



## Northern Territory statehood: major constitutional issues

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### Executive summary

This research paper surveys the major constitutional issues relating to Northern Territory statehood and gives an indication of the complexities and nuances involved. The application of Commonwealth legislation to the Territory after statehood is also discussed. Background is provided on the Northern Territory's constitutional development and the statehood timeline.

The major constitutional issues relating to statehood include:

- the use of section 121 of the Australian Constitution for granting statehood
- the implementation of a constitution for the Northern Territory as a new state under section 106 of the Australian Constitution
- representation of the Territory as a new state in the Commonwealth Parliament and
- the availability of section 122 of the Australian Constitution in relation to the Territory after statehood.

Most of these issues will be the subject of comprehensive negotiations between the Commonwealth and the Northern Territory prior to any grant of statehood. There is a longstanding expectation within the Territory, however, that statehood should put the Northern Territory on a footing of constitutional equality with the existing states.

The Commonwealth has been reluctant in the past to endorse constitutional equality per se for the Northern Territory as a new state, particularly in relation to parliamentary and executive power. There is potential for tension between the expectations of the Territory and the intentions of the Commonwealth, particularly regarding matters such as the Territory constitution and the level of Senate representation. However, the formal stance of the new Rudd Commonwealth Government in relation to the terms and conditions of statehood remains to be seen.

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## Glossary

AGD	Attorney-General’s Department (Cwlth)
ALP	Australian Labor Party
HRSCCLCA	House of Representatives Standing Committee on Legal and Constitutional Affairs
NTSSC	Northern Territory Statehood Steering Committee

## Acknowledgements

The author would like to thank Austin Asche, Scott Bennett, Chris Lawley, Cathy Madden, Marilyn Harrington, and Diane Spooner for their assistance in the preparation of this research paper.

## Introduction

The proposition of statehood for the Northern Territory has been part of the political landscape since at least the 1950s. The establishment of a new state within a nation has been called ‘one of the most difficult political decisions a federation can attempt’, and the Northern Territory experience to date certainly reveals that statehood is no straightforward endeavour.<sup>1</sup>

The major constitutional issues relating to Northern Territory statehood include:

- the use of section 121 of the Australian Constitution for granting statehood
- the implementation of a constitution for the Northern Territory as a new state under section 106 of the Australian Constitution
- representation of the Territory as a new state in the Commonwealth Parliament and
- the availability of section 122 of the Constitution in relation to the Northern Territory after statehood.

The purpose of this paper is to survey these matters and to give an indication of the complexities and nuances involved; consideration is also given to the application of Commonwealth legislation in the Territory after statehood. Background is also provided on the Northern Territory’s constitutional development and on the statehood timeline. This paper does not consider the arguments for and against statehood or internal Territory matters.<sup>2</sup>

In addition to the constitutional issues, there are a number of other significant and complex statehood matters that arise out of the Territory’s relationship with the Commonwealth. These include:

- the possession and control of Commonwealth land and uranium resources in the Territory
- indigenous land rights
- the possession and control of the Kakadu and Uluru-Kata Tjuta National Parks and the Ashmore Reef and Cartier Island offshore reserves

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1. P. Loveday and P. McNab (eds), *Australia’s Seventh State*, Law Society of the Northern Territory and Australian National University North Australia Research Unit, Darwin, 1988, p. xiv.
  2. For a discussion of constitutional options for the Northern Territory see D. J. Whalan, ‘Aspects of Northern Territory law: backbone or some skeletons in the constitutional cupboard’, in R. Jones (ed), *Northern Australia: Options and Implications*, Australian National University Research School of Pacific Studies, Canberra, 1980, pp. 204–06.

- industrial relations regulation in the Territory and
- financial and economic arrangements between the Territory and the Commonwealth.

These matters, which are beyond the scope of this paper, have received recent consideration by the House of Representatives Standing Committee on Legal and Constitutional Affairs in its report on Northern Territory statehood (considered further below).

The broad suite of issues surrounding statehood will be the subject of comprehensive negotiations between the Commonwealth and the Northern Territory prior to any grant of statehood. One certainty, however, is the longstanding expectation within the Northern Territory that statehood should put the Territory on a footing of equality with the States. In 1986 the Chief Minister of the Northern Territory stated that ‘Constitutional and political equality, long denied to Territorians and long sought-after, is the keystone and the prime objective of my Government’s policy’.<sup>3</sup> The following year, a Northern Territory Legislative Assembly Committee established to investigate a constitution for the Territory and statehood issues affirmed that ‘Statehood for the Territory must provide for constitutional equality with the other States.’<sup>4</sup> More recently, the Northern Territory Statehood Steering Committee (NTSSC), which was established in 2004 by the Legislative Assembly to assist with the development of a new Territory constitution and with promoting statehood education and awareness, has contended that:

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.<sup>5</sup>

The Commonwealth, for its part, has recognised the importance of the claim for constitutional equality in relation to individual rights. In 1996 a joint

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3. S. Hatton (Chief Minister), *Towards Statehood: ministerial statement*, Northern Territory Legislative Assembly, Darwin, 28 August 1986, p. 1.

4. Northern Territory Legislative Assembly Select Committee on Constitutional Development, *Discussion Paper on a Proposed New State Constitution for the Northern Territory*, Govt. Printer, Darwin, October 1987, p. 2.

5. Northern Territory Statehood Steering Committee, Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs’ Inquiry into the Federal Implications of Northern Territory Statehood, House of Representatives Standing Committee on Legal and Constitutional Affairs, Canberra, October 2006, p. 2,

<http://www.aph.gov.au/house/committee/laca/ntstatehood/subs/sub001.pdf>, accessed on 11 January 2008. Author’s emphasis. The full terms of reference for the Northern Territory Statehood Steering Committee are available online at

[http://www.dcm.nt.gov.au/dcm/statehood/publications/pdf/statehood\\_committee\\_tor.pdf](http://www.dcm.nt.gov.au/dcm/statehood/publications/pdf/statehood_committee_tor.pdf), accessed on 11 January 2008.

Commonwealth/Northern Territory Statehood Working Group, which considered a range of issues pertinent to statehood, stated in its report that:

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.<sup>6</sup>

However, the report of the Working Group also revealed the Commonwealth's reluctance to provide an endorsement of constitutional equality per se for the Northern Territory as a new state, particularly in relation to parliamentary and executive power:

... 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.<sup>7</sup>

Whether the Commonwealth still holds this view remains to be seen, for little or no further work on the possible terms and conditions of statehood has been conducted by the Commonwealth since the failed Northern Territory statehood referendum of 1998.

## Background

### The constitutional development of the Northern Territory

The Northern Territory has had an interesting and eventful constitutional history. The area that would eventually become the Northern Territory was part of the Colony of New South Wales from 1825 to 1863 before being annexed by the Province of South Australia in 1863.<sup>8</sup>

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6. Northern Territory Statehood Working Group, *Final Report*, Northern Territory Statehood Working Group, 1996, p. 27, <http://www.nt.gov.au/lant/parliament/committees/condev/ntconstitution/ntcons/finalreportworkinggroup.PDF>, accessed on 11 January 2008.
  7. *ibid.*, pp. 27–8.
  8. Letters Patent commissioning Ralph Darling as Governor of New South Wales and extending the western boundary of New South Wales to 129 degrees east longitude (16 July 1825); and Letters Patent annexing the Northern Territory to South Australia (6 July 1863). These instruments can be viewed online at <http://www.foundingdocs.gov.au>, accessed on 11 January 2008.

