

# WE OF THE NEVER NEVER?:<sup>1</sup> CONSTITUTIONAL MISCONCEPTIONS AND POLITICAL REALITIES IN PRE-CONSTITUTING THE STATE OF THE NORTHERN TERRITORY<sup>2</sup>

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The Territory is, in one sense, poised to become a State. Whether it does, and when it does, and on what terms it does, will depend a great deal upon the people of the Territory.<sup>3</sup> *Chief Justice Robert French*

Delaying drongos are a hardy breed quite capable of transmitting their genes to the third and fourth generation.<sup>4</sup> *The Honourable Austin Asche AC QC*

## I INTRODUCTION

In 2011 and 2012, the long history of Northern Territory's attempts to achieve the grant of statehood was marked by the unusual circumstances surrounding the Northern Territory Legislative Assembly's passage of the *Constitutional Convention (Election) Act*,<sup>5</sup> an Act providing for the election of delegates for a Constitutional Convention at a time to be proclaimed by the Minister.<sup>6</sup>

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1 The title of the article is borrowed in a temporal, rather than a geographical sense, from Jeannie (Aeneas) Gunn's classic novel *We of the Never Never* (Hutchinson and Co, 1907) based on autobiographical experiences at Elsey Station, Mataranka, Northern Territory in 1902 and 1903.

2 It is anticipated that the name 'Northern Territory' would be retained upon the conferral of statehood by the Commonwealth. More than 90% of people surveyed by the Statehood Steering Committee did not wish to change the name: Northern Territory Statehood Steering Committee, 'Forums, Presentations and Shows FAQ's', <[www.ntstate7.com.au/sites/default/files/page-files/State7\\_FAQs.pdf](http://www.ntstate7.com.au/sites/default/files/page-files/State7_FAQs.pdf)>.

3 Chief Justice Robert French 'The Northern Territory: A celebration of constitutional history' (2011) 85 *Australian Law Journal* 735, 745 (Kriewaldt Lecture, Centenary of the Northern Territory Supreme Court 23 May 2011 Darwin, Northern Territory).

4 Honourable Austin Asche AC QC, Former Chief Justice of the Northern Territory and Former Administrator of the Northern Territory, 'Keynote Address' in Rick Gray (ed) *Constitutional Foundations reconciling a diversity of interests in a new Northern Territory constitution for the 21<sup>st</sup> century* (Northern Australia Research Unit Research School of Pacific and Asian Studies Australian National University, 1998), 3. It is not suggested that any individual referred to in this article answers the description used in 1998 by Hon Austin Asche AC QC.

5 *Constitutional Convention (Election) Act 2011* (NT).

6 See Legal and Constitutional Affairs Committee, Northern Territory Legislative Assembly, *Report on Statehood Program*, (Northern Territory Legislative Assembly, 2012), 4. The legislation passed the Legislative Assembly on 30 November 2011. It was originally anticipated that the election of

The election of Convention delegates was originally agreed, on a bipartisan basis, to occur in March 2012,<sup>7</sup> with the first Convention to be held in April 2012, but was postponed to a time of the prospective elected government's choosing, at the earliest after the 2012 Northern Territory election.<sup>8</sup>

This point was reached nearly 10 years after the Martin government, elected in 2001, renewed the Territory's recent quest for statehood, which was initiated in the wake of the 1998 defeat of a statehood referendum and the referral to the Northern Territory Legislative Assembly Committee on Legal and Constitutional Affairs of statehood matters for inquiry and report in 1999.<sup>9</sup> A Northern Territory Statehood Steering Committee was established by resolution of the Northern Territory Legislative Assembly in 2004.<sup>10</sup> From 2005, the Statehood Steering Committee 'developed and commenced an extensive education and information campaign about Northern Territory Statehood',<sup>11</sup> designed around three key aspects: the provision of information

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Statehood Convention delegates would occur on the same day as local government elections in the Northern Territory. See Constitutional Convention (Election) Bill 2011 (NT) Explanatory Statement 'General Outline': 'It is anticipated that the election to be held under the Act may be on the same day as elections to be held under the Local Government Act so additional provision is made to accommodate that eventuality'; and see Part 8, Division 2 of the *Constitutional Convention (Election) Act 2011* (NT), amending the *Local Government Act* s 89; and s 9 of the *Constitutional Convention (Election) Act 2011* (NT) which states '(1) The polling day is the day declared by the Minister by Gazette to be the polling day and (2) To avoid doubt, the declaration must be made before the start of the nomination period'. The nomination day is the day that is 23 days before the polling day, and the nomination period is the period (a) starting on the day that is 57 days before the polling day; and (b) ending at 12 noon on the nomination day: ss 11(1) and 11(2) of the *Constitutional Convention (Election) Act 2011* (NT).

- 7 See Media Release Minister for Statehood, 'NT Constitutional Convention dates announced', 17 June 2011, <<http://newsroom.nt.gov.au/www.newsroom.nt.gov.au/indexec27.html?fuseaction=printRelease&ID=8318>>; Media Release Speaker of Legislative Assembly, 'Next Step towards Becoming State 7', 17 June 2011 <<http://newsroom.nt.gov.au/www.newsroom.nt.gov.au/index0dfe.html?fuseaction=printRelease&ID=8314>>, and Media Release Chief Minister, 'Constitutional Convention Bill Introduced, 27 October 2011 <<http://newsroom.nt.gov.au/www.newsroom.nt.gov.au/index65e8.html?fuseaction=printRelease&ID=8797>>.
- 8 See Northern Territory *Parliamentary Debates* Legislative Assembly, 16 February 2012, 2 (Mrs Aagaard), 7 (Mr Mills).
- 9 Standing Committee on Legal and Constitutional Affairs, Northern Territory Legislative Assembly *Report into appropriate measures to facilitate Statehood* (Standing Committee on Legal and Constitutional Affairs, 1999).
- 10 Northern Territory Statehood Steering Committee, Northern Territory Legislative Assembly, *Statehood Steering Committee Activity Report 2006–2008*, 3. It was established as an advisory committee to the Legislative Assembly Standing Committee on Legal and Constitutional Affairs. This followed the announcement of a community based statehood campaign by Chief Minister Claire Martin: Speech to Charles Darwin Symposium Series 22 May 2003, 2 referred to in House of Representatives Standing Committee on Legal and Constitutional Affairs, Commonwealth Parliament, *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, 2007), 12 (hereafter, *The Long road to statehood report*).
- 11 Northern Territory Statehood Steering Committee, Northern Territory Legislative Assembly, *Con-*

and education; the development of a 'draft Constitution in consultation with Territorians and the facilitation of a constitutional convention to finalise that Constitution'; and that the Northern Territory Government take the lead in discussions with the Commonwealth Government concerning the future terms and conditions of Northern Territory Statehood.<sup>12</sup> Importantly, it can be observed that after a period of years, only the first of these three key aspects has been completed.

In 2010, having engaged in an extensive and varied work program<sup>13</sup> to involve Territorians in and to promote statehood issues,<sup>14</sup> the Statehood Steering Committee produced a Final Report with 10 recommendations to further the Statehood Program.<sup>15</sup> These recommendations included that the Statehood Steering Committee conclude its work<sup>16</sup> and that the Legal and Constitutional Affairs Committee establish a Constitutional Convention Committee.<sup>17</sup> In brief, these developments constitute the organisational framework to 2011 for the advancement of Northern Territory statehood, against which in 2011 and 2012 the circumstances of the *Constitutional Convention (Election) Bill 2011* (NT) were played out.

Much broader questions and issues arise from debates and public comments as to the meaning and consequences of this delay, and its effect upon the development of a plausible case by the Northern Territory to the Commonwealth to negotiate the grant of statehood.<sup>18</sup> Recent experience, at both Territory and

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*stitutional Paths to Statehood*, Community Discussion Paper (Northern Territory Statehood Steering Committee, 2007), 1.

12 Ibid.

13 For details of this work program, see *Statehood Steering Committee Activity Report 2006–2008*, above n 10 (Attachment G Northern Territory Statehood Steering Committee Final Report and Recommendations (2010)) and Northern Territory Statehood Steering Committee, Northern Territory Legislative Assembly, *Final Report and Recommendations to the Legislative Assembly Standing Committee on Legal and Constitutional Affairs* (2010) 5–12, which includes Phases 2 and 3 Community Education and Consultation and Phase 4 Information Roadshow Forums (Hereafter *Final Report and Recommendations*)

14 *Final Report and Recommendations*, above n 13, 1.

15 Ibid 3–4, Recs 1–10.

16 Ibid 3, Rec 1.

17 Ibid 3, Rec 2. A Northern Territory Constitutional Convention Committee was appointed by the Legal and Constitutional Affairs Committee. In 2011, the Constitutional Convention Committee developed detailed plans for the Convention: See *Report on Statehood Program*, above n 6, 3 and 4. The Constitutional Convention Committee also commissioned (for discussion purposes at the Convention) a Constitutional Framework Document, being a 'model for the essential elements of the constitution based on the *Northern Territory (Self Government) Act* and the constitutions of existing States: ibid 3–4, 12 and Appendix E.

