood. As part of discussions and the 2010 public forum campaign the Committee informed participants how the system works now and that whether the ALRA will come under the administration of the Territory upon Statehood is not yet settled.

The *1996 Report* states: *Patriation of the ALRA would require consultation and negotiations between the Commonwealth and the Northern Territory Government and indigenous people to identify fundamental provisions which they consider require protection and the extent and nature of any constitutional protection.*<sup>40</sup>

Detailed negotiation should be undertaken at a government to government level involving the relevant interest groups.

## **6. National Parks in the Northern Territory**

The Commonwealth controls and maintains Kakadu and Uluru - Kata Tjuta National Parks while the Northern Territory Government controls and operates around ninety other national parks.

Outside of Jervis Bay, these are the only national parks, under the direct administration of the Commonwealth on the Australian mainland.

Leasing agreements are in place between traditional owners and the Commonwealth to allow the land in question at Kakadu and Uluru to be operated as National Parks. The transfer of the lease agreements and ongoing maintenance is a matter for discussion in the context of Northern Territory Statehood.

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<sup>37</sup> Indigenous Constitutional Strategy Northern Territory, Incorporating: The Kalkaringi Statement; Constitutional Convention of the Combined Aboriginal Nations of Central Australia, Kalkaringi 17-20 August 1998 and Resolutions of the Northern Territory Aboriginal Nations on Standards for Constitutional Development Northern Territory Indigenous Constitutional Convention, Batchelor College 30 November – 4 December 1998. Published 1999 by ATSIC, the Central Land Council and the Northern Land Council.

<sup>38</sup> The SSC has met the Northern Land Council and the Central Land Council on separate occasions to commence discussions on the content of the *Indigenous Constitutional Strategy* document and to seek any update on the position of the land councils given eight isn't it more than 8 years?? years have elapsed since the councils considered the issue of Statehood in detail.

<sup>39</sup> Page 8

<sup>40</sup> Page 45

It is apparent the Commonwealth could enact laws for the conservation and protection of much of the natural environment and Aboriginal heritage in existing parks supported by various heads of Commonwealth power, particularly ss.51(i), 51(xx), 51(xxvi) and 51(xxix) of the Constitution, but it seems this would probably not extend to ongoing management of national parks in a future State unless included in the terms and conditions.

The Commonwealth needs to determine as a matter of policy whether it wishes to retain control over the two subject national parks as a term or condition of Northern Territory Statehood or whether it would transfer the land held on its behalf by the Director of National Parks to the Northern Territory along with the assignment of any lease from traditional owners.

The Committee felt that the Northern Territory having equal status with the existing States should be considered in this context. This does not mean the Northern Territory may not agree to a negotiated process or agree to the administration of these two national parks by the Commonwealth. Any decision should be by proper mutual agreement.

The 1987 Northern Territory Options Paper on National Parks<sup>41</sup> outlines administrative arrangements that remain remarkably current.

The Ashmore and Cartier Islands are Commonwealth territory separate to the Northern Territory and have been since self government in 1978. The Northern Territory has previously been vocal about the 'loss' of these islands, however not for some years.

Twenty years ago, a Commonwealth Parliamentary Committee recommended the islands be incorporated into the Northern Territory. The Commonwealth responded at the time by stating it would consider the recommendation in the context of Northern Territory Statehood.

The Committee took the view there is no need for the Commonwealth to wait. There is nothing to prevent the Commonwealth coming to a conclusion on this issue in consultation with the Northern Territory and making a public decision to either incorporate the islands into the Northern Territory now or to the new State, if and when Statehood occurs, or to retain them as Commonwealth territory into the future.

The views of Territorians are important for further consideration of these land and parks issues.

## **7. Minerals in the Northern Territory**

Mining earns more than any other industry in the Northern Territory. According to the Minerals Council, the Territory's mining and mineral processing industries contribute at least \$4.1 billion in value of production each year.

Royalties to the NT Government are around \$48 million and a further \$3.1 million is paid by the Commonwealth Government as a grant in lieu of uranium royalties. Offshore oil and gas falls under the Commonwealth Government's jurisdiction.

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<sup>41</sup> Ibid

The vast majority of the Territory's exports are from the resource industry. Mining in the Territory is a growth industry and provides direct employment for many thousands of people. Indirectly, mining is estimated to provide 10,000 jobs.