The Territory remained part of South Australia until 1911, at which point it was formally surrendered by South Australia to the Commonwealth.<sup>9</sup> The terms of the Australian Constitution, enacted in 1900, provided the Commonwealth with a plenary power to legislate for territories and to regulate the representation of territories in the Commonwealth Parliament:

The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.<sup>10</sup>

The Commonwealth assumed government of the Northern Territory on 1 January 1911—a state of affairs that would continue, with some variations, for almost 70 years. Notable developments during the first 50 years of Commonwealth government included the division of the Territory into two separate administrative territories, North Australia and Central Australia, from 1926 to 1931,<sup>11</sup> the military administration of the Territory from 1942 to 1946, and the establishment of the Northern Territory Legislative Council by the Commonwealth in 1947.<sup>12</sup> The Legislative Council was established as a limited ordinance-making body, and, for most of its existence, consisted of a majority of appointed members and a minority of elected members.<sup>13</sup>

The 1970s was a particularly eventful decade for the constitutional development of the Northern Territory. In 1974 the Commonwealth established the Northern Territory

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9. Northern Territory Surrender Act 1907 (SA); Northern Territory Acceptance Act 1910 (Cwlth); Northern Territory (Administration) Act 1910 (Cwlth). See also Commonwealth of Australia Gazette, no. 79, 24 December 1910. Negotiations between South Australia and the Commonwealth regarding the surrender of the Northern Territory took place in 1901–02 and 1906–07.
  10. Commonwealth of Australia Constitution Act 1900 (UK), s. 122. See *Berwick Ltd v. Gray* (1976) 133 CLR 603 per Mason J, p. 607, for a characterisation of the plenary power in section 122.
  11. Northern Australia Act 1926 (Cwlth); this was repealed by the Northern Territory (Administration) Act 1931 (Cwlth).
  12. Northern Territory (Administration) Act 1947 (Cwlth).
  13. Upon its establishment the Legislative Council consisted of the Administrator as Council Chairman, seven appointed members and six elected members. In 1959 the number of elected members was increased to eight and the number of appointed members was increased to nine (*Northern Territory (Administration) Act 1959* (Cwlth)). The proportions changed in 1968 when the number of elected members was increased to eleven and the number of appointed members was set at six (*Northern Territory (Administration) Act (No. 2) 1968* (Cwlth)). The Legislative Council ceased to exist in 1974 when the Legislative Assembly was established.

Legislative Assembly, which replaced the Legislative Council.<sup>14</sup> The Assembly was a fully-elected body consisting of 19 members, although the scope of the Assembly's powers differed little from that of the Legislative Council. In 1977, following a successful referendum, section 128 of the Australian Constitution was altered to enable Northern Territory (and ACT) electors to vote in constitutional referendums.<sup>15</sup> Perhaps the single most important development of the 1970s, however, was the grant of self-government to the Territory by the Commonwealth in 1978.<sup>16</sup> This involved:

- the establishment of the Northern Territory as a body politic under the Crown
- the conferral of power on the Legislative Assembly to legislate for the 'peace, order and good government of the Territory'
- the establishment of an Executive and
- the conferral of executive authority in respect of certain specified matters.<sup>17</sup>

The grant of self-government, however, was (and is) limited by provision for the disallowance of legislation by the Governor-General, by the withholding of executive authority from the Northern Territory Government in respect of certain matters,<sup>18</sup> and by the continued power of the Commonwealth to legislate for the Territory under section 122 of the Australian Constitution. The Commonwealth exercised this constitutional power in 1997 in relation to Territory euthanasia laws.<sup>19</sup>

In terms of Commonwealth parliamentary representation, the Northern Territory was granted a single member of the House of Representatives in 1922.<sup>20</sup> The member had no voting

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14. Northern Territory (Administration) Act 1974 (Cwlth).

15. Constitution Alteration (Referendums) 1977 (Cwlth).

16. *Northern Territory (Self-Government) Act 1978* (Cwlth); Northern Territory (Self-Government) Regulations 1978 (Cwlth), nos. 102, 168, 290 of 1978.

17. *ibid.*

18. The Northern Territory (Self-Government) Regulations 1978 (Cwlth) specify matters in respect of which the Northern Territory Government has no executive authority; these include 'the mining of uranium or other prescribed substances' and Indigenous land rights under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth).

19. The *Euthanasia Laws Act 1997* (Cwlth) rendered the Northern Territory *Rights of the Terminally Ill Act 1995* ineffective and without force as a law of the Territory. The Commonwealth Act also provided that the legislative power of the Northern Territory Legislative Assembly does not extend to the making of laws permitting euthanasia or assisting suicide.

20. Northern Territory Representation Act 1922 (Cwlth).

rights, could not be elected as Speaker or Chairman of Committees, and was not counted for House of Representatives quorum or majority determination purposes. This situation was augmented marginally in 1936 when the member was granted voting rights in regard to disallowance motions for Territory ordinances, and, in 1959, the member was granted full voting rights in regard to proposed Northern Territory legislation and disallowance motions relating to regulations made under Territory ordinances.<sup>21</sup> It was not until 1968, however, that the Northern Territory member was granted the powers, immunities and privileges possessed by members from the States.<sup>22</sup> In 1990 the *Commonwealth Electoral Act 1918* was amended to ensure that at least one member of the House of Representatives would be chosen in the Northern Territory at Commonwealth general elections.<sup>23</sup>

A redistribution of the Northern Territory into two electorates for Commonwealth elections in 2000 meant that two Territory members were elected to the House of Representatives at the Commonwealth general election in 2001<sup>24</sup>—a level of representation that has subsequently been preserved by Commonwealth legislation.<sup>25</sup> With regard to Senate representation, the Commonwealth granted the Northern Territory two Commonwealth Senate positions in 1974.<sup>26</sup> The Territory senators have the powers, privileges and immunities possessed by State senators, but differ from their State counterparts in that their terms are concurrent with those of members of the House of Representatives.

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21. Northern Territory Representation Act 1936 (Cwlth); Northern Territory Representation Act 1959 (Cwlth).
  22. Northern Territory Representation Act 1968 (Cwlth).
  23. Electoral and Referendum Amendment Act 1989 (Cwlth) (Royal Assent 23 January 1990).
  24. Australian Electoral Commission, *2000 Redistribution of the Northern Territory into Two Electoral Divisions*, Australian Electoral Commission, Canberra, 2000,  
<http://www.aec.gov.au/Electorates/Redistributions/2000/NT/index.htm>, accessed on 11 January 2008.
  25. *Commonwealth Electoral Amendment (Representation in the House of Representatives) Act 2004* (Cwlth). This legislation implemented recommendations of the Commonwealth Parliament's Joint Standing Committee on Electoral Matters report, *Territory Representation: Report of the Inquiry into increasing the minimum representation of the Australian Capital Territory and the Northern Territory in the House of Representatives*, Joint Standing Committee on Electoral Matters, Canberra, November 2003,  
<http://www.aph.gov.au/house/committee/em/territories/report/fullreport.pdf>, accessed on 11 January 2008.
  26. Senate (Representation of Territories) Act 1973 (Cwlth) (Royal Assent 7 August 1974). See also Part III of the Commonwealth Electoral Act 1918 (Cwlth).

## The statehood timeline

On 13 May 1958, the Commonwealth Minister for Territories, Paul Hasluck, stated that:

The Government has a strong interest in the development of the Northern Territory, including its political development ... The Government endorses the objectives towards which, as Minister for Territories, I have worked steadily for seven years, namely the eventual creation of the Northern Territory as a north Australian State – either in the present boundaries or with a readjustment of boundaries. We hope to see its population grow and its resources develop so that it will reach in the shortest possible time full self-governing status.<sup>27</sup>

Almost 50 years later, Northern Territory statehood remains an objective rather than a reality. Yet statehood has certainly gained prominence since the mid-1970s and has been the focus of considerable attention and development since the mid-1980s. The issue received national publicity in November 1975 with the announcement by Prime Minister Malcolm Fraser that statehood would be achieved within five years.<sup>28</sup> While this did not eventuate, the establishment of a Statehood Executive Group by the Northern Territory Government in 1985 inaugurated a period of serious investigation and development of the statehood question by a number of government and parliamentary bodies, including the joint Commonwealth/Northern Territory Statehood Working Group.<sup>29</sup> This period culminated in the production of a final draft constitution for the Northern Territory in 1996 by the Northern Territory Legislative Assembly Sessional Committee on Constitutional Development.<sup>30</sup>

In 1998 a number of developments transpired. A constitutional Statehood Convention was convened early in the year and adopted a draft constitution for the Territory based on that prepared by the Sessional Committee; the draft constitution was subsequently formally