18 This is in spite of assurances by the then Northern Territory Leader of the Opposition, that the selection process for Constitutional Convention delegates should proceed after the 2012 Legislative Assembly election: See Northern Territory, *Parliamentary Debates* Legislative Assembly, 30 November 2011, 1 (Mr Mills) and 16 February 2012, 7 (Mr Mills).

Commonwealth levels, reveals that the Northern Territory's progress towards statehood has been hindered at the political level by a range of constitutional misconceptions surrounding statehood, as well as an inability to shape political action in a consistently bipartisan manner so as to address and resolve a range of critical substantive and process issues relating to an effective and timely acquisition of statehood. Such gaps in legal understanding may easily flow on to produce a less than optimal political culture and dynamic towards the attainment of statehood. Indeed, contemporary legislative developments, at both Commonwealth and Territory levels, appear contrary to a substantively bi-partisan consensus with Northern Territory statehood issues, both critical and necessary to bringing about such significant constitutional change.

In particular, a less than informed and accurate understanding of the legal requirements and processes towards statehood may create a poor translation of policy within the Northern Territory to respond to the quite specific requirements and needs of stakeholders that are critical to the realisation of statehood – whether that be meeting the precise bipartisan requirements of the Commonwealth, the array of entrenched constitutional protections sought by Indigenous Territorians, or the need for authentic sovereign political ownership of the statehood process by the people of the Northern Territory. These issues affect the prospect of not merely restarting the constitutional convention timetable, but doing it in manner which subsequently will realistically advance statehood.

Mindful of these themes, this article commences with an examination of Commonwealth legislation removing the Commonwealth executive override power over Northern Territory Legislative Assembly legislation, and the associated legislative process in the Commonwealth Parliament. Constitutional misconceptions about this legislation are also canvassed, with links to the circumstances surrounding the enactment by the Northern Territory Legislative Assembly of the *Constitutional Convention Election Act 2011* (NT) that occasioned further delays in the statehood process. An analysis is then made of the collapse of bipartisan attitudes and policy as reflected in the debates surrounding passage of the Northern Territory legislation. It is argued that these delays in the progression of statehood offer a political opportunity to pause and reflect, but expose a range of matters in which consensus and bipartisanship are crucial to advancing the prospects of Northern Territory statehood. Given the enormous expenditure of process on parliamentary, committee and community effort over many years, it becomes presently important to take account of the failed 1998 convention and referendum experience, namely that public perceptions of political action surrounding statehood have a determinative effect on outcomes.

Further, it is argued that the passive approach of the Commonwealth towards statehood – an approach shared by both major political parties and reflected in the Commonwealth preconditions and framework – demands practical and focused responses from Northern Territory politicians, as well as a bipartisanship that is both substantive and continuous. These characteristics are underlined by the need to reconcile Northern Territory aspirations and political realities with the difficult prospective task of negotiating the terms and conditions of statehood with the Commonwealth across a range of areas – the status of constitutional admission to the Commonwealth, the development of a new Northern Territory *Constitution*, the foundation principle of the eventual equality of the Northern Territory with other states in relation to subject matters presently reserved to the Commonwealth, as well as the size of Commonwealth Parliament representation. It is further highlighted that Indigenous communities within the Northern Territory have specified a framework agreement as a prerequisite to the approval of statehood, and in doing so, exercise a de facto right of veto over the realisation of statehood.

This article concludes that these further delays raise issues of wider import about political and legal processes presently deficient, but necessary, to realise the goal of statehood, with other points of discontinuity and disconnection, in an extended statehood process approaching 10 years duration. In this respect, the change of government following the August 2012 Northern Territory elections introduced a number of other practical legal and political considerations into the statehood mix. Both political unity and a constructive, imaginative negotiation process are required to navigate the multiplicity of contentious legal and policy issues around statehood, and to avoid the present statehood process joining the Northern Territory tradition of grand ambitions meeting failed schemes.

## II THE TERRITORIES SELF-GOVERNMENT (DISALLOWANCE AND AMENDMENT OF LAWS) ACT 2011 (Cth) AND ITS LINK TO THE CONSTITUTIONAL CONVENTION ELECTION ACT 2011 (NT)

Of contemporary significance for the development of Northern Territory statehood was the introduction of a Commonwealth bill,<sup>19</sup> initially to remove the ‘Governor-General’s power under the *Australian Capital Territory (Self-Government) Act 1988* to disallow or amend any Act of the Legislative Assembly for the Australian Capital Territory’.<sup>20</sup> Subsequently, proposed

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19 Australian Capital Territory (Self Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010 (Cth). The Bill was introduced into the Senate on 29 September 2010 by the then leader of the Australian Greens, Senator Bob Brown.

20 See Senate Legal and Constitutional Affairs Legislation Committee, *Commonwealth Parliament, Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment*

amendments were circulated on 1 March 2011 to ‘make similar changes to the *Northern Territory (Self Government) Act 1978*’.<sup>21</sup> The Senate Committee Report of May 2011 recommended ‘the removal of the Commonwealth’s powers to disallow ACT and Northern Territory legislation...leaving the parliamentary process as the means of exercising Commonwealth influence over ACT and Northern Territory legislation’.<sup>22</sup> These amendments were passed in the Senate on 18 August 2011, the title of the Bill being amended to the Territories Self-Government Legislation Amendment (Disallowance and Amendment of Laws) Bill 2011 (Cth). That Bill was then referred to the House of Representatives Standing Committee on Social Policy and Legal Affairs, which produced an advisory report,<sup>23</sup> recommending that the House of Representatives pass the bill.<sup>24</sup> Soon after, the Bill became law<sup>25</sup> and received royal assent on 4 December 2011, removing s 9 of the *Northern Territory (Self Government) Act 1978* (Cth). Section 9 had permitted the Governor General, within 6 months after the Administrator’s assent to a proposed law, to disallow a law or part of a law of the Northern Territory Legislative Assembly<sup>26</sup> or to recommend to the Administrator any amendments of any laws of the Northern Territory that the ‘Governor General considers to be desirable as a result of his or her consideration of the law’.<sup>27</sup>

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*Power of the Commonwealth) Bill 2010* (Senate Legal and Constitutional Affairs Legislation Committee, May 2011), 1 (hereafter *Senate Committee Report*). This statement overinflates the capacity of the Governor General in relation to amendment of Acts of the ACT Legislative Assembly. Prior to its amendment, s 35 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) stated ‘that (2) Subject to this section, the Governor-General may, by written instrument, disallow an enactment within 6 months after it is made...(4) The Governor-General may, within 6 months after an enactment is made, recommend to the Assembly any amendments of the enactment, or of any other enactment, that the Governor-General considers to be desirable as a result of considering the enactment...(5) Where the Governor-General so recommends any amendments, the time within which the Governor-General may disallow the enactment is extended for 6 months after the date of the recommendation’.

21 See *Senate Committee Report*, above n 20, 1. Changes were also proposed to the *Norfolk Island Act 1979* (Cth).

22 See Commonwealth of Australia, *Parliamentary Debates* House of Representatives, 31 October 2011, 12090, (Mr Crean). See also *Senate Committee Report*, above n 20, para 3.66, Rec 1. The Senate Committee also recommended removal of references to territory legislatures as having ‘exclusive legislative authority and responsibility for making laws’ (cl 4 of the Bill) and that the Bill not apply to Norfolk Island: *ibid* paras 3.66 and 3.67 (Recs 1 and 2).

23 House of Representatives Standing Committee Social Policy and Legal Affairs, Commonwealth Parliament, *Advisory Report: Territories Self-Government Legislation Amendment (Disallowance and Amendment of Laws) Bill 2011* (September 2011) (hereafter, *House of Representatives Report*).

24 *Ibid* Rec 1, 5.

25 *Territories Self-Government Legislation Amendment (Disallowance and Amendment of Laws) Act 2011* (Cth).

26 *Northern Territory (Self Government) Act 1978* (Cth), s 9(1).

27 *Northern Territory (Self Government) Act 1978* (Cth), s 9(2).