Should the Northern Territory control all its resources? Any change to current arrangements may not be automatic upon Statehood.

They will be negotiated as a part of the terms and conditions the Commonwealth and the Northern Territory discuss when setting the conditions for Territory Statehood.

The *Mineral Royalty Act* (NT) levies a royalty on mineral commodities that applies to most mines and mineral commodities in the Northern Territory with the exception of quarries for extractive minerals, uranium mines and mines operating under specific royalty agreements. Mining royalties in the NT are a flat 20% of profits not 'ad valorem' as in other jurisdictions. With various tax deductions, criticism has been levied in the past that some miners may be able to avoid paying royalties by never making a 'profit'.

Royalties paid from mining on Aboriginal land are paid to the Commonwealth then come back into the Territory

Existing arrangements allow for royalties to be paid directly to the Northern Territory Government, and an equivalent amount paid by the Commonwealth Government to the Aboriginal Benefit Trust Account and distributed according to a formula set out in the Commonwealth *Land Rights Act*.

The Commonwealth's proposed mining profits tax regime may have an impact into the future.

The control and development of our minerals is important to Territorians. Through the Statehood process the Commonwealth and the Territory will be deciding who owns and controls what minerals in the Northern Territory. Your views on this are important too.

Mining of uranium or other prescribed substances within the meaning of the *Atomic Energy Act 1953* and regulations and or rights in respect of Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act 1976*<sup>42</sup> are expressly reserved powers still held by the Commonwealth.

During 1987 the Northern Territory Government published an options paper that amongst other things considered the issue of the control of uranium resources in the Northern Territory.<sup>43</sup> That paper expressed - *in relation to resources the basic position of the Northern Territory Government is that upon Statehood, all resources in the new State, other than those held by the Commonwealth for genuinely federal type purposes, should be owned and controlled by the new State.*<sup>44</sup>

Who owns uranium determines who mines it. The Committee's overriding principle of eventual equality meant that as a State they took the view the Territory must own and manage its own mineral resources including uranium.

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<sup>42</sup> Sub Clauses 2(a) and 2(b) of *The Regulations*.

<sup>43</sup> *Towards Statehood – Minerals and Energy Resources Upon Statehood* April 1987

<sup>44</sup> *Ibid* page 2



Minerals as they occur in the two Commonwealth controlled national parks and minerals as they occur on Aboriginal land are also matters to be resolved in the context of Northern Territory Statehood. Because much of the currently known uranium ore bodies in the Northern Territory are on Aboriginal land, there is a direct link between the ownership of the land, the royalties, the decision making to mine and the terms and conditions of Statehood.

Where deposits are not on Aboriginal land such as the Angela and Pamela deposits south of Alice Springs (which have been subject to a recent Territory Government announcement that it does not support mining there) so long as we are not a State it will still be a matter for the Commonwealth to decide as to whether the mineral is extracted.

The future administration of the Alligator Rivers Region, (ARR) now primarily under Commonwealth administration is an integral part of that consideration.

So long as day to day administration and environmental control over uranium mines in the Northern Territory falls under the Territory Government and the final power to mine or not is reserved to the Commonwealth, confusion will prevail in these vital matters. The SSC submits this confusion is bad for business, prosperity and potential growth.

The Commonwealth retains all minerals not just uranium in the ARR, whereas the Territory controls other minerals occurring elsewhere in the Territory.

There is also potentially some confusion and blurring of the issues<sup>45</sup> associated with the proposed placement of a radioactive waste facility in the Territory and the control of uranium mining in the Northern Territory.

The Committee consistently supported Commonwealth engagement in discussions with the Territory Government on the future ownership and control of uranium as part of the terms and conditions of Statehood and make clear in advance the Commonwealth's intentions with regard to future ownership of this resource.

It would also be desirable for the Commonwealth to state its position on the future payment of royalty equivalencies for minerals mined on Aboriginal land.

Previous Territory Governments took the view that since the Commonwealth entered into the agreements under Commonwealth legislation with no input from the Northern Territory administration, the liability should remain with the Commonwealth upon Statehood.<sup>46</sup> The Commonwealth may have a different view.