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27. Paul Hasluck, Minister for Territories, 'Questions: Northern Territory Administration', House of Representatives, *Debates*, 13 May 1958, p. 1691.
  28. M. Fraser (Prime Minister), *Statehood for the Northern Territory*, media release, 18 November 1975; 'N.T. Statehood Promise', *Northern Territory News*, 18 November 1975; G. Atherton, 'Fraser pledges to make NT our seventh State', *The Australian*, 19 November 1975.
  29. The main investigative bodies were the Statehood Executive Group, the Legislative Assembly Select (later Sessional) Committee on Constitutional Development (established 1985), and the joint Commonwealth/Northern Territory Statehood Working Group (established 1995). The Statehood Working Group was established with the agreement of Prime Minister Paul Keating following submissions by the Northern Territory to the Council of Australian Governments.
  30. Northern Territory, Legislative Assembly, Sessional Committee on Constitutional Development, *Foundations for a Common Future: The Report on Paragraph 1(a) of the Committee's Terms of Reference on a Final Draft Constitution for the Northern Territory*, Govt. Printer, Darwin, 1996, vol. 1, pp. 8–57, 8–132.

adopted by the Legislative Assembly in August.<sup>31</sup> Also in August 1998, Prime Minister John Howard announced Commonwealth support for the Territory becoming a state by 1 January 2001.<sup>32</sup> On 3 October 1998 a referendum on statehood was held in the Northern Territory and the following question was submitted to Territory electors:

Now that a constitution for the 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?<sup>33</sup>

The referendum was unsuccessful, with a majority (51.3 per cent) 'No' vote.<sup>34</sup> The following year the Northern Territory Legislative Assembly Standing Committee on Legal and Constitutional Affairs found that major reasons for the majority 'No' vote included:

... a lack of information and understanding about Statehood, concern about the Statehood Convention process and the events surrounding it, a lack of trust in those responsible for last year's process, inadequate consultation, the role and approach of the Chief Minister, and a protest against the then Chief Minister and "the arrogance of politicians".<sup>35</sup>

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31. Denis Burke, Minister for Health, Family and Children's Services, 'Motion to adopt paper', Northern Territory, Legislative Assembly, *Debates*, 13 August 1998, <http://notes.nt.gov.au/lant/hansard/HANSARD8.NSF/b58fc2859d6d7ce148255fcd00276797/f176cb3722eff997692566950049b943?OpenDocument>, accessed on 11 January 2008.
  32. J. Howard (Prime Minister) and S. Stone (Chief Minister), *Joint Press Conference*, Parliament House, Canberra, 11 August 1998, <http://pandora.nla.gov.au/nph-arch/1999/Z1999-Feb-2/http://www.pm.gov.au/media/pressrel/1998/ntstate.htm>, accessed on 11 January 2008.
  33. Northern Territory, Legislative Assembly, Standing Committee on Legal and Constitutional Affairs, *Information Paper No. 1 – Northern Territory Constitutional Development and Statehood: A Chronology of Events*, Standing Committee on Legal and Constitutional Affairs, Darwin, 2002, pp. 12–13, <http://www.nt.gov.au/lant/parliament/committees/lca/Info%20paper%20No-1-%20Chronology%20of%20Events-22-Aug-2002.pdf>, accessed on 11 January 2008. See also Shane Stone, Chief Minister, 'Motion: referendum question', Northern Territory, Legislative Assembly, *Debates*, 19 August 1998, <http://notes.nt.gov.au/lant/hansard/HANSARD8.NSF/b58fc2859d6d7ce148255fcd00276797/ee39041ea5cedd99692566950049d5a3?OpenDocument>, accessed on 11 January 2008.
  34. Northern Territory Electoral Commission, *Statehood Referendum – 3 October 1998: Statement of Results*, <http://notes.nt.gov.au/nteo/Electorl.nsf?OpenDatabase>, accessed on 11 January 2008.
  35. Northern Territory, Legislative Assembly, Standing Committee on Legal and Constitutional Affairs, *Report into appropriate measures to facilitate Statehood*, Standing Committee on Legal and Constitutional Affairs, Darwin, 1999, p. 2,

The Committee further found that indigenous Territorians voted 'No' as a bloc for these and other reasons.<sup>36</sup>

The goal of statehood received fresh impetus in May 2003 with the announcement by Northern Territory Chief Minister Clare Martin of a new, community-based statehood campaign.<sup>37</sup> The new campaign would include the drafting of a new Territory constitution and the holding of a second statehood referendum: 1 July 2008, the 30<sup>th</sup> anniversary of self-government, was identified as a flexible target date for the referendum. Milestones in the statehood campaign to date have included the establishment of the NTSSC in 2004 to facilitate the campaign and the appointment of the Northern Territory's first Minister for Statehood in September 2006.<sup>38</sup>

At the Commonwealth level, in February 2007 the Northern Territory Minister for Statehood and his Opposition counterpart met with the Commonwealth Attorney-General and the Commonwealth Minister for Local Government, Territories and Roads in Canberra to discuss the implications of statehood.<sup>39</sup> Little seemed to be achieved at this meeting, however, and following the meeting the Attorney-General was reported to be unconvinced of the existence of popular support for statehood in the Territory and of the view that such support must be demonstrated.<sup>40</sup>

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<http://www.nt.gov.au/lant/parliament/committees/lca/state-ref-report.pdf>, accessed on 11 January 2008.

36. Other reasons included a lack of understanding about the meaning of statehood; distrust of the Territory Government and fear that statehood would increase its power; and concerns about losing existing rights and the impact of statehood on law, culture, and language: *ibid.*, pp. 2–3.
37. C. Martin (Chief Minister), *Statehood: this time let's get it right!*, media release, Darwin, 22 May 2003.
38. Northern Territory, Legislative Assembly, *Northern Territory Government Ministries (ALP) 2005–30<sup>th</sup> November 2007*, Northern Territory Legislative Assembly, Darwin, 2007, p. 4, <http://www.nt.gov.au/lant/pub/Ministries%20of%2010th%20Assembly.pdf>, accessed on 11 January 2008. At the end of November 2007 the Statehood portfolio was combined with a new portfolio of Territory-Federal Relations and added to the Chief Minister's suite of portfolios.
39. S. Stirling (Minister for Statehood) and T. Mills (Shadow Minister for Statehood), *Joint Press Release*, media release, Darwin, 5 February 2007, <http://newsroom.nt.gov.au/index.cfm?fuseaction=viewRelease&id=1341&d=5>, accessed on 11 January 2008.
40. 'Ruddock questions NT's statehood push', ABC News Online, 7 February 2007, <http://www.abc.net.au/news/australia/nt/summer/200702/s1841951.htm>, accessed on 11 January 2008.

Statehood received expressions of support from the Australian Labor Party (ALP) at a number of points when it was in opposition. Prior to the 1998 federal election and the Northern Territory statehood referendum, the ALP indicated its support for statehood and a popularly-elected Constitution Convention.<sup>41</sup> In September 2004 the Opposition Shadow Minister for Tourism, Regional Services and Territories stated that ‘Labor supports the move toward Statehood for the Northern Territory ... providing this reflects the aspirations of Territorians and no Territorian or group of Territorians are disadvantaged due to the Territory becoming a State’.<sup>42</sup> ALP campaign documents released prior to the 2004 federal election also expressed support for statehood and for a new Territory constitution.<sup>43</sup> While statehood was not covered in ALP campaign documentation prior to the 2007 federal election, in early 2007 the Northern Territory Chief Minister indicated that (then) Opposition Leader Kevin Rudd supported statehood.<sup>44</sup>

In the Commonwealth parliamentary context, the House of Representatives Standing Committee on Legal and Constitutional Affairs (HRSLCA) commenced an inquiry in 2005 into the federal implications of statehood and recent statehood developments.<sup>45</sup> The Committee concluded its inquiry in May 2007; its single recommendation is discussed below. It is also worth noting here that statehood has received expressions of support at the state government level. In February 2007 the Council for the Australian Federation, which consists of state and territory premiers and chief ministers, indicated its support for the goal of Northern Territory statehood.<sup>46</sup>

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41. Australian Labor Party, *A Better Plan for Northern Australia*, Australian Labor Party, Canberra, 1998, pp. 5–6.
  42. K. O’Brien (Shadow Minister for Tourism, Regional Services and Territories), *Opportunities for all in the Territories*, media release, Launceston, 21 September 2004.
  43. Australian Labor Party, *Opportunity for all in Northern Australia*, Australian Labor Party, Canberra, 2004, p. 3.
  44. C. Martin (Chief Minister), *Leaders Support Territory*, media release, Darwin, 9 February 2007, <http://newsroom.nt.gov.au/index.cfm?fuseaction=viewRelease&id=1537&d=5>, accessed on 11 January 2008. ALP policy documents indicated that an ALP Government would establish an Office of Northern Australia to provide advice and policy expertise to the Minister for Regional Development. See Australian Labor Party, *Labor’s Plan for Northern Australia*, Australian Labor Party, Canberra, 2007, [http://www.alp.org.au/download/now/071103\\_northern\\_australia\\_fact\\_sheet\\_with\\_header.pdf](http://www.alp.org.au/download/now/071103_northern_australia_fact_sheet_with_header.pdf), accessed on 11 January 2008.
  45. The terms of reference for the inquiry and related documents are available at <http://www.aph.gov.au/house/committee/laca/ntstatehood/tor.htm>, accessed on 11 January 2008.
  46. Council for the Australian Federation, *Communiqué*, Council for the Australian Federation, Sydney, 9 February 2007, p. 6.