With the removal of the Commonwealth executive method of amendment of Northern Territory Legislative Assembly legislation, the remaining amendment method is Commonwealth Parliament legislative override of Northern Territory legislation, founded upon the Commonwealth's territories power in s 122 of the *Commonwealth Constitution*. The removal of the Commonwealth executive override power from the *Northern Territory (Self Government) Act 1978* (Cth) is both a significant and symbolic affirmation of Northern Territory self-governance in its movement towards statehood. What is remarkable, therefore, is the level and diversity of political party opposition to this reform at the Commonwealth level, which in turn is linked to, and has animated opposition in the Northern Territory Legislative Assembly to the election of Constitutional Convention delegates, thereby renegeing on a previously agreed bipartisan schedule.<sup>28</sup>

Particular characteristics emerged in relation to opposition of the removal of the executive override power over Northern Territory laws in the Federal Parliament. Within the Commonwealth Parliamentary Committee reports, two strands of opposition became apparent to this legislation's enlargement of Northern Territory self-government. The first questioned the track record and motives of the sponsor of the Bill, Senator Bob Brown, as he then was, over territory rights, alleging advancement of the Australian Greens social agenda, including euthanasia and same sex marriage, as well as selective past inconsistencies in relation to application to which territories and which subject matters.<sup>29</sup>

The second raised issues of the methodology of reaching the legislative reforms and their scope, with aspirations far exceeding the expeditious, practical and modest conferral of self-governance authority for the Northern Territory in the present Bill:

In particular, Liberal Senators are of the view that piecemeal amendments do not in any way represent good legislative practice...The process by which the Australian territories move towards greater independence ...should continue, but Liberal Senators consider that a more systematic and comprehensive approach is to be preferred...Liberal Senators consider that the committee should follow its own recommendation and urge the Senate to commend a systematic and holistic review of self-government arrangements in the ACT and NT. This would ensure that all relevant constitutional and self-determination issues in the territories are

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28 See Minister for Statehood Media Release 'NT Constitutional Convention dates announced' 17 June 2011, <[http://newsroom.nt.gov.au/www/newsroom nt.gov.au/indexec27.html?fuseaction=printRelease&ID=8318](http://newsroom.nt.gov.au/www/newsroom%20nt.gov.au/indexec27.html?fuseaction=printRelease&ID=8318)>.

29 See *Senate Committee Report*, above n 20, 'Dissenting Report By Liberal Senators', paras 1.1 to 1.3 and *House of Representatives Report*, above n 23, 'Dissenting report: Hon D Stone MP and Mr Vasta MP', paras 1.3 to 1.4.

given proper and thorough consideration before any legislative proposals are brought forward.<sup>30</sup>

Of course, such extensive assessment and reform investigatory mechanisms would not have produced the expeditious removal of the executive override power, and the exhaustive breadth of the inquiry suggested might be a potential legislative tactic to forestall constitutional change, despite a publicly articulated support for Northern Territory statehood.

Similar reasons for opposing the Bill were raised by coalition members in Commonwealth Parliamentary debates, the content of *Hansard* more accurately conveying the passionate, but not necessarily principled, reasons for opposition to increased territory independence, than the more restrained content of the two Parliamentary reports.<sup>31</sup> Again, the major opposition is found in a concatenation of adverse factors about the motives and record of the Bill's sponsor, Senator Bob Brown,<sup>32</sup> and various claims about the Australian Greens social agenda.<sup>33</sup>

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30 See *Senate Committee Report*, above n 20, 'Dissenting Report by Liberal Senators', pars 1.3, 1.5. See also *House of Representatives Report*, above n 23, par 1.5: 'The issues of the Territories' statehood and greater independence should be the subject of careful, transparent and comprehensive debate leading to a detailed set of recommendations that include consideration of all of the constitutional complexities involved in self determination'. It might be seen as ironic that conservative opponents of the Bill criticised a cautiously incremental approach and advocated a systematic and far reaching review process. This response of the coalition members of the Commonwealth Parliament Senate Committee can be seen as similarly ironic given that the issue of more independence of the Northern Territory from Canberra was a theme of successive CLP governments over the first 23 years of self-government from 1978 to the election of the Martin government in 2001.

31 *Senate Committee Report*, above n 20, and *House of Representatives Report*, above n 23.

32 In particular, see the criticism about Senator Brown during debate on the Bill: Commonwealth Parliament, *Parliamentary Debates* Senate, 18 August 2011, 4777 (Senator Brandis); Commonwealth Parliament, *Parliamentary Debates* Senate, 18 August 2011, 4782 (Senator Humphries); Commonwealth Parliament, *Parliamentary Debates* Senate, 18 August 2011, 4789 (Senator Scullion); Commonwealth Parliament, *Parliamentary Debates* House of Representatives, 31 October 2011, 12082, (Mr Keenan) and Commonwealth Parliament, *Parliamentary Debates* House of Representatives, 31 October 2011, 12087 (Mrs Griggs).

33 See Commonwealth Parliament, *Parliamentary Debates* Senate, 18 August 2011, 4777 (Senator Brandis): 'this bill, although on its face a constitutional bill, is in fact being sought to be used as a vehicle for gay marriage to be introduced in the Australian Capital Territory'; Commonwealth Parliament, *Parliamentary Debates* Senate, 18 August 2011, 4789 (Senator Scullion) 4789 'You cannot accuse the Greens of not being organised or of not having a motive... this is all about introducing same-sex marriages in the Australian Capital Territory'; Commonwealth Parliament, *Parliamentary Debates* Senate, 18 August 2011, 4786 (Senator Cormann) 'The Greens are being driven by their social agenda in relation to same sex marriage, euthanasia and other bits and pieces for which they cannot get support, despite repeated attempts, in any of the state parliaments... it is exclusively driven by Senator Brown's desire to see legislation on civil unions and same sex marriage and euthanasia become more achievable in the sorts of parliaments where he thinks that this sort of legislation has a chance to get up'; Commonwealth Parliament, *Parliamentary Debates* 31 October 2011, 12082 (Mr Keenan): 'this bill, although on the face a constitutional bill, is being sought for use as a vehicle for same-sex marriage to be introduced in



The casual nature of opposition to a simple reform representing further progression towards statehood by the removal of the executive based override power, might be explained by the various political participants being several steps removed from the practicalities of Northern Territory self-governance and law making.<sup>34</sup> Alternatively, it might indicate an inadequate appreciation of the tortuous efforts towards Northern Territory statehood.<sup>35</sup> Characteristic of the opposition in parliamentary debate is first, general assertions favouring statehood, but claiming that the best interests of territory self-governance will be served by rejecting the Bill;<sup>36</sup> then secondly, some incorrect assessments of the constitutional powers of the Northern Territory Legislative Assembly, consequential upon enacting the proposed amendments.

### III CONSTITUTIONAL MISCONCEPTIONS IN THE COMMONWEALTH PARLIAMENTARY DEBATES

#### A *Understanding the Misconceptions*

Two sets of constitutional issues briefly arise as objections to the legislation in the Commonwealth parliamentary debates. The first erroneously claims that the territory legislatures, freed from the possibility of Commonwealth

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the Australian Capital Territory'; Commonwealth Parliament, *Parliamentary Debates* 31 October 2011, 12087 (Mrs Griggs): 'The coalition is not going to play along with the cynical game that the Australian Greens are promoting with this sudden interest in the governance practices of the territories'.

34 However, in the case of Senator Scullion, CLP Senator for the Northern Territory, and Mrs Griggs, Member for Solomon in the Northern Territory, it becomes more difficult to reconcile the stated opposition to the Bill with consistent CLP claims in the Northern Territory to support for statehood.

35 Useful summaries of these efforts and developments are found in the following documents: Standing Committee on Legal and Constitutional Affairs, Northern Territory Parliament, Information Paper No 1 *Northern Territory Constitutional Development and Statehood A Chronology of Events* (Standing Committee on Legal and Constitutional Affairs, June 2002), 4–17; Standing Committee on Legal and Constitutional Affairs, Northern Territory Parliament, *Report into appropriate measures to facilitate Statehood* (Standing Committee on Legal and Constitutional Affairs, April 1999), 15–20; *The long road to statehood report*, above n 10, 7–8.

36 See in particular Commonwealth, *Parliamentary Debates*, House of Representatives, 31 October 2011, 12087 (Mrs Griggs): 'There are serious issues about the form and effectiveness of self-government. These are real issues which deserve systematic and careful examination by the federal parliament; not a piecemeal approach to legislative design based more upon political purposes than on the advance of a systematic examination of what is wrong and what needs to be fixed about the institution of self-government in the Northern Territory'; Commonwealth, *Parliamentary Debates*, Senate, 18 August 2011, 4789 (Senator Scullion): 'A few people...are really excited that this is going to give them more rights in the Territory. Once they have all the information they then understand that this is not another step in moving forward towards statehood'. The tenor of these approaches is consistent with the Liberal Senators and Liberal members dissenting comments in the *Senate Committee Report*, above n 20 and the *House of Representatives Committee Report*, above n 23, that there should be a comprehensive examination of self-governance issues for the ACT and the Northern Territory.

executive override of their legislation, have unfettered plenary power, including in the case of the Northern Territory, power to engage in a range of independent activities normally associated with the Commonwealth.<sup>37</sup> This claim appears to have been fueled by the inclusion within the original Bill<sup>38</sup> of Objects of Act cl 4 (b), which stated that ‘The objects of this Act are to (b) ensure that the Legislative Assembly for the Australian Capital Territory has *exclusive legislative authority* and responsibility for making laws for the Australian Capital Territory’. That clause was subsequently deleted from the revised version of the Bill,<sup>39</sup> which became the legislation.<sup>40</sup> The claim of unfettered territory legislative power is patently wrong.