Royalty payments for resources mined pursuant to mining titles, granted by a new State Government after a grant of Statehood, is another matter to consider in this context and will be a matter determined in conjunction with determining the future administration of the *Aboriginal Land Rights (Northern Territory) Act*.<sup>47</sup>

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<sup>45</sup> SSC Member Ms Kezia Purick in her capacity as CEO of the NT Minerals Council discussed the blurring these two issues in a radio interview with Richard Margetson on ABC Radio Darwin (8DDD) on 4 August 2005

<sup>46</sup> Options Paper April 1987 Pages 9-10

<sup>47</sup> The 1996 Report notes at page 47 *The question of ownership and control of uranium...is unable to be divorced from the wider issues of the ALRA and its possible patriation; national parks; environmental concerns and Aboriginal concerns generally*

## 8. Industrial Relations in the Northern Territory

During 2006 the Northern Territory joined other jurisdictions challenging the Commonwealth's use of the corporations power under the Australian Constitution to implement the Commonwealth's *Work Choices* reforms.

A change of Government at the Federal level since then means *Work Choices* has been replaced with *Fair Work Australia*, and the Northern Territory remains subject to the Commonwealth's industrial relations system.

In spite of Regulation 4 of the *Northern Territory Self Government Regulations* which states the Northern Territory has competence under s.35 of the *Self Government Act* to have executive authority over "Labour relations (including training and apprenticeship and workers' compensation and compulsory insurance or indemnity therefor)", s.53 of the *Self-Government Act* specifies the superior application of the *Workplace Relations Act 1996* (as amended by *Fair Work Australia* reforms.)

From the Commonwealth's previous approach to these jurisdictional issues it would appear unlikely the Commonwealth would entertain the Northern Territory assuming its own industrial relations regime upon Statehood.

The future of industrial relations in the Northern Territory as a new State would be a matter of government to government negotiations.

## 9. Other Existing Limitations under the Self Government Act

The *Northern Territory Self Government Act* authorises the capacity of Territory Ministers to make valid laws as per Annexure 1 of this paper.

Section 6 of the *Self-Government Act* confers a plenary legislative power upon the Northern Territory which is as extensive as the legislative powers of the States, however, the power is constrained by other parts of the *Self-Government Act*, and the overall capacity of the Commonwealth to repeal or further amend that Act at any time if it so wishes

## 10. Representation in the Australian Parliament

How would the new State be represented in the Commonwealth Parliament?

Representation levels have been an issue for Australians living in the Northern Territory since guaranteed levels of representation were lost on 1 January 1911 when South Australia officially surrendered the Northern Territory to the Commonwealth pursuant to s.111 of the Constitution.<sup>48</sup>

In 1986 the then Territory Government determined that conformity with the population quota for the House of Representatives and a phased increase in representation in

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<sup>48</sup> 111. *The Parliament of a State may surrender any part of the State to the Commonwealth; and upon such surrender, and the acceptance thereof by the Commonwealth, such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth.*

the Senate based on election cycles was their preferred approach to terms and conditions of Statehood with regard to representation issues.

The (then) Chief Minister in 1986 stated: *no relationship between population size and senate representation will be accepted*.<sup>49</sup> Flexibility in the formula toward equality in Senate numbers was canvassed at different times, for example Chief Minister Perron in 1994 floated two possible paths to achieving Senate equality one taking 12 years, the other 24 years<sup>50</sup>.

Territory representation is an important issue and was outlined in some detail in a document published by the then Chief Minister in 1986 and again in the *1996 Report*. As at 31 May 2005, the Northern Territory had 111,527 voters for its two House of Representatives seats.

The Commonwealth Constitution outlines the formula for determining State representation entitlements.<sup>51</sup> The High Court has determined the Constitution does not guarantee an equal number of electors or people in each division.<sup>52</sup> However the quota in s.24 of the Commonwealth Constitution requires there to be an apportionment of the number of House of Representative seats in each state based on a population quota. It is uncertain if this apportionment system can be varied for a new state under the terms and conditions power.

The ability of the Commonwealth to pass legislation to permit, restrict, or even abolish levels of representation for the Territories is the reality. Political 'interference' with the system of representation has been a catchcry for Statehood since the Territory obtained its first limited Commonwealth representation in 1922. It is only as a State that the quota system could be protected as set out in the Commonwealth enabling legislation so that it cannot thereafter be unilaterally varied.