Whether or not the second statehood referendum is held in the Territory on 1 July 2008 remains to be seen. The NTSSC, which has conducted a very active education and awareness campaign since its establishment, produced an updated draft work plan in February 2006. The work plan states that the aim is to achieve statehood in a ‘timely, cost effective and efficient manner’, and envisages 2007–08 as a possible timeframe for a second constitutional Statehood Convention and plebiscite.<sup>47</sup> From May to August 2007 a plebiscite on statehood was conducted in the Northern Territory by the Australian Electoral Commission for the NTSSC. A total of 809 electors took part in the plebiscite, with results indicating a high level of support for the prospect of the Territory becoming a state and for the Territory as a new state having the same powers as the existing states (76 and 87 per cent respectively).<sup>48</sup> Despite this activity, it is quite possible that the second referendum could be a medium-term proposition given the little time remaining until the 1 July 2008 target date, the initial casting of this date as flexible, and the fact that the NTSSC work plan indicates that timeframes are flexible.<sup>49</sup> The timing of statehood itself remains a matter for conjecture.

## Major constitutional issues

### The mechanism for admitting or establishing a new state: section 121

In August 1998, Prime Minister John Howard indicated that the preferred mechanism for achieving Northern Territory statehood would be Commonwealth legislation enacted under section 121 of the Australian Constitution.<sup>50</sup> In a May 2007 discussion paper, the NTSSC

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[http://www.dpc.vic.gov.au/CA256D800027B102/Lookup/CouncilfortheAustralianFederationcommuniqueFebruary2007/\\$file/Council%20for%20the%20Australian%20Federation-Communique-9%20February%202007.pdf](http://www.dpc.vic.gov.au/CA256D800027B102/Lookup/CouncilfortheAustralianFederationcommuniqueFebruary2007/$file/Council%20for%20the%20Australian%20Federation-Communique-9%20February%202007.pdf), accessed on 11 January 2008.

47. Northern Territory Statehood Steering Committee, *Report to the Legislative Assembly Standing Committee on Legal and Constitutional Affairs – 2005 Calendar Year Activities*, Northern Territory Statehood Steering Committee, Darwin, 2006, p. 7,

[http://www.dcm.nt.gov.au/dcm/statehood/publications/pdf/2005stabledreport\\_200602.pdf](http://www.dcm.nt.gov.au/dcm/statehood/publications/pdf/2005stabledreport_200602.pdf), accessed on 11 January 2008.

48. S. Bradley AM (Committee Co-Chair), *Strong Support for Statehood*, media release, Darwin, 29 August 2007,

<http://www.dcm.nt.gov.au/dcm/statehood/news/documents/StatehoodMockReferendumResults.pdf>, accessed on 11 January 2008. Sixty-eight per cent of those polled also supported the Territory having equal Senate representation with the existing States.

49. Northern Territory Statehood Steering Committee, *Report to the Legislative Assembly*, op. cit., pp. 7–8, 47, 51–2.

50. J. Howard and S. Stone, loc. cit. A national referendum conducted under section 128 of the Constitution has also been identified as a possible mechanism for facilitating statehood. It has been noted, however, that the section 128 mechanism ‘would require significant national support and has therefore not been supported by those proposing Statehood’ due to ‘fears that

indicated its support for section 121 as the preferred mechanism for achieving statehood.<sup>51</sup> Section 121, which has not yet been utilised by the Commonwealth, provides that:

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 Parliament, as it thinks fit.<sup>52</sup>

Various commentators have considered the different aspects of section 121. With regard to the distinction made in the section between the ‘admission’ and the ‘establishment’ of new states, Quick and Garran, in their early commentary on the Constitution, took the view that admission ‘can only refer to the entry into the Commonwealth of political communities which, prior to their entry, were duly constituted colonies’ (for example New Zealand, New Guinea and Fiji).<sup>53</sup> Establishment, however, ‘includes the formation of States either out of Federal territory, or out of States already in existence, by sub-division or otherwise’.<sup>54</sup> Some subsequent commentators have maintained this view,<sup>55</sup> although one commentary has suggested that:

As to the formation of new States from Territories which are geographically part of the Commonwealth, it is an uncertain question whether such Territories are ‘established’ or ‘admitted’. In so far as a Territory which is to be admitted to Statehood would have already attained the status of a self-governing Territory, it would be appropriate to describe the process as admission ... If this wide interpretation of ‘admit’ is adopted, it would be more

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such a referendum would fail’: A. Twomey, ‘A Constitution for a new State: Dilemmas for the Northern Territory’, *Public Law Review*, vol. 18, no.3, Sept. 2007, p. 202.

51. Northern Territory Statehood Steering Committee, *Constitutional Paths to Statehood: Northern Territory Statehood Steering Committee Community Discussion Paper*, Northern Territory Statehood Steering Committee, Darwin, 2007, p. 4,

<http://www.statehood.nt.gov.au/documents/DPWeb1.pdf>, accessed on 11 January 2008. The Steering Committee indicates that the previous Northern Territory Legislative Assembly Select Committee on Constitutional Development also considered section 121 to be the preferred mechanism (p. 4).

52. Commonwealth of Australia Constitution Act (UK), s. 121.

53. J. Quick and R. Garran, *The Annotated Constitution of the Australian Commonwealth*, Angus & Robertson and Melville & Mullen, Sydney and Melbourne, 1901, pp. 968–69.

54. *ibid.*

55. For example G. Sawyer, ‘The Northern Territory: Constitutional Status, Present and Future’, in R. Herr and P. Loveday (eds), *Small is Beautiful: Parliament in the Northern Territory*, Australasian Study of Parliament Group and Australian National University North Australia Research Unit, Canberra, 1981, p. 95; and P. H. Lane, *Lane’s Commentary on the Australian Constitution*, 2nd edn., LBC Information Services, Sydney, 1997, p. 824.

appropriate to restrict the word 'establish' to the formation of a new State from an existing State or States ...<sup>56</sup>

The other important element of section 121 is the power of the Commonwealth Parliament, upon the admission or establishment of a new state, to 'make or impose such terms and conditions, including the extent of representation in either House of Parliament, as it thinks fit'. Quick and Garran considered this power, in relation to representational equality with other States, to be a broad one:

Under the Constitution of the Commonwealth the Federal Parliament has a free hand in deciding the terms and conditions under which a new member may be admitted into the Federal family system. It will be at liberty to impose such stipulations as it thinks fit, unhampered by considerations of equality of Original States ... It is to be noted that the rule of equal representation in the Senate is only mandatory in the case of Original States; new States cannot demand parity of senatorial representation as a right; the Federal Parliament may assign to such States the number of senators which it thinks fit ... No minimum number of representatives is prescribed in the Constitution for new States; and it would seem that even the principle of proportional representation in the House of Representatives ... might under this section be varied in the case of new States. The Federal Parliament would, clearly, under the power conferred by sec. 121, be able to fix the minimum number of senators, as well as the minimum number of representatives, to be assigned to the new States.<sup>57</sup>

It has also been suggested that the language of section 121 implies that there must be some degree of representation for a new state in the Commonwealth Parliament.<sup>58</sup> The High Court of Australia has given some consideration to the issue of parliamentary representation of new states in connection with section 121; this is discussed further below.

Commentators after Quick and Garran have noted the breadth of the terms and conditions power in section 121, but have also identified some potential limitations on the exercise of that power. For example, John Toohey, a former Justice of the High Court of Australia, observed that section 121 is 'expressed in broad terms',<sup>59</sup> but also suggested that the High Court would not be likely to 'permit the imposition of any term or condition which derogated from the rights in relation to States'<sup>60</sup> in the following sections of the Australian Constitution:

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56. R. D. Lumb and G. A. Moens, *The Constitution of the Commonwealth of Australia Annotated*, 5th edn., Butterworths, Sydney, 1995, pp. 551–52. See also J. Toohey, 'New States and the Constitution: An Overview', in P. Loveday and P. McNab (eds), *op. cit.*, pp. 2–4.