The correct constitutional position of the removal of the Commonwealth executive override by the deletion of s 9 of the *Northern Territory (Self-Government) Act 1978* (Cth)<sup>41</sup> can be summarily stated. Section 6 of the *Northern Territory (Self-Government) Act 1978* (Cth) provides a characteristic power to ‘make laws for the peace, order and good government of the Territory’, and this conferral of power is seen as ‘equivalent to that granted by the Imperial Parliament to the Australian colonies on attaining self-government and involves no impermissible delegation of power by the Commonwealth’.<sup>42</sup> The list of matters in respect of which Ministers of the Northern Territory have executive authority under s 35 of the *Northern Territory (Self-Government) Act 1978* (Cth)<sup>43</sup> continues by the authority of reg

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37 ‘This legislation does, in effect, say that instead of using an executive arm of government to deal with issues that are not within a state’s capacity to legislate on in things like marriage, starting your own navy, having your own currency, taxation and immigration. If the territories play with that area, we are going to have to come back and have a full debate in parliament’: Commonwealth, *Parliamentary Debates*, Senate, 18 August 2011, 4789 (Senator Scullion). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 31 October 2011, 12087 (Mrs Griggs): ‘In fact, as stated by my colleague Senator Scullion in the other place, the bill as it stands would allow a territory parliament to pass any law, including a law in the area that is the responsibility of the Commonwealth as defined in section 51 of the Australian *Constitution*. This action would result in no immediate avenues to address this’.

38 Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010 (Cth)

39 Territories Self-Government Legislation Amendment (Disallowance and Amendment of Laws) Bill 2011 (Cth). See the discussion in the *Senate Committee Report* critical of the original objects clause, and the Committee recommendation of its removal: *Senate Committee Report*, above n 20, 26–7 and ix, Rec One.

40 *Territories Self-Government Legislation Amendment (Disallowance and Amendment of Laws) Act 2011* (Cth).

41 *Ibid.* See Schedule 2.

42 Gerard Carney, *The Constitutional Systems of the Australian states and territories* (Cambridge University Press, 2006), 450. For a further discussion of the characteristics of the *Northern Territory (Self Government) Act 1978* (Cth) see French CJ, above n 3, 735, 742–3.

43 Section 35 of the *Northern Territory (Self-Government) Act 1978* (Cth) states that ‘The regulations may specify the matters in respect of which the Ministers of the Territory are to have executive authority’.

4(1) of the *Northern Territory (Self-Government) Regulations 1978* (Cth).<sup>44</sup> Assent to laws passed by the Northern Territory Legislative Assembly made by the Administrator, with different requirements prevailing according to s35, is established by s 7 of the *Northern Territory (Self-Government) Act 1978* (Cth),<sup>45</sup> according to whether the law relates to a matter specified under s 35,<sup>46</sup> or in other cases.<sup>47</sup> Specific classes of subject matter have been reserved from the Northern Territory Legislative Assembly – laws concerning euthanasia are excluded from the s6 peace, order and good government power,<sup>48</sup> as are ‘laws conferring on any court, tribunal, board, body, person or other authority any power in relation to the hearing and determining of disputes, claims or matters relating to terms and conditions of employment’,<sup>49</sup> and the regulation of Kakadu and Uluru national parks.<sup>50</sup>

Furthermore, reg 4(2) of the *Northern Territory (Self-Government) Regulations 1978* (Cth) excludes from the matters in respect of which Northern Territory ministers have executive authority under reg 4(1), matters relating to the mining of uranium or other prescribed substances within the meaning of the *Atomic Energy Act 1953* (Cth)<sup>51</sup> and rights in respect of Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).<sup>52</sup>

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44 Regulation 4(1) states that ‘Subject to subregulations (2) and (4), the Ministers of the Territory are to have executive authority under section 35 of the Act in respect of the following matters’ (the extensive list of matters is then included).

45 Section 7(1) of the *Northern Territory (Self Government) Act 1978* (Cth) states that ‘Every proposed law passed by the Legislative Assembly shall be presented to the Administrator for assent’.

46 Section 35 states that ‘The regulations may specify the matters in respect of which the Ministers of the Territory are to have executive authority’. Regulation 4(1) of the *Northern Territory (Self-Government) Regulations 1978* (Cth) prescribes an extensive range of matters under which Ministers of the Territory are to have executive authority under s 35 of the Act. Section 7(2) (a) of the *Northern Territory (Self Government) Act 1978* (Cth) states ‘Upon the presentation of a proposed law to the Administrator for assent, the Administrator shall, subject to this section, declare (a) in the case of a proposed law making provision *only for or in relation to a matter* specified under section 35: (i) that he or she assents to the proposed law; or (ii) that he or she withholds assent to the proposed law’ (emphasis added).

47 Section 7(2)(b) of the *Northern Territory (Self Government) Act 1978* (Cth) states ‘Upon the presentation of a proposed law to the Administrator for assent, the Administrator shall, subject to this section, declare (b) *in any other case* (i) that he or she assents to the proposed law; (ii) that he or she withholds assent to the proposed law; or (iii) that he or she reserves the proposed law for the Governor-General’s pleasure’.

48 Ibid. See s 50A.

49 Ibid. See s 53(5).

50 *Environmental Protection and Biodiversity Conservation Act 1999* (Cth). On the reservation of specific subject matters from the Northern Territory Legislative Assembly, see also Carney, above n 42, 45; Northern Territory Statehood Steering Committee 2005–2010, Northern Territory Parliament, *Information Paper What Might the Terms and Conditions of Northern Territory Statehood be?*, (2011), 8–9; *The long road to statehood report*, above n 10, 14, 15–17.

51 Regulation 4(2)(a) of the *Northern Territory (Self-Government) Regulations 1978* (Cth).

52 Ibid reg 4(2)(b).

Contrary to the implications about expanded plenary power suggested in Opposition claims in the parliamentary debates,<sup>53</sup> the powers of the Northern Territory Legislative Assembly are still delimited by the above arrangements, but most significantly, by the Commonwealth's constitutional territories power in s 122– and with it, the ability of the Commonwealth Parliament to limit or restrict the grant of power under ss 6, 7 and 35 of the *Northern Territory (Self-Government) Act 1978* (Cth) to the Northern Territory Legislative Assembly. This principle is consistent with the ultimate source of authority for creation of the Northern Territory Legislative Assembly's powers being the power afforded to the Commonwealth Parliament by the territories power.<sup>54</sup>

The extent of the constitutional misconception of the source of Northern Territory Legislative Assembly power produced by the present removal of the Commonwealth executive override power is starkly illustrated in the following comments:

There is a convention in federal parliament that the Commonwealth does not interfere with the legislation of a territory parliament where the legislation is consistent with the powers of a state parliament. A well-known exception was when the federal parliament overturned the Northern Territory euthanasia laws. Euthanasia is an area of legislation or issue that remains the responsibility of the states under the *Constitution*. Now under the bill the power of the federal parliament to undertake similar actions in the future is maintained. So if this bill is really about preventing federal intervention in the legislative powers of the territories, why was this issue not included in the bill?<sup>55</sup>

This statement assumes first, that the changes made to remove the executive override power should have extended to removal of s 50A of the *Northern Territory (Self-Government) Act 1978* (Cth),<sup>56</sup> and indeed to other restrictions imposed by Commonwealth legislation on the powers of the Northern Territory Legislative Assembly.<sup>57</sup> More importantly, the content of the statement about preventing federal intervention in the legislative powers of the territories confuses Commonwealth practice and convention with the limits of Commonwealth constitutional power. The Commonwealth Parliament cannot disable that part of the Commonwealth's territories power that enables

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53 See the comments referred to above made by Senator Scullion and Mrs Griggs.

54 For discussion of the present scope of the s 122 territories power, see French CJ, above n 3, 743–4.

55 Commonwealth Parliament, *Parliamentary Debates*, House of Representatives, 31 October 2011, 12087 (Mrs Griggs).

56 This section removes from the s 6 peace, order and good government power of the Northern Territory Legislative Assembly 'the making of laws which permit or have the effect of permitting (whether subject to conditions or not) the form of intentional killing of another called euthanasia (which includes mercy killing) or the assisting of a person to terminate his or her life'.