Similarly the agreement on Senate representation should be incorporated into the terms and conditions process.

There are some constitutional doubts as to whether the s.121 method can be used to impose a different constitutional relationship with the Commonwealth on the new State as compared with existing States.<sup>53</sup> That is not to say the Commonwealth could not rely upon other constitutional powers to do so.

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<sup>49</sup> Ministerial Statement Page 5

<sup>50</sup> Agenda Paper for 1994 Leaders (Premiers) Conference, Provided to the Statehood Steering Committee by the Department of the Chief Minister.

<sup>51</sup> S.24 - The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of senators. The number of members chosen in the several States shall be in proportion to the respective members of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner -

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

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

<sup>52</sup> Attorney-General (Cth); Ex Rel. McKinlay v. The Commonwealth; South Australia v. The Commonwealth ; Lawlor v. The Commonwealth [1975] HCA 53; (1975) 135 CLR 1 (1 December 1975)

<sup>53</sup> The discussion also applies to whether the new State could be given a status 'superior' to existing states on some fronts. See Colin Howard *Statehood On Conditions* Chapter 2 in Australia's Seventh State Peter Loveday and Peter McNab (eds) NT Law Society/ANU 1988

The issue of representation must be resolved at a government to government level prior to any question being put to the people of the Northern Territory as to whether they want Statehood. When Territorians are able to make an informed decision on what Statehood means a referendum will be meaningful.

Original States, those colonies that came together in 1901 to become States, have a guarantee of five members of the House of Representatives (the 'Peoples' House) and an equal number of Senators (the 'States' House).

The Senate is comprised of 76 Senators, 12 from each of the States and two each from the Australian Capital Territory and the Northern Territory.

Section 24 of the Australian Constitution provides that the House of Representatives will comprise approximately twice as many members as there are Senators, so as the House has grown since federation in 1901 so has the number of Senators.

Originally each state had six senators (1901 – 1948) then ten senators (until 1984) and now 12 Senators each.

Because of the nexus provision (s.24 of The Constitution) it is vital to remember that should the Northern Territory obtain more Senators, the House of Representatives membership will grow to keep the required balance of approximately twice the number of Senators.

For instance, if the Northern Territory were to achieve an instant boost of an additional ten senators bringing the number up to twelve, that would mean up to twenty additional members would be added to the House of Representatives. Most of these would flow naturally to the larger States (in terms of population).

It is unlikely the Commonwealth Government would welcome thirty additional politicians into the Australian Parliament at one time. The creation of more political positions is likely to be unpopular with the electorate and a government looking after its own electoral interests would be concerned a change of government could be the immediate result.

The Statehood Steering Committee did not advocate instant equality. However, the Committee took the view that eventual equality is the only truly democratic goal and Statehood is not worth pursuing if the new State was forever doomed to a lesser number of Senators.

How could this be achieved? A submission by Senator Trish Crossin to the House of Representatives Committee Inquiry in 2006 provides a possible model for consideration<sup>54</sup>.

The Senator's model examines the possibility of four senators upon Statehood with an additional four added twelve years later and the final four coming in twelve years hence. Senate equality would therefore be about 25 years away from the date of Statehood.

When it comes to the House of Representatives the Northern Territory would not be in a position to make a claim to five members of the House of Representative because the Northern Territory is not an 'Original State'. Original States (as outlined

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<sup>54</sup> [www.aph.gov.au/house/committee/laca/ntstatehood/subs/sub004.pdf](http://www.aph.gov.au/house/committee/laca/ntstatehood/subs/sub004.pdf)

above) have such a guarantee; however, a new State cannot expect to enjoy such a privilege today. The rationale in the 1890s was to encourage the colonies to come together and form the single Australian nation. Today, whilst we seek the continent becoming a complete federation rather than continuing with the anomaly of the Northern Territory being unequal in the federal system, it would be difficult to argue an entitlement to five members of the House of Representatives irrespective of our population base.

## **PART THREE**

### **Territorians Having a Say**

#### **1. A Statehood Referendum**

During 2007 the Statehood Steering Committee undertook a Mock Referendum asking three questions.