57. J. Quick and R. Garran, *op. cit.*, p. 970. See also J. Toohey, *op. cit.*, pp. 4–5.

58. P. H. Lane, *op. cit.*, pp. 824–25.

59. J. Toohey, *op. cit.*, p. 12. P. H. Lane also states that section 121 'is a wide power, consisting of a substantive grant without qualifying conditions': *op. cit.*, p. 824.

60. J. Toohey, *op. cit.*, p. 8.

- section 51 (ii) (Commonwealth taxation laws not to discriminate between states or parts of states)
- section 51 (xxxii) (Commonwealth laws for the acquisition of property from states to be on just terms)
- section 55 (Commonwealth taxation laws shall deal only with the imposition of taxation and with only one subject of taxation, and taxation laws imposing customs and excise duties shall deal with such duties only)
- section 80 (trial on indictment of any offence against any Commonwealth law shall be by jury)
- section 92 (trade, commerce, and intercourse among the states shall be absolutely free)
- section 99 (Commonwealth trade, commerce or revenue laws shall not give preference to one state or any part of a state over another state or any part thereof)
- section 116 (the Commonwealth shall not legislate in relation to religious matters)
- section 117 (a resident of a state shall not be subject in any other state to any disability or discrimination which would not be equally applicable if the resident had been in the other state)
- section 118 (full faith and credit shall be given throughout the Commonwealth to the laws, acts, records, and judicial proceedings of every state)
- section 119 (the Commonwealth shall protect every state against invasion and, upon application by the government of a state, against domestic violence) and
- section 123 (the Commonwealth may increase, diminish or otherwise alter the limits of a state with the consent of the state parliament and the approval of a majority of electors in the state).<sup>61</sup>

Toohy maintained that ‘There is nothing in the Constitution which supports a confinement of these provisions to original States; on the contrary, the Constitution evinces a clear intention that a reference to “States” is a reference to both original and new States’.<sup>62</sup>

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61. See J. Toohy, *op. cit.*, pp. 8–9.

62. J. Toohy, *op. cit.*, p. 9. Covering clause 6 of the Constitution defines the ‘States’ as being the colonies of NSW, New Zealand, Queensland, Tasmania, Victoria, WA, and SA (including the NT) ‘as for the time being are parts of the Commonwealth, and any colonies or territories as may be admitted into or established by the Commonwealth as States’, and defines the ‘Original States’ as being those States that are ‘parts of the Commonwealth at its establishment’.

Professor Geoffrey Sawer identified a number of further provisions of the Constitution that, in his view, could not be encroached upon by the exercise of the terms and conditions power in section 121:

It is unlikely that the High Court would allow the terms and conditions to displace as to the new state the distribution of legislative power between Commonwealth and States provided by ss. 51, 61 and 71, and 109. Provision such as the free trade guarantee—92—and the fiscal restrictions or facilities—90, 91, 96—would apply.<sup>63</sup>

The proposition has also been advanced that the ‘upon such admission or establishment’ element of section 121 limits the exercise of the terms and conditions power to the point of admission or establishment of a new state and not beyond: ‘The power is to be exercised only at or about the time of admission and establishment; it is not a continuing power’.<sup>64</sup> In a related vein, it has also been suggested that section 121 could not be used after the admission or establishment of a new state to revoke or amend the legislation granting statehood.<sup>65</sup> One other commentator has expressed the view, however, that the ‘upon admission or establishment’ element should not be understood in relation to the point of admission or establishment of statehood, but rather as meaning that ‘the Parliament may impose such terms as it thinks fit as conditions of admission or establishment’.<sup>66</sup>

It is to be expected that the terms and conditions of a grant of statehood, which will encompass many, if not all, of the statehood issues to be resolved, will be the subject of detailed and comprehensive negotiations between the Commonwealth and Northern Territory Governments prior to any grant of statehood under section 121. In its September 2006 submission to the HRSCCLA statehood inquiry, the NTSSC delineated its position regarding the negotiation of the terms and conditions of statehood:

It is important that an agreed process to determine any terms and conditions is 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 what progress is being made. The previous Northern Territory Committee recommended the negotiation process should go hand in hand with Territory constitutional development.

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63. G. Sawer, *op. cit.*, p. 98. See also R. D. Lumb and G. A. Moens, *op. cit.*, p. 552.

64. G. Sawer, *loc. cit.* Toohey however suggests that ‘it is not easy to support’ Sawer’s interpretation: J. Toohey, *op. cit.*, p. 12.

65. D. J. Whalan, *op. cit.*, p. 206.

66. C. Howard, ‘Statehood on Conditions: Federal Representation and Residual Links’, in P. Loveday and P. McNab (eds), *op. cit.*, p. 18.

... When it comes to managing emerging issues related to the terms and conditions for Statehood, it would be open to the Commonwealth to determine the only 'term and condition' would be equality with the existing States.<sup>67</sup>

The NTSSC also called on the Commonwealth to declare its intentions regarding statehood and to engage with the Northern Territory on statehood matters.<sup>68</sup> The Commonwealth Attorney-General's Department (AGD), in its submission to the same inquiry, indicated that it has not undertaken any work on the possible terms and conditions of a grant of statehood since the 1998 Territory referendum.<sup>69</sup> The Commonwealth Department of the Prime Minister and Cabinet, which also made a submission to the inquiry, declined to answer a query from the Committee concerning Commonwealth parliamentary representation of the Territory on the basis of this being a policy issue 'on which it would be inappropriate for the department to pre-empt government consideration'.<sup>70</sup>

The HRSCLCA completed its statehood inquiry in May 2007 and concluded that, while 'it is not appropriate for the Commonwealth to drive the statehood agenda for the Northern Territory', there is nevertheless 'a real danger of statehood being in a stalemate if the Commonwealth does not progress matters in some way'.<sup>71</sup> The Committee accordingly recommended that:

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67. Northern Territory Statehood Steering Committee, *Submission*, op. cit., p. 3.

68. Northern Territory Statehood Steering Committee, *Submission*, op. cit., p. 7.

69. Attorney-General's Department, Response to questions for the Attorney-General's Department arising from the Northern Territory statehood inquiry public hearing, 6 February 2007, House of Representatives Standing Committee on Legal and Constitutional Affairs, Canberra, 2007, p. 2,

<http://www.aph.gov.au/house/committee/laca/ntstatehood/subs/sub011.pdf>, accessed on 11 January 2008.

70. Department of the Prime Minister and Cabinet, *Answers to Committee Questions*, House of Representatives Standing Committee on Legal and Constitutional Affairs, Canberra, 2007, p. 2,

<http://www.aph.gov.au/house/committee/laca/ntstatehood/subs/sub012.pdf>, accessed on 11 January 2008.

71. House of Representatives Standing Committee on Legal and Constitutional Affairs, *The long road to statehood: Report of the inquiry into the federal implications of statehood for the Northern Territory*, House of Representatives Standing Committee on Legal and Constitutional Affairs, Canberra, May 2007, pp. 34, 36,

<http://www.aph.gov.au/house/committee/laca/ntstatehood/report/fullreport.pdf>, accessed on 11 January 2008.

... the Australian Government update and refine its position on Northern Territory statehood and re-commence work on unresolved federal issues.<sup>72</sup>

This unanimous recommendation from a Commonwealth parliamentary committee now awaits a Commonwealth Government response. It is possible that the recommendation will induce the Commonwealth to examine the suite of federal statehood issues afresh and arrive at a policy position regarding the terms and conditions of statehood. It is not clear, however, what the formal stance of the new Rudd Government will be regarding the terms and conditions of statehood, and it is also possible that the Government will not accept the recommendation.