57 From the use of examples suggesting generality in the quote – 'a well known exception' and 'to undertake similar actions in the future'. For the other restrictions, see the legislative references above in n 48, n 49 and n 50.

it to both legislatively determine the scope of the legislative power of the Northern Territory Legislative Assembly, as well as provide the constitutional foundation for Commonwealth legislative override of Northern Territory legislation. The statement of preventing federal legislative intervention in the territories ultimately is premised upon the Commonwealth Parliament affecting a constitutional restriction on the s 122 territories power, a change that can only be brought about by a federal referendum, which requires approval of a majority of electors in a majority of states, with territory electors being counted in the majority of electors.<sup>58</sup> It is impracticable from a political perspective that either major political party would seek to disable the Commonwealth territories power in this way and unthinkable that the required majorities of the states and voters would approve of such a change.

Aside from a departure with the constitutional niceties of what the Commonwealth Parliament is legislatively empowered to do in relation to the powers of the Northern Territory Legislative Assembly, the above statement also argues for a constitutional position – removal of the capacity of Commonwealth legislative as well as executive intervention – at odds with earlier, parallel Opposition objection to the Green’s social agenda, said to support same sex marriage and euthanasia. In other words, affecting the kind of Commonwealth legislative disempowerment envisaged (even if constitutionally possible) would in fact facilitate an agenda already criticised by several of the parliamentary party colleagues<sup>59</sup> of these two Northern Territory Federal politicians.<sup>60</sup>

## **B *The Misconceptions Migrate to Northern Territory Legislative Assembly Debates***

More remarkable, however, is how these constitutionally incorrect appraisals in the Commonwealth Parliament of the self-governance enhancing reforms, with removal of the Commonwealth executive override, through the *Territories Self-Government Legislation Amendment (Disallowance and Amendment of Laws) Act 2011* (Cth), were transposed to the Northern Territory Legislative Assembly and influenced its debates concerning the election of statehood convention delegates and the circumstances of the passage of the *Constitutional Convention (Election) Act 2011* (NT). The apparent contradiction between Northern Territory political party advocacy and support of statehood, and opposition in the Northern Territory Parliament

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58 See s 128 of the *Commonwealth Constitution*. References to territory electors in s 128 were included by amendments in the *Constitution Alteration (Referendums) Act 1977* (Cth).

59 See the comments to this effect referred to above by Senators Brandis, Cormann and Humphries and Mr Keenan.

60 Senator Scullion and Mrs Griggs MHR.

to the Federal reform removing executive override of Northern Territory laws, then remarkably fueled opposition within the Northern Territory Parliament to the timing of the statehood convention and the election of delegates.

On 22 November 2011,<sup>61</sup> the then Chief Minister of the Northern Territory moved that ‘the Northern Territory Assembly congratulates both houses of the Federal Parliament in Canberra for the successful passage of legislation which increases the rights of Territorians’,<sup>62</sup> and highlighted the greater democratic accountability of the new arrangements:

Of course, we still do not have the same rights as the other states, we are not a state, and the Commonwealth parliament still has the ability to override any legislation we enact. There is still no defence to that provision but at least, the Commonwealth parliament involves debate which is open, transparent and on the public record. It does require the voting intention, or voting actions, of members of the Commonwealth parliament to be recorded so people can be held accountable for the position they take on any matter in regard to the Northern Territory by way of their contribution to debate in the two houses of federal parliament.<sup>63</sup>

The ensuing debate in the Northern Territory Legislative Assembly, however repeated the Oppositional claims at Federal level to the Commonwealth Act. Such claims provided a bad omen a few days later for resumption of Legislative Assembly debate about legislation seeking to implement the previously agreed bi-partisan timetable for the election of statehood convention delegates and the holding of the statehood convention.<sup>64</sup>

The Northern Territory Opposition leader argued that the intent and purpose of the Commonwealth legislation as following the Greens’ social agenda.<sup>65</sup> Whilst asserting an Opposition principle for increasing the rights of Territorians, he considered the Commonwealth legislation instead as ‘dealing with constitutional matters that have an effect nationally’.<sup>66</sup> A senior

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61 The second reading debate on the Constitutional Convention (Election) Bill 2011 (NT) commenced on 27 October 2011, with the Chief Minister’s speech. Debate was adjourned until continuation on 30 November 2011.

62 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 22 November 2011, 1, Parliamentary Record No 23 (Mr Henderson). The legislation referred to by the Chief Minister was the *Territories Self-Government Legislation Amendment (Disallowance and Amendment of Laws) Act 2011* (Cth).

63 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 22 November 2011, 1, Parliamentary Record No 23 (Mr Henderson)

64 The Constitutional Convention (Election) Bill 2011 (NT) was introduced into the NT Legislative Assembly on 27 October 2011, with the second reading speech being given by the Chief Minister and debate subsequently adjourned until 30 November 2011.

65 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 22 November 2011, 4 (Mr Mills).

66 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 22 November 2011, 4 (Mr Mills). The last comment curiously ignores the legislation’s common impact in both the Northern



Opposition frontbencher<sup>67</sup> then raised a novel, but erroneous, constitutional argument about the legislation:

We are all legislators in some regard in the Northern Territory and the idea of unrestricted power to create legislation is quite appealing. We can raise our own Army! We can create our own currency! We can stop federal taxes...Quite simply, what the legislation does is allows the territories to bypass section 51 of the Australian *Constitution* which says states and territories cannot make laws contradictory to federal laws. That is probably not a bad thing here providing it is used responsibly, but wearing the hat of an Australian which I note everybody in this House is as well – we are all Australians, it is in our interest as Australians to have a working federal parliament and this legislation has the ability, if allowed to stand, which I doubt it will because the first time it is tested it will be found to be unconstitutional and struck off the books. However, if it is allowed to stand we could have unfettered ability to create our own laws in the Northern Territory, but as an Australian, that would create absolute chaos and mayhem in the federal parliament. That is not in Australia's best interests, irrespective of how much power it gives us in the Northern Territory.<sup>68</sup>

The above statement appears to be an elaborated and imaginative reprise of the conferral of unfettered plenary power upon the Northern Territory Legislative Assembly by the Commonwealth legislation, as raised in the Commonwealth Parliament by two of its Northern Territory representatives earlier in 2011.<sup>69</sup> For the reasons set out above, it is similarly incorrect.

Further objections were then raised by Mr Tollner, who elided debate from discussion of the Commonwealth legislation, to the related topic of the Northern Territory Constitutional Convention, at that time anticipated to occur in March 2012. An academic member of the Constitutional Convention Committee, and formerly of the Statehood Steering Committee, was criticised for a lack of independence and his advice regarding the Commonwealth legislation considered to be tainted because of Labor Party connections.<sup>70</sup> The timing of the election for Constitutional Convention delegates was then objected to on the grounds of the wet season, its coincidence with local government elections and the enfranchisement of 16 and 17 year old electors.<sup>71</sup> In a significant

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Territory and the ACT of removing the Commonwealth executive override power of both territories' legislation.

67 Mr Tollner, Member for Fong Lim.

68 Northern Territory, *Parliamentary Debates*, Legislative Assembly 22 November 2011, 9 (Mr Tollner).

69 See Commonwealth, *Parliamentary Debates*, Senate, 18 August 2011, 4789 (Senator Scullion) and Commonwealth, *Parliamentary Debates*, House of Representatives, 31 October 2011, 12087 (Mrs Griggs).

70 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 22 November 2011, 9 (Mr Tollner)

71 Ibid.

departure from the principles of bi-partisanship support for statehood, Mr Tollner then raised the issue of the March 2012 Constitutional Convention being used to the advantage of the incumbent government in the lead up to the August 2012 Northern Territory election,<sup>72</sup> to distract from the government's performance in office and to hinder the Opposition from communicating its message to the electorate.<sup>73</sup>

Additional opposition to the motion was made by the independent member, Mr Wood,<sup>74</sup> also voicing concerns about the Commonwealth legislation as furthering the Greens social and political agenda,<sup>75</sup> and asserting that the statehood developments ironically treated the Northern Territory local government in the same dismissive way as Canberra treated the Northern Territory government.<sup>76</sup> The government motion in support of the Commonwealth legislation was defeated,<sup>77</sup> with the Chief Minister highlighting the significance of the breakdown in bi-partisanship of progress towards statehood<sup>78</sup> and internal challenges to the authority of the Leader of the Opposition.<sup>79</sup>

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72 Ibid.

73 Ibid. Particular objection was voiced to the extant media campaign promoting statehood, prior to the passage of the Constitutional Convention (Election) Bill 2011 (NT).

74 The Henderson Government relied upon the vote of the independent Member for Nelson, Mr Wood, to maintain it in government. See Northern Territory Government Media Release Chief Minister 14 August 2009, 'Delivering for Territorians', <<http://newsroom.nt.gov.au/www/newsroom.nt.gov.au/index3859.html?fuseaction=printRelease&ID=5899>> and 'Parliamentary Agreement' made 14 August 2009 between Paul Henderson MLA Chief Minister of the Northern Territory and Mr Gerry Wood MLA, Independent Member for Nelson <<http://www.newsroom.nt.gov.au/adminmedia/mailouts/5899/attachments/Parliamentary%20Agreement%20CM-GW%2014-08-09.pdf>>.