*1. Do you agree the Northern Territory should become a State under the Australian Constitution?*

*2. Do you agree the Northern Territory, as a new State, should have the same powers as the existing States of Australia?*

*3. Do you agree the Northern Territory, as a new State, should have the same number of Senators as the existing States of Australia?*

The results were overwhelmingly positive for the first two questions and more marginally positive for the third question. The results can be viewed on-line at [www.state7.com.au](http://www.state7.com.au).

The difficulty with a referendum question that simply asks *do you want Statehood?* begs the question; *what sort of Statehood?* This paper has attempted to analyse some of the issues raised by that second question.

It is only with information about what the terms and conditions of Statehood may be and what would be contained in a State Constitution (see separate discussion paper: *Constitutional Paths to Statehood* published May 2007) that Territorians will be truly informed to make a decision as to whether they wish to support the Statehood that will be on offer.

The Territory community can only take the Statehood process so far. Territorians may determine what we *think* the terms and conditions should be, and decide what should be in a Constitution that underpins the way the new State is governed, but it is difficult to support Statehood unless and until the Commonwealth Government makes it clear what it *determines* to be the terms and conditions of Statehood and that includes any views that Commonwealth has on the final draft of the Northern Territory State Constitution.

Under S.121 of the Australian Constitution only the Commonwealth has this final power. It is up to Territorians to ensure that when we go to a referendum we are doing so as informed voters. The Statehood Steering Committee has urged the Northern Territory Government to ensure the Commonwealth engages in a meaningful process to disclose the terms and conditions it is willing to permit well ahead of asking Territorians to vote in a referendum to support Statehood.

#### **2. The Commonwealth Decision Makers**

The Australian Constitution says the Australian Parliament will determine the terms and conditions. In reality it will be the Government of the day possibly tempered by any negotiations required to obtain Senate support.

The Statehood Steering Committee acknowledged the Northern Territory Legislative Assembly provides multi partisan support for Statehood and took the view the

Commonwealth Parliament should come to the same position on the overall move toward Statehood and reach consensus positions on any of the individual terms and conditions issues in order to ensure a smooth passage through the Parliament so a new State is admitted with overwhelming Commonwealth support.

### **3. The Existing States**

Australia has six original states. They were formed from the original colonies coming together in 1901 and have existed in a more or less harmonious federal relationship ever since. According to the Forum of Federations and Associate Professor Anne Twomey<sup>55</sup> approximately 40% of the world's population live in a federal system of government.

When the Northern Territory eventually becomes a State it is likely to be the first new State admitted or created in Australia's history. Apart from the granting of limited self Government, this will be a very significant constitutional move and even internationally there are few examples for the Territory to follow<sup>56</sup>.

### **4. A Cooperative (COAG) Process**

The Council of Australian Governments (COAG) meets at least annually to discuss matters of national importance and is made up of the leaders of the States and Territories as well as the Prime Minister.

COAG has a role to play in advancing Statehood. COAG is the place where the jurisdictions must agree to the final terms and conditions to ensure all concerns about Territory Statehood are dealt with ahead of time, well before a referendum is held in the Northern Territory we need to know the attitude of all COAG members. While there has been in-principle support expressed in the past, a more formal engagement is required.

### **5. Territorians' Views**

Statehood is up to us – What limits or conditions if any should the Commonwealth place on Statehood for the Northern Territory? Tell your local Member of the Legislative Assembly or Member of the House of Representatives or Senator and nominate to be a candidate for election to the 2011 Constitutional Convention.

**More information at [www.ntstate7.com.au](http://www.ntstate7.com.au) or Ph 1800 237 909**

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<sup>55</sup> Op Cit see [www.apo.org.au](http://www.apo.org.au) 26/04/07

<sup>56</sup> Notwithstanding the examples of the admission of Alaska and Hawaii in the United States, however these were almost 50 years ago now. Creation of Nation States such as East Timor seeking independence from another nation is very different.