## A Northern Territory constitution and section 106

Two matters that will be important in negotiations regarding the terms and conditions of statehood are the future Northern Territory constitution and its implementation in relation to section 106 of the Australian Constitution. Section 106 provides for the preservation of state constitutions after federation as follows:

The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.<sup>73</sup>

The Northern Territory does not currently have a constitution; as noted above, the drafting of a new Territory constitution is an element of the new statehood campaign that was announced in 2003.<sup>74</sup> In its 2006 submission to the HRSC/LCA statehood inquiry, the NTSSC indicated its view that the Northern Territory will need to have a constitution in place prior to statehood which 'at least puts the Northern Territory in the same position as the other States of Australia upon entry to the Federation'.<sup>75</sup> Professor Dean Jaensch has suggested that 'In political [*sic*] terms, it would be necessary for such a document to be part of the [statehood] process'.<sup>76</sup> The NTSSC has also stated its belief that 'the Commonwealth should have no role

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72. *ibid.*, p. 37.

73. Commonwealth of Australia Constitution Act (UK), s. 106.

74. The NTSSC has drafted a basic constitution document, based on the provisions of the *Northern Territory (Self-Government) Act 1978* (Cwlth), for discussion purposes as part of its *Constitutional Paths to Statehood* discussion paper. This document is available at <http://www.statehood.nt.gov.au/documents/DPAnnexWeb.pdf>, accessed on 11 January 2008.

75. Northern Territory Statehood Steering Committee, *Submission*, *op. cit.*, p. 9.

76. D. Jaensch, 'The Slow Road to Statehood', in P. Loveday and P. McNab (eds), *op. cit.*, p. 69.

in preparing a proposed Northern Territory constitution provided such a constitution is consistent with the Commonwealth Constitution and the Australia Acts'.<sup>77</sup>

In its May 2007 discussion paper the NTSSC also indicated that 'a future Northern Territory Constitution should be in force just prior to admission as a new State in order to attract the protection of section 106'.<sup>78</sup> Twelve years ago a different position was articulated by the joint Commonwealth/Northern Territory Statehood Working Group, which stated in its 1996 report that having a constitution in place prior to statehood was not the favoured stance of the Northern Territory Government.<sup>79</sup>

The Statehood Working Group also noted some issues arising in relation to the implementation of a Northern Territory constitution. Firstly, the Working Group indicated that, in order to be in place prior to statehood, a Northern Territory constitution would need to be passed by the Commonwealth Government under section 122 of the Australian Constitution and the *Northern Territory (Self-Government) Act 1978* would need to be repealed.<sup>80</sup> In the 1992 High Court decision of *Capital Duplicators Pty Ltd v. Australian Capital Territory*,<sup>81</sup> Brennan, Deane and Toohey JJ noted that 'the terminology of s. 122 emphasizes that the Parliament may prescribe the constitutional arrangements for the government of a territory'.<sup>82</sup>

Secondly, the Working Group indicated that, upon statehood, section 106 of the Australian Constitution would be likely to preserve a Northern Territory constitution in existence before statehood or implemented upon statehood (unless the Commonwealth could validly retain power to alter the Territory constitution under the terms and conditions of statehood). The Working Group also observed, however, that at any point prior to a grant of statehood an existing Territory constitution would, as a Commonwealth Act, be subject to change by the Commonwealth.<sup>83</sup> The Northern Territory Legislative Assembly Sessional Committee on Constitutional Development similarly noted in 1996 that a Territory constitution implemented prior to statehood 'would not have the protection of the Commonwealth Constitution [*sic*]'.<sup>84</sup> The Sessional Committee did note, however, that having a Territory constitution in place prior to statehood could have certain advantages, such as separating constitutional issues

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77. Northern Territory Statehood Steering Committee, *Submission*, loc. cit.

78. Northern Territory Statehood Steering Committee, *Constitutional Paths*, op. cit., p. 42.

79. Northern Territory Statehood Working Group, op. cit., p. 16.

80. *ibid.*

81. (1992) 177 CLR 248.

82. *ibid.*, p. 271.

83. Northern Territory Statehood Working Group, op. cit., pp. 16–17.

84. Northern Territory, Legislative Assembly, Sessional Committee on Constitutional Development, *Foundations for a Common Future*, op. cit., p. 8–55.

from political statehood concerns and reinforcing ‘the constitutional position of the Northern Territory in advance of Statehood’.<sup>85</sup>

The relationship between state constitutions and section 106 has been considered by the High Court on a number of occasions. In the 1996 decision of *McGinty v. Western Australia*,<sup>86</sup> Toohey J stated that ‘the scope and operation of s 106 are by no means settled’,<sup>87</sup> and that ‘Historically it has been seen, for the most part, as offering protection to the States against the exercise of Commonwealth power’.<sup>88</sup> In the 1947 decision of *Melbourne Corporation v. Commonwealth*,<sup>89</sup> for example, Latham CJ stated that ‘State constitutional powers are, subject to the Commonwealth Constitution, expressly preserved by the Commonwealth Constitution—ss. 106, 107’.<sup>90</sup> In the 1989 decision of *Re Tracey; Ex parte Ryan*,<sup>91</sup> Brennan and Toohey JJ expressed the view that section 106 protects state court functions from Commonwealth legislative interference by way of its maintenance of state constitutions:

State courts are an essential branch of the government of a State and the continuance of State Constitutions by s. 106 of the Constitution precludes a law of the Commonwealth from prohibiting State courts from exercising their functions.<sup>92</sup>

The operation of section 106 is not settled, however, and the High Court has also indicated that the maintenance of state constitutions by section 106 is subject to Commonwealth law enacted under section 51 (xxxviii) of the Australian Constitution.<sup>93</sup>

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85. *ibid.*

86. (1996) 186 CLR 140.

87. *ibid.*, p. 208.

88. *ibid.*

89. (1947) 74 CLR 31.

90. *ibid.*, p. 50.

91. (1989) 166 CLR 518.

92. *ibid.*, pp. 574–75 (see also statements per Mason CJ, Wilson and Dawson JJ, p. 547). See also *Australian Railways Union v. Victorian Railways Commissioners* (1930) 44 CLR 319 per Dixon J, pp. 391–92.

93. See *Port MacDonnell Professional Fishermen’s Association Inc v. South Australia* (1989) 168 CLR 340 and *Attorney-General (WA) v. Marquet* (2003) 217 CLR 545. Section 51 (xxxviii) specifies that the Commonwealth has legislative power with respect to ‘the exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia’.

One additional possibility, noted by the Statehood Working Group, would be the implementation of a new Northern Territory constitution as part of the grant of statehood under section 121 of the Australian Constitution.<sup>94</sup> At least one commentator has also suggested that the terms and conditions power in section 121 would 'extend to the modification of the constitutional framework under which the Territory Government operates'.<sup>95</sup> The Statehood Working Group also recognised this possibility and noted that this 'raises political considerations'.<sup>96</sup> In 1998, Prime Minister John Howard indicated that a Northern Territory constitution would need to be 'acceptable not only to Territorians but to the rest of the Australian people' and identified a consultative approach to formulating the constitution as the way forward.<sup>97</sup>

In its submission to the HRSLCA statehood inquiry, the NTSSC stated that 'constitutional equality of a new State with existing States is a central issue' and maintained that the Commonwealth should not 'reserve to itself any power to later amend the new constitution or to place any fetters on future State amendment of same'.<sup>98</sup> One commentator has recognised the importance of this issue for the Territory:

The most pressing question ... from the Northern Territory's point of view, is whether rigidity can be imposed upon the Constitution of a new State by the inclusion of a condition of continuing effect, in the Commonwealth's enabling Act, that no amendment may be made to the State Constitution unless it complies with a particular manner and form requirement. On the political side, States generally would object to the Commonwealth imposing and controlling the means of amending the State's Constitution, simply as a matter of principle. However, such an outcome might be acceptable to the Northern Territory if it were necessary to achieve Statehood.<sup>99</sup>

The NTSSC has already sounded a warning in relation to the exercise of Commonwealth power and the integrity of a future Territory constitution:

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94. Northern Territory Statehood Working Group, *op. cit.*, p. 17.

95. P. Bayne, 'Drawing Up A New Constitution: Consultation and Conventions', in P. Loveday and P. McNab (eds), *op. cit.*, p. 111.

96. Northern Territory Statehood Working Group, *loc. cit.*

97. J. Howard and S. Stone, *loc. cit.* The Prime Minister indicated that the Commonwealth would not require approval of a Northern Territory constitution by the other States in order for statehood to proceed.