75 Northern Territory *Parliamentary Debates*, Legislative Assembly, 22 November 2011, 5 (Mr Wood).

76 Ibid 6 (Mr Wood).

77 Ibid 14 (Speaker of the Assembly).

78 Ibid 12–13 (Mr Henderson): 'I thought we had a bipartisan approach towards an agreed road map towards statehood...All along, there have been collaborative meetings of the Statehood Steering Committee and the Legal and Constitutional Affairs Committee of this parliament. There have been bipartisan trips to Canberra, meetings of the Statehood Steering Committee and the constitutional committee around the Northern Territory in a bipartisan way, with a road map towards statehood...I have been in meetings with the Deputy Leader of the Opposition and the Leader of the Opposition where we have agreed to this process. We agreed on the process and the timing. The whole approach to this has been...genuinely from our side bipartisan. None of these issues have been raised through all of the meetings that have happened that have taken us to this point in time, to the road map and the timing of that road map'. The defeat of the motion supporting the Commonwealth law flagged the likely subsequent deferral of the election of delegates for, and holding of, the Constitutional Convention: 'Statehood falls at first hurdle' *NT News* 23 November 2011 and 'Push for NT Statehood seems doomed' *NT News* 24 November 2011.

79 Northern Territory *Parliamentary Debates*, Legislative Assembly, 22 November 2011, 13 (Mr Henderson). The internal challenges persisted after election to government, eventually leading to the ousting of the Hon Terry Mills as Chief Minister in 2013, following his appointment as Chief

### C *The Impact of Earlier Legislative Assembly Debates: A Collapse of Bipartisan Attitudes and Policy*

The second reading debate on the *Constitutional Convention (Election) Bill 2011* (NT),<sup>80</sup> having commenced on 27 October 2011, with the Chief Minister's speech and immediate adjournment, recommenced on 30 November 2011, some eight days after the defeat of the Chief Minister's motion in support of the greater Territory rights conferred in the *Territories Self-Government Legislation Amendment (Disallowance and Amendment of Laws) Act 2011* (Cth).<sup>81</sup> Ultimately, the Legislative Assembly deferred consideration of the holding of the election of candidates to the Constitutional Convention and the Constitution Convention itself until a date after the Northern Territory General Election of 25 August 2012.<sup>82</sup> The *Constitutional Convention (Election) Act 2011* (NT) passed the Legislative Assembly and was assented to on 21 December 2011. This was on the assurance that the date for election of delegates to the Constitutional Convention would be the decision of the succeeding Northern Territory Parliament, after the August 2012 election<sup>83</sup>—the Twelfth Assembly — as the legislation 'establishes means and mechanisms for such an election to occur'.<sup>84</sup>

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Minister after the August 2012 elections: see Chief Minister of the Northern Territory Media Release March 13 2013, 'Statement From Terry Mills': <<http://www.newsroom.nt.gov.au/index.cfm?fuseaction=viewRelease&id=10487&d=5>>.

80 'The purpose of the Constitutional Convention (Election) Bill 2011 is to provide for the election of delegates for a Constitutional Convention to be held by the Government... It is anticipated that the election to be held under the Act may be on the same day as elections to be held under the Local Government Act so additional provision is made to accommodate that eventuality': *Explanatory Statement Constitutional Convention (Election) Bill 2011*, above n 6, 1–2.

81 Northern Territory *Parliamentary Debates* Legislative Assembly 22 November 2011, 14 (Speaker of the Legislative Assembly).

82 NT State 7 website – announcement <<http://www.ntstate7.com.au/>>.

83 'If the Chief Minister does agree to the date being moved to sometime after the Twelfth Assembly – at the decision of the Twelfth Assembly – then my colleagues would support the passage of this bill': Northern Territory *Parliamentary Debates* Legislative Assembly 30 November 2011, 2 (Mr Mills); 'If the legislation does pass and I urge the opposition – I understand they will support the legislation – at least we have the structure that will provide for an election and for a convention, will be sitting there on the statute book for the next government and the next parliament of this Territory to take forward': Northern Territory *Parliamentary Debates* Legislative Assembly 30 November 2011, 26 (Mr Henderson).

84 Northern Territory *Parliamentary Debates* Legislative Assembly 30 November 2011, 2 (Mr Mills). Section 9 of the *Constitutional Convention (Election) Act 2011* (NT) states '(1) The polling day is the day declared by the Minister by Gazette notice to be the polling day (2) To avoid doubt, the declaration must be made before the start of the nomination period'. The nomination period for those seeking election as delegates to the Convention under s.11 (2) of the *Constitutional Convention (Election) Act 2011* (NT) 'is the period (a) starting on the day that is 57 days before the polling day; and (b) ending at 12 noon on the nomination day' and the (1) 'nomination day is the day that is 23 days before the polling day'.

The Legislative Assembly debates of 30 November 2011 reveal important insights into the collapse of bipartisan policy on statehood and its agreed timeline, relevant to any revived proposal for a Constitutional Convention. Some division existed in the Opposition to the move to defer the election of Constitutional Convention delegates and the circumstances by which that deferral was brought about. This was evidenced in the comments of the Deputy Leader of the Opposition and member of the Constitutional Convention Committee:<sup>85</sup>

Recent events and announcements with regard to this legislation and subsequent convention have been disturbing to say the least, and I personally have not been comfortable with some statements made inside and outside the House. Also, I have been disturbed with the level of misinformation given to the Local Government Association of the Northern Territory...More importantly, what we have learnt from past experiences is we need to move on the path to statehood in a strong bipartisan way, a path I strongly recommend we continue to adopt otherwise the Territory is doomed to be an outcast in our Australian society and we will not achieve statehood...The matter of achieving Territory equality and equity is bigger than all of us. It continues to surprise me how some people trivialize either statehood or the path to statehood.<sup>86</sup>

Secondly, Opposition members gave strong rhetorical affirmations of statehood, but rationalised opposition to the timing of election of Constitutional Convention delegates, insisting that the efficacy of electoral processes was consistent with bipartisanship:

Let me make it absolutely clear, the Country Liberal Party has a proud tradition, a heritage that we must honour as members of the Country Liberal Party, and that we fully and without reserve support statehood...There is bipartisan support for the Constitutional Convention, but such is our conviction over the need to preserve and protect this process from any potential for political interference of any kind, to give this process the cleanest possible air, then it was our view, my view, the view of my party, that this election should occur after the next Territory election.<sup>87</sup>

Another said:

What we are doing in this House today through passing this legislation strengthens statehood because we are another step closer...People on this side, the Country Liberals, genuinely want to see statehood. I believe the Labor Party genuinely wants to see statehood...Let us give this what it deserves, which is clear air and total bipartisan support to ensure statehood gets off the ground, and that we are all part of what will become history.<sup>88</sup>

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85 Ms Kezia Purick MLA.

86 Northern Territory, *Parliamentary Debates* Legislative Assembly 30 November 2011, 5 (Ms Purick) 5.

87 Ibid 1 (Mr Mills).

88 Ibid 16–17 (Mr Chandler).

However, the Government response to the Opposition measures made clear that bipartisan orientation, so necessary to ensure a timely and orderly progression towards statehood, was fractured and fragmented. The Government highlighted the Opposition's previous public commitment to bi-partisanship, in the form of an agreed timetable for Constitutional Convention elections.<sup>89</sup> It challenged the Opposition's claims about the timing of the Convention election being unsuitable because of local government elections scheduled for the same day.<sup>90</sup> It highlighted the considerable effort expended by Committees and others to advance the statehood issue to its present position,<sup>91</sup> and the significant finances expended over six years in that process.<sup>92</sup> The Government provocatively asserted that opposition to the previously agreed election date arose from internal Opposition political machinations, representing a challenge to the authority of the leadership of the Leader of the Opposition.<sup>93</sup> The Chief Minister's response contrasted the consistent support for statehood of an Opposition member<sup>94</sup> of the Legal and Constitutional Affairs Committee, with the position of other Opposition politicians<sup>95</sup> and their recanting of the agreed process. The tone and language of the Chief Minister's response confirmed the loss of bipartisan good will on agreed progression of the statehood issue.<sup>96</sup>

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89 Ibid 12–13 (Mr Gunner): 'As members are, no doubt, aware on 17 June this year, the Chief Minister and the Leader of the Opposition held a joint media conference with the NTCCC members to announce the convention would be held in April 2012. It has been on the public record for five and a half months that the election would take place in March, and the convention April, with a second convention well after the 2012 Territory general election'. See also Northern Territory *Parliamentary Debates*, Legislative Assembly, 30 November 2011, 6 (Mrs McCarthy): 'On the 17 June 2011... a joint decision was declared on by the Leader of the Opposition, the Chief Minister of the Northern Territory, by Madam Speaker, the Chair of the Legal and Constitutional Affairs Committee and by members of the Constitutional Affairs Committee ... on that day, this parliament, supported by all those members, declared the road map forward. That road map included the full election of delegates to a Constitutional Convention in Darwin in April 2012'.