## **ANNEXURE 1**

### **The *Northern Territory Self Government Act* gives Territory Ministers executive power as follows**

Remuneration, allowances and other entitlements in respect of services of members of the Legislative Assembly, members of the Executive Council and Ministers of the Territory, including matters in respect of which enactments may be made under s54 of the Act

Territory insurance

Territory banking

Taxation, including stamp duty

Provision of rural, industrial and home finance credit and assistance

The Public Service of the Territory

Courts (including the procedures of the courts and the remuneration of the judiciary but not including the construction, at Alice Springs, of buildings for use by superior courts)

Legal aid

Maintenance of law and order and the administration of justice

Correctional services

Police

Private law

The legal profession

Administration of estates and trusts

Civil liberties

Inquiries and administrative reviews (including matters relating to a Territory ombudsman)

Markets and marketing

Corporate affairs

Marketable securities

Consumer affairs



Sales and leases of goods, supply of services, and security interests in or over goods

Prices and rent control

Industry (including forestry, fisheries, pastoral, agricultural, building and manufacturing)

Regulation of businesses and professions

Tourism

Printing and publishing

Labour relations (including training and apprenticeship and workers' compensation and compulsory insurance or indemnity therefor)

Industrial safety

Mining and minerals (including gases and hydrocarbon fuels)

Land, public and private (including internal waters)

Land use, planning and development

Civil aviation within the Territory

Surface transport regulation (including traffic control, carriers, railways, roads and bridges, vehicle registration and compulsory third party insurance, driver licensing and railway and road safety)

Ports and harbours

Marine navigation

Environment protection and conservation (including parks, reserves and gardens and preservation of historical objects and areas)

Flora and fauna

Fire prevention and control

Water resources

Energy planning and regulation

Public utilities

Public works

Registration of land titles, instruments, and births, deaths and marriages

Local government

Housing

Public health

Education

Territory archives

Child, family and social welfare

Museums, libraries and art galleries

Scientific research

Recreation, entertainment and sport

Community, cultural and ethnic affairs

Lotteries, betting and gaming

Liquor

Firearms, explosives and hazardous and dangerous substances

Civil defence and emergency services

Censorship

(2)

Subject to subregulation (6), a matter specified in subregulation (1) shall not be construed as including or relating to:

(a)

the mining of uranium or other prescribed substances within the meaning of the *Atomic Energy Act 1953* and regulations under that Act as in force from time to time; or

(b)

rights in respect of Aboriginal Land under the *Aboriginal Land Rights (Northern Territory) Act 1976*.

(3)

Subject to subregulations (2) and (4), the inclusion of any matter in subregulation (1) (whether with another matter or as a separate matter) does not derogate from or affect the generality of any other matter specified in that subregulation.

(4)

A matter specified in subregulation (1) shall be construed subject to the provisions of this regulation, the Act and any other Act and regulations under another Act in force in the Territory, and so as not to be inconsistent with those provisions, to the intent that, where such a matter would, but for this subregulation, have been construed as being so inconsistent, it shall nevertheless be a matter for executive authority under section 35 of the Act to the extent to which it is not so inconsistent.

(5)

The Ministers of the Territory are also to have executive authority under section 35 of the Act in respect of the following matters:

- (a) matters in respect of which enactments may be made under sections 12 and 13 and Part V of the Act;
  - (b) matters in respect of which duties, powers, functions or authorities are expressly imposed or conferred by or under another Act in force in the Territory, or by or under an enactment or an agreement or arrangement referred to in paragraph (f), on the Administrator or a Minister or officer of the Territory;
  - (c) matters under an enactment (including the making of regulations, rules, by-laws and other instruments) made for the purposes of, and to the extent provided by, such another Act that expressly provides for the making of such an enactment;
  - (d) the making of instruments (including regulations, rules or by-laws) under enactments other than those referred to in paragraph (c) or (f), not being instruments making provision for or in relation to a matter referred to in paragraph (a), (b), (c) or (d) of subregulation (2);
  - (e) matters under instruments made under regulations, rules or by-laws;
  - (f) agreements and arrangements between the Territory and the Commonwealth or a State or States, including the negotiation and the giving effect to any such agreement or arrangement by the Territory by way of enactment, regulations or other instrument, or otherwise;
  - (g) enactments making provision in general terms in relation to a matter specified in subregulation (1) and only incidentally extending to a matter referred to in subregulation (2);
  - (h) matters incidental to the execution of any executive authority vested in the Ministers of the Territory.
- (6) Subregulation (2) does not apply to a matter specified in subregulation (1) if the matter is also included in the matters specified in subregulation (5).