98. Northern Territory Statehood Steering Committee, *Submission*, *loc. cit.*

99. A. Twomey, *op. cit.*, p. 213.

Any attempt by the Commonwealth to autocratically impose unacceptable terms and conditions, particularly if they purport to conflict with the new State Constitution, would doom the whole exercise to failure.<sup>100</sup>

For the Northern Territory, a meaningful constitution that enshrines basic equality with the states and is not subject to Commonwealth interference is clearly an integral element of statehood. The importance of a constitution for the Territory also appears to have been recognised by the Commonwealth. Beyond this, however, there is at least the potential for tension to arise between the expectations of the Territory and the intentions of the Commonwealth (whatever these may be). The implementation of a Northern Territory constitution will be a significant matter for negotiations between the Commonwealth and the Territory.

## Representation in the Commonwealth Parliament

Aside from the current numerical levels of representation, the fundamental point of difference between the Northern Territory and the states in the area of Commonwealth parliamentary representation is the constitutional position of the Territory relative to that of the states. Sections 7 and 24 of the Australian Constitution provide, respectively, that there shall be a minimum of six senators for each Original State and a minimum of five members of the House of Representatives from each Original State.<sup>101</sup> Section 7 also requires that the Senate representation of the Original States be equal, and section 24 prescribes the basis upon which the number of members and senators for the states is to be determined as follows:

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

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

- (i) a quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of the senators;
- (ii) the number of members to be chosen in each State shall be determined by dividing

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100. Northern Territory Statehood Steering Committee, *Submission*, op. cit., pp. 4–5.

101. Covering clause 6 of the Constitution defines the Original States as being those States that are ‘parts of the Commonwealth at its establishment’.

the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.<sup>102</sup>

In contrast to the Original States, no minimum level of representation for the Northern Territory, either in the Senate or in the House of Representatives, is enshrined in the Australian Constitution. Indeed, as noted above, section 122 of the Constitution explicitly provides the Commonwealth Parliament with the power to provide for the parliamentary representation of the Territory ‘to the extent and on the terms which it thinks fit’. The level of Territory representation in the Commonwealth Parliament (currently two senators and two members of the House of Representatives) is governed by Part III of the *Commonwealth Electoral Act 1918*.

The application of sections 7 and 24 in relation to new states, in conjunction with the exercise of the terms and conditions power in section 121, has received some consideration by the High Court. In the 1977 decision of *Queensland v. The Commonwealth*,<sup>103</sup> Aickin J, in a dissenting judgment, indicated that the terms and conditions power in section 121 would not extend to the removal of Commonwealth parliamentary representation for a new state:

It appears to me that it would not be within the power of the Parliament under s. 121 to admit or establish a new State upon the basis that there were to be no senators “for” such a State or that they were to be selected otherwise than by being “directly chosen” by the people of such a State, nor any members of the House of Representatives chosen in such a State. Section 121 shows that it is only the “extent”, and not the fact or mode, of representation which is committed to the Parliament.<sup>104</sup>

In the earlier decision of *Western Australia v. The Commonwealth* (1975),<sup>105</sup> Murphy J observed that ‘it appears from s. 7 and s. 121 that the constitutional guarantee of equal representation of States in the Senate and minimum number of six senators for each State is applicable only to original States and not to new States’.<sup>106</sup> In the same decision Barwick CJ stated that:

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102. Commonwealth of Australia Constitution Act (UK), s. 24.

103. (1977) 139 CLR 585.

104. *ibid.*, p. 617.

105. (1975) 134 CLR 201.

106. *ibid.*, p. 282. Noting these comments, Toohey has stated ‘That the Parliament is not bound by the terms of ss. 7 and 24 in the exercise of its power under s. 121 to impose terms and conditions as to the extent of representation of the new State is clear from the language of those sections. They confine the application of the principle they express to “Original States”’: J. Toohey, *op. cit.*, p. 5.

... ss. 7 and 24 will operate with respect to the new State when admitted ... But, not being an original State, the number of senators which the new State can elect to the Senate would need to be prescribed. To some extent s. 24 will prescribe the representation of the residents of the new State, who, because it is a State, become part of the people of the Commonwealth for the purpose of both sections. But there is scope for a limitation to be placed upon the number of members as well as upon the number of senators which the electors of a new State may elect: and such a limitation might be regarded as affecting the extent of the representation. Thus, by determining the “extent of the representation”, the numerical strength of the representation provided by the Constitution itself, may be determined by the Parliament at the point of, and as a term and condition of, the admission of the new State.<sup>107</sup>

If the Northern Territory, as a new state, would not receive as of right the minimum levels of representation in the Commonwealth Parliament that are guaranteed for the Original States by the Constitution, but would nevertheless be entitled to representation, the question then becomes what the level of this representation would be. In its 1996 report, the Statehood Working Group identified a range of options for Commonwealth parliamentary representation of the Territory as a new state:

- representation on the same basis as an Original State
- Senate representation equal to the states (12 senators) and House of Representatives representation on the section 24 quota basis
- Senate representation under a formula designed to achieve eventual equality or based on population increases and House of Representatives representation on the section 24 quota basis and
- continuation of (then) current representation levels.<sup>108</sup>

The option of Senate representation under a formula designed to achieve eventual equality, unrelated to population, together with House of Representatives representation on the basis of the section 24 quota, emerged in the report as the least problematic of these options.

### The position of the Northern Territory

In 1986, the Chief Minister of the Northern Territory stated that, regarding representation in the House of Representatives, the Territory as a state would ‘abide by the constraints of the quota’ set out in section 24 of the Constitution.<sup>109</sup> The Chief Minister also stated in no uncertain terms that the new state would expect equal representation in the Senate with the

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107. *Western Australia v. The Commonwealth* (1975) 134 CLR 201 per Barwick CJ, pp. 228–29.

108. Northern Territory Statehood Working Group, *op. cit.*, p. 19–21.

109. S. Hatton, *op. cit.*, p. 4.

other States, if not immediately then over time, and that 'No relationship between Senate representation and population size will be accepted'.<sup>110</sup>

Ten years later, the position of the Northern Territory Government on these points was essentially unchanged. In its 1996 report, the Statehood Working Group noted that the Northern Territory Government had indicated that it would not:

... seek the constitutionally guaranteed minimum representation of an Original State in the House of Representatives of five members ... It is content to accept membership in that House on the basis of the section 24 quota.<sup>111</sup>

Regarding Senate representation, the Working Group stated that:

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 ... which would ensure equality within a reasonable time, provided that such a formula was not linked to population size ...<sup>112</sup>

The Working Group also observed that the Northern Territory as a new state would not be guaranteed the minimum levels of representation provided for the Original States in sections 7 and 24 of the Constitution.<sup>113</sup> In 1998 Prime Minister John Howard discounted full parity of Senate representation in the first instance, identifying instead the possibility of three Senators to begin with followed by increases in representation in line with increases in population size.<sup>114</sup> In its 2006 submission to the HRSCLCA statehood inquiry, the NTSSC recognised that 'the agreement on Senate representation should be incorporated into the terms and conditions process' and stated that it 'supports equality ... Anything less than a partnership with the other States in a federation will in the eyes of many Territorians probably not be worth fighting for'.<sup>115</sup>

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110. *ibid.*, p. 5.

111. Northern Territory Statehood Working Group, *op. cit.*, p. 19.

112. *ibid.*, p. 20.

113. *ibid.*, p. 19.

114. J. Howard and S. Stone, *loc. cit.* The Prime Minister did indicate, however, that this would be a matter for discussion between the Commonwealth and the Northern Territory.