90 Northern Territory *Parliamentary Debates*, Legislative Assembly, 30 November 2011, 11 (Mr Gunner); Northern Territory *Parliamentary Debates*, Legislative Assembly, 30 November 2011, 8 (Mrs McCarthy).

91 Ibid 9–11 (Mr Gunner); Northern Territory *Parliamentary Debates*, Legislative Assembly, 30 November 2011, 6–7 (Mrs McCarthy)

92 Nearly \$5 million was expended over a six years period, including \$500,000 since the 17 June 2011 bipartisan announcement of the Convention election date: see *Report on Statehood Program*, above n 6, 18. Refer also to Northern Territory *Parliamentary Debates*, Legislative Assembly, 30 November 2011, 12 (Mr Gunner).

93 Northern Territory *Parliamentary Debates*, Legislative Assembly, 30 November 2011, 23, 25 (Mr Henderson); Northern Territory *Parliamentary Debates*, Legislative Assembly, 30 November 2011, 21 (Ms Scrymgour).

94 The Member for Goyder, Ms Kezia Purick MLA.

95 The Member for Brennan, Mr Peter Chandler, MLA and the Member for Fong Lim, Mr David Tollner MLA.

96 'It was so disparaging of six years worth of hard work, bipartisanship and work across the Northern Territory ... it was just a total rubbishing of the entire process'; 'It astounds me the way we have lost a bipartisan position on this particular issue'; 'I have very sadly had to acknowledge that

The negative outcomes for bipartisanship were further confirmed in debate in the Legislative Assembly on the tabling in February 2012 of the Legal and Constitutional Affairs Committee *Report on Statehood Program*,<sup>97</sup> which detailed the extensive preparations made by the Northern Territory Constitutional Convention Committee throughout 2011.<sup>98</sup> Of first importance are the direct consequences of the postponement of the election of Constitutional Convention delegates – the discontinuation by the Legal and Constitutional Affairs Committee on work on statehood for the duration of the present Legislative Assembly, as well as the closure of the Office of Statehood,<sup>99</sup> responsible for conducting the statehood program. More striking however, are the distrust, animosity and counter-accusations, degenerating to partisan political exchanges between Opposition and Government, over the previously agreed timetable for the election of delegates and a Constitutional Convention.<sup>100</sup>

## IV A POLITICAL OPPORTUNITY TO PAUSE AND REFLECT

### A *Time to Pause and Reflect*

The developments in the Northern Territory Legislative Assembly in 2011 and 2012, further delaying at least the progression of statehood, resonate with recurrent larger problems in the constitutional and political progression of the Northern Territory. Importantly, a future political and legal statehood process, commencing with the activation of the procedures of the *Constitutional Convention (Election) Act 2011* (NT), must respond to these significant issues. The collapse of parliamentary bipartisanship in 2011 brings into sharp focus that consensus over a range of matters is crucial to tangible progress towards Northern Territory statehood. It is apparent from the level of political

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because the CLP have walked away from a bipartisan position, we are unable to maintain a bipartisan approach to an election in March next year and a convention in April, that this parliament no longer has the ability to take this forward': Northern Territory *Parliamentary Debates*, Legislative Assembly, 30 November 2011, 23, 25 (Mr Henderson).

97 *Report on the Statehood Program*, above n 6, tabled in the Legislative Assembly on 16 February 2012.

98 *Ibid.* See chapters 2, 3 and 4 'The NTCCC met 11 times over 12 months and developed detailed plans for the convention': Northern Territory *Parliamentary Debates*, Legislative Assembly, 16 February 2012, 1 (Mrs Aagaard).

99 Northern Territory *Parliamentary Debates*, Legislative Assembly, 16 February 2012, 1 (Mrs Aagaard)

100 Northern Territory *Parliamentary Debates*, Legislative Assembly, 16 February 2012, 5 (Dr Burns), highlighting the retraction of the Opposition Leader's commitment made to the agreed timetable in June 2011, whilst alleging that the Opposition Leader's leadership had been outmanoeuvred and undermined on this issue by the strident opposition of his colleague Mr Tollner in the Legislative Assembly on 22 November 2011. In turn, the Opposition Leader, Mr Mills retorted with claims of a political narrative crafted by Dr Burns for political advantage: Northern Territory, *Parliamentary Debates*, Legislative Assembly, 16 February 2012, 7 (Mr Mills).



disputation surrounding the Northern Territory Legislative Assembly motion congratulating the Federal Parliament for its passage of the *Territories Self-Government Legislation Amendment (Disallowance and Amendment of Laws) Act 2011* (Cth),<sup>101</sup> the qualified passage of the *Constitutional Convention (Election) Act 2011* (NT)<sup>102</sup> and debate at the tabling of the *Report on Statehood Program* in the Legislative Assembly,<sup>103</sup> that several important practical and contextual issues have been forgotten.

Establishing the preconditions conducive to the attainment of statehood requires politically consistent approaches to several difficult issues, in stark contrast to the series of events outlined above. Some of its demands have been severally identified elsewhere, such as in the Final Report and Recommendations of the Northern Territory Statehood Steering Committee<sup>104</sup> and in the Key Sensitivities in the *Report on Statehood Program*.<sup>105</sup>

The fact that knowledge about and reflection upon the failed 1998 statehood attempt informed the consultative and educative foundation and methodology of the Statehood Steering Committee from 2004,<sup>106</sup> and that of the successor Constitutional Convention Committee in 2011, is instructive. In 2011–2012, within the Northern Territory Legislative Assembly, a consistent and constructive attitudinal focus on bipartisan methods dissipated. Prior efforts towards statehood and the preliminary critical matters requiring resolution highlight the fraught nature of the path to statehood and the pressing requirements of coherence and bipartisanship. Given the 2011 Federal and Northern Territory Legislative experience, it is useful to articulate history and current issues as compelling the necessity of bipartisanship in politically transacting statehood issues in the immediate future.

## B *Lessons from Earlier Expectations and Dashed Hopes*

The most obvious criticism of processes concerning statehood within the Northern Territory relates to the enormous expenditure of committee,

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101 See Northern Territory *Parliamentary Debates*, Legislative Assembly, 22 November 2011.

102 See Northern Territory *Parliamentary Debates*, Legislative Assembly, 30 November 2011.

103 See Northern Territory *Parliamentary Debates*, Legislative Assembly, 16 February 2012.

104 See for example *Final Report and Recommendations*, above n 13, 3 (Recommendations 1 to 10).

105 *Report on Statehood Program*, above n 6, 15, ‘Key Sensitivities’, identifying a range of misconceptions about what statehood would mean for the Northern Territory and stating that ‘the public consultation and education component worked concertedly to create a better two way understanding of why Statehood is good for the Territory, as well as what issues might impede progress towards this goal’.

106 See *Final Report and Recommendations*, above n 13, 1, and the emphasis of approach on community consultation and engagement; *Report on Statehood Program*, above n 6, 2, 5. See also *Report into appropriate measures to facilitate Statehood*, above n 9, ‘Chapter 4: Reasons for the “No” Vote in the October 1998 Statehood Referendum’.

parliamentary and community effort over many years, to the present point where further significant delays in advancing this issue have manifested and a bipartisan approach has overtly frayed.

From one perspective, this history of the statehood experience from 1985 is itself evidence of a lack of functionality and maturity in political institutions and political fabric of the Northern Territory. These factors provide corroborative evidence for statehood opponents seeking to justify the continuing constitutional status of the Northern Territory as a territory, and not a state, of the Commonwealth of Australia. In the alternative, opponents of statehood may advocate more radical measures to divide the Northern Territory into new political units, such as a self governing Darwin city state with hinterland, and for the remainder of the current Northern Territory to be directly administered by the Commonwealth and with self-governing local, including indigenous, structures.<sup>107</sup> Such views more recently invoke support in the failed state Northern Territory thesis<sup>108</sup> and in the Commonwealth intervention from 2007 into remote Indigenous communities following the release of a damning report regarding child sexual abuse.<sup>109</sup>

The quest for statehood commenced relatively early after the grant of self government<sup>110</sup> to the Northern Territory.<sup>111</sup> In 1985, a Legislative Assembly Select Committee on Constitutional Development was established,<sup>112</sup> with the task of inquiring on a new *Constitution* for a new State,<sup>113</sup> proceeding to release discussion and information papers, invite public submissions, and conduct public hearings, consultations and committee meetings.<sup>114</sup> The

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107 See Nicholas Rothwell, 'Giving it back: a revolution in the bush' *The Australian* 31 October 2009.