115. Northern Territory Statehood Steering Committee, *Submission*, *op. cit.*, p. 11.

Clearly, Commonwealth parliamentary representation of the Northern Territory as a new state is a crucial matter for statehood.<sup>116</sup> It seems settled that the Territory, as a new state and not an original State, would not be entitled to the minimum levels of representation that the Constitution guarantees for the original States. Past statements also suggest that the Territory would accept representation in the House of Representatives according to the quota basis set out in section 24. It should be noted, however, that these statements were made prior to the Territory receiving its second member of the House, and presumably the Territory would not wish to see any reduction of its current level of representation upon statehood. The main question requiring resolution in negotiations between the Commonwealth and the Territory may well be the initial and future levels of Senate representation. The NTSSC has expressed the view that the negotiations regarding parliamentary representation will need to be resolved in advance of the second statehood referendum.<sup>117</sup>

#### The effect of a new state on parliamentary numbers: the 'nexus' requirement in section 24

One other issue that arises in this context is the effect that the Northern Territory, as a new state, would have upon the overall numbers in the Commonwealth Parliament due to the operation of the 'nexus' requirement in section 24 of the Constitution. Section 24 requires that 'the number of such members shall be, as nearly as practicable, twice the number of the senators'. In the 1977 decision of *Attorney-General (NSW); Ex rel. McKellar v. The Commonwealth*,<sup>118</sup> the High Court held that only state senators and members are relevant to the 'nexus' requirement. In this decision Gibbs J stated that 'the second part of the first paragraph of s. 24, the nexus provision, relates only to the number of members chosen in, and to the senators chosen for, the States'.<sup>119</sup>

If the Northern Territory was to achieve statehood, then the question of whether the new state's members and senators would have to be included in calculations for the 'nexus' between the House of Representatives and the Senate would need to be resolved. Inclusion of Territory senators in the 'nexus' calculation would likely mean an increase in the number of members of the House of Representatives allocated amongst the States.<sup>120</sup> In its 1996 report the Statehood Working Group indicated that the 'weight of opinion on this matter favours an

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116. The Northern Territory Statehood Steering Committee has indicated that 'Territory representation is constantly raised by Territorians as an important issue': *Submission*, op. cit., p. 10.

117. *ibid.*, p. 11.

118. (1977) 139 CLR 527.

119. *ibid.*, p. 543. See also statements per Barwick CJ, p. 536, and Stephen J, p. 562.

120. In its 2007 statehood inquiry report the HRSCLCA calculated that, based on 2005 national population figures, a post-statehood Territory representation level of four Senators could require the creation of 5 or 8 additional electoral divisions around Australia: House of Representatives Standing Committee on Legal and Constitutional Affairs, op. cit., p. 116.

interpretation of section 24 which would confine the operation of the nexus requirement to the Original States'.<sup>121</sup> However, the Working Group also stated that 'the matter is not free from doubt'.<sup>122</sup>

## **The availability of section 122 in relation to the Northern Territory after statehood**

The Commonwealth Parliament's plenary power in section 122 of the Constitution to legislate for Commonwealth territories would presumably no longer be available in relation to the Northern Territory after statehood. As one commentator has put it, 'Commonwealth power persists over s 122 [sic] territories as long as they remain territories.'<sup>123</sup> In its 1996 report the Statehood Working Group expressed the view that:

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.<sup>124</sup>

In the High Court's 1992 *Capital Duplicators* decision, Mason CJ and Dawson and McHugh JJ located section 122 within the context of a territory's progression towards and attainment of statehood:

Section 122 forms part of Ch. VI of the Constitution ... Plainly enough, Ch. VI, in particular ss. 121 and 122, contemplates that a Commonwealth territory may advance to Statehood. In the course of its evolution towards Statehood, it is natural, indeed inevitable, that a territory will be progressively endowed with institutions appropriate to self-government ... Section 122 was and is the source of legislative power for the advancement of the territories along this path towards the final step of Statehood, at which point s. 121 becomes the relevant source of power.<sup>125</sup>

## **Commonwealth legislation applying to the Northern Territory**

A range of Commonwealth legislation currently applies to the Northern Territory including legislation specific to the Territory and legislation which has a broader application. Perhaps the most obvious example is the *Northern Territory (Self-Government) Act 1978* and its

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121. Northern Territory Statehood Working Group, op. cit., p. 21.

122. ibid, p. 22.

123. P. H. Lane, op. cit., p. 829.

124. Northern Territory Statehood Working Group, op. cit., p. 25.

125. (1992) 177 CLR 248, p. 266.

attendant regulations; other examples include the *Aboriginal Land Rights (Northern Territory) Act 1976*, the *Commonwealth Electoral Act 1918*, the *Atomic Energy Act 1953*, and the *Environment Protection (Alligator Rivers Region) Act 1978*. Some Commonwealth legislation applying to the Territory, such as the *Northern Territory (Self-Government) Act 1978*, has been enacted under section 122 of the Australian Constitution; other legislation has been enacted under other constitutional heads of power. Many issues surrounding statehood are bound up with Commonwealth legislation applying to the Northern Territory.

It is clear that a grant of statehood would affect the suite of Commonwealth legislation that applies to the Northern Territory. Some level of repeal and/or amendment, for example, would almost certainly be necessary (again, most obviously in relation to the *Northern Territory (Self-Government) Act 1978* and regulations, particularly in the context of a Northern Territory constitution). In its submission to the HRSCCLA statehood inquiry, the AGD indicated that:

The establishment of the Northern Territory as a state would have a significant impact on Commonwealth legislation applying to the Territory. It would inevitably affect the *Northern Territory (Self-Government) Act 1978* and other Commonwealth legislation with differential operation as between the states and the territories.<sup>126</sup>

As to specifics, the AGD stated that ‘it is not possible to address this issue in any detail without making assumptions about the terms and conditions upon which statehood may be conferred’.<sup>127</sup> In its 1996 report, the Statehood Working Group identified at least 28 Commonwealth Acts (including many of the examples noted above) with specific or extended application to the Northern Territory that could require repeal or amendment in the event of statehood.<sup>128</sup> In its recent report, the HRSCCLA also listed over 250 items of Commonwealth legislation that could require minor amendment in relation to statehood.<sup>129</sup> The Working Group further noted that some Commonwealth legislation applying to the Territory at the point of statehood may well have separate constitutional legitimacy apart from section 122 of the Constitution and could therefore remain in force after statehood:

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.<sup>130</sup>

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126. Attorney-General’s Department, op. cit., p. 2.

127. *ibid.*

128. Northern Territory Statehood Working Group, op. cit., p. 31.

129. House of Representatives Standing Committee on Legal and Constitutional Affairs, op. cit., pp. 119–30.

130. Northern Territory Statehood Working Group, op. cit., p. 25.

For Commonwealth legislation not in this category, the Working Group indicated that any continued application would need to be specified and could either be dealt with in an agreement between the Commonwealth and the Northern Territory or transferred to the new state.<sup>131</sup> In addition, the Working Group noted that legislation coming under special arrangements, such as a referral of powers under section 51 (xxxvii) of the Constitution or under cooperative schemes between the Commonwealth and the states, would require specific measures in order to have continued application in the Northern Territory after statehood.<sup>132</sup> One prominent example of a Commonwealth legislative regime constituted by virtue of a referral of powers is the current corporations law scheme established by the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001*.

An alternative approach to dealing with the range of Commonwealth legislation applying to the Northern Territory was identified by Lionel Bowen, a former Commonwealth Attorney-General:

... it may be that all Commonwealth laws would continue to apply after statehood, with the power of the new State to repeal or amend such laws being dealt with in its Constitution or by the imposition of terms and conditions.<sup>133</sup>

In its 2006 submission to the HRSC/LCA statehood inquiry the NTSSC expressed the view that the current Commonwealth legislative regime that is in place by virtue of section 122 'would have to change upon a grant of Statehood, acknowledging the Commonwealth retains a range of constitutional powers over the States'.<sup>134</sup> The NTSSC also stated that 'the Commonwealth should take into account any Northern Territory views' regarding any lesser amendments that might be required.<sup>135</sup>

## Conclusion

Statehood has been identified as a goal for the Northern Territory since at least the 1950s but has yet to be achieved. Despite this, the latest statehood campaign and the planned second referendum (to be held possibly in July 2008) indicate that the statehood aspiration is still very much alive in the Territory.

The constitutional issues outlined in this paper are complex and are fundamental to the question of bringing a new state into existence within the Australian Federation. For Northern

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131. *ibid.*, pp. 25–6.

132. *ibid.*

133. L. Bowen, 'Statehood: The Commonwealth Perspective', in P. Loveday and P. McNab (eds), *op. cit.*, p. 42.

134. Northern Territory Statehood Steering Committee, *Submission*, *op. cit.*, p. 12.

135. *ibid.*

Territory statehood, many of these issues, along with other significant and complex matters, will require extensive negotiations between the Commonwealth and the Territory prior to statehood becoming a reality.

The matter of constitutional equality with the existing States, a longstanding expectation within the Territory in relation to statehood, has the potential to be a point of contention given the Commonwealth's reluctance in the past to endorse constitutional equality per se for the Northern Territory as a new state. An additional factor is the new Rudd Commonwealth Government. While the ALP expressed support for statehood when in Opposition, the declared policy position of the new Government regarding the terms and conditions of statehood remains to be seen.

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