108 See articles by *The Australian* journalist Nicholas Rothwell, 'The failed state' *The Australian* 24 October 2009; 'Giving it back: a revolution in the bush' *The Australian* 31 October 2009 and 'The case against State 7' *The Australian* 16 April 2011. See also 'Territory politicians counter 'failed state' claim' *The Australian* 26 October 2009.

109 Northern Territory Government, *Little Children Are Sacred* Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (Northern Territory Government, 2007); *Northern Territory National Emergency Response Act 2007* (Cth); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) and *Families Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth). Intervention measures in the Northern Territory are to continue for a further ten years: see *Stronger Futures in the Northern Territory Act 2012* (Cth).

110 See *Northern Territory (Self-Government) Act 1978* (Cth).

111 A number of starting points have been noted: see 'Background To Statehood Campaign 6.1 1975–1985, Chief Ministers Everingham/Tuxworth' in Standing Committee on Legal and Constitutional Affairs Northern Territory Parliament Information paper No 1 *Chronology of Events*, above n 35, 5–6.

112 See *A Chronology of Events*, above n 35, 6 and *The Long Road to Statehood*, above n 10, 9.

113 *Report into appropriate measures to facilitate Statehood*, above n 9, 15.

114 *Ibid.* And see *Chronology of Events*, above n 35, 6.

issue of statehood lost momentum under the Perron government in the late 1980s, reflected in the pursuit of an enhanced form of self-government<sup>115</sup> the Select Committee changed to Sessional Committee status, with its functions broadened to include other constitutional and legal matters.<sup>116</sup> In 1995, following involvement of COAG, the Commonwealth agreed to the establishment of a joint Commonwealth/Northern Territory statehood working group<sup>117</sup> to examine statehood issues and implications, with its report made available in May 1996.<sup>118</sup> In November 1996, the Legislative Assembly Sessional Committee's report<sup>119</sup> was tabled. This report recommended that a new Northern Territory *Constitution* be adopted, replacing the *Northern Territory (Self-Government) Act*.<sup>120</sup> The Committee provided a draft *Constitution* and a preferred method of change, involving referral of the draft *Constitution* to a broadly representative and Northern Territory Constitutional Convention, with a majority of elected members, with submission of the *Constitution* (as finalised by the Convention) to a referendum for approval by Northern Territory voters.<sup>121</sup>

In March–April 1998, over 8 days, a Statehood Convention,<sup>122</sup> comprising 53 delegates (none elected by direct popular election) was held to consider and report on four statehood issues, namely (i) whether the Northern Territory should become a state (ii) the form of the *Constitution* for the new state (iii) the name of the new state and (iv) the form of the *Constitution* of the new state.<sup>123</sup> Though the Convention was presented on the second day with an alternative draft *Constitution* by Government minister Burke, 'delegates resolved to adopt the *Final Draft Constitution for the Northern Territory* that was prepared by the Sessional Committee on Constitution Development', subject to alterations made by resolution<sup>124</sup> and also passed other important

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115 *Chronology of Events*, above n 35.

116 *Report into appropriate measures to facilitate Statehood*, above n 9, 16; *The Long Road to Statehood*, above n 10, 9.

117 *Chronology of Events*, above n 35, 7; *Report into appropriate measures to facilitate statehood*, above n 9, 16; and *The Long Road to Statehood*, above n 10.

118 See Statehood Working Group, Northern Territory Parliament, *Final Report* (1996). 'The Report discussed in detail the issues and options concerning a grant of Statehood to the Northern Territory, although not necessarily favouring the Northern Territory proposals': *Chronology of Events*, above n 35, 8.

119 Sessional Committee, Northern Territory Parliament, *Foundations for a Common Future* (1996).

120 *Report into appropriate measures to facilitate Statehood*, above n 9, 16.

121 *Ibid*; *Chronology of Events*, above n 35, 9.

122 For an examination of the 1998 Convention, see Alistair Heatley and Peter McNab 'The Northern Territory Statehood Convention 1998' (1998) 9 *Public Law Review* 155.

123 See *Chronology of Events*, above n 35, 10; *Report into appropriate measures to facilitate Statehood*, above n 9, 17.

124 *Chronology of Events*, above n 35, 11. See also *The long road to statehood*, above n 10, 9.

resolutions.<sup>125</sup> The Statehood Convention Report was tabled in the Legislative Assembly on 30 April 1998 and adopted on party lines.<sup>126</sup>

The circumstances preceding the Convention and the Convention itself were controversial. Delegates were either directly appointed by the government or elected by government nominated organisations.<sup>127</sup> The Northern Land Council and the Central Land Council boycotted the Convention, and several delegates withdrew during the course of the Convention.<sup>128</sup> Responding to the method by which Convention delegates were elected, the community group Territorians for a Democratic Statehood was established during the Convention,<sup>129</sup> which advocated clear democratic participatory objectives.<sup>130</sup>

The statehood referendum, with a single question,<sup>131</sup> was held on 3 October 1998,<sup>132</sup> following an in principle decision of the Commonwealth government to grant the Northern Territory statehood.<sup>133</sup> The referendum was defeated by a no vote of 51.3 per cent, with opposition to the question put being led by Territorians for a Democratic Statehood, but also from ‘smaller political parties, the Trades and Labor Council, the Aboriginal Land Councils and ATSIC’.<sup>134</sup> Significantly, opposition voting from remote mobile booths, reflecting a high proportion of Indigenous voters, was particularly high.<sup>135</sup>

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125 Including that the Northern Territory should become a new State, that the new State be called the State of the Northern Territory and that the Northern Territory become a state as soon as possible.

126 *Report into appropriate measures to facilitate statehood*, above n 9, 18; *Chronology of Events*, above n 35, 11.

127 *Chronology of Events*, above n 35, 10; *Report into appropriate measures to facilitate statehood*, above n 9, 17.

128 *Chronology of Events*, above n 35, 10–11 and *Report into appropriate measures to facilitate statehood*, above n 9, 17.

129 *Chronology of Events*, above n 35, and *Report into appropriate measures to facilitate statehood*, above n 9, 20.

130 Territorians for a Democratic Statehood had the objectives of (i) promoting the cause of democratic Statehood for the Northern Territory; (ii) promoting discussion and debate on both Statehood for the Northern Territory and the new State’s *Constitution* and (iii) furthering the cause of directly elected and representative peoples’ conventions with majority input into the question of Statehood and the new State’s *Constitution*: *Chronology of Events*, above n 35, 11–12 and *Report into appropriate measures to facilitate statehood*, above n 9, 20.

131 The referendum question was ‘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?’

132 The day of the 1998 Federal election. For an examination of the 1998 referendum, see Alistair Heatley and Peter McNab, above n 122.

133 See *Chronology of Events*, above n 35, 12; *Report into appropriate measures to facilitate Statehood*, above n 9, 19; *The long road to statehood*, above n 10, 10. The *Referendums Act 1998* (NT) was passed by the NT Legislative Assembly on 12 August 1998.

134 *Report into appropriate measures to facilitate Statehood*, above n 9, 20; *Chronology of Events*, above n 35, 12.

135 73.3 % of voters from such booths voted No to the referendum question: *Report into appropriate measures to facilitate Statehood*, above n 9, 21, Table 1.1.

One striking experiential factor from the 1998 signaling the dangers of an erosion of bipartisanship from 2011 poses for present efforts to attain statehood, is the responsibility of the former Northern Territory Chief Minister, Shane Stone, for the manner in which the Convention and referendum were conducted. In the aftermath of the failed 1998 referendum, the Legislative Assembly referred questions for inquiry<sup>136</sup> to the Standing Committee on Legal and Constitutional Affairs, which subsequently produced a report.<sup>137</sup> Importantly, the Committee found that opposition to statehood was significantly lower than the 1998 referendum result, and that key deficiencies in political process caused the referendum question to be defeated:

These included a lack of information and understanding about Statehood, concern about the Statehood Convention process and events surrounding it, a lack of trust in those responsible for last year's process, inadequate consultation, the role of the Chief Minister in seemingly pushing the issue too fast, and a protest against the then Chief Minister and 'the arrogance of politicians'.<sup>138</sup>

Telling observations were able to be derived from the community consultations about three of the above key elements which were particularly impacted by the Government's political determination and influence. The following were amongst the observations that were made in the report:

Many people commented that their concern about the processes of the Statehood Convention contributed to their decision to vote No...Typically these concerns pertained to the absence of popularly elected delegates to the Statehood Convention, and the introduction of an alternative draft *Constitution* prepared by the Government, which many perceived as sidelining of the draft developed by the Sessional Committee on Constitutional Development following years of community consultation.<sup>139</sup>

And:

Significant numbers of people stated that as a result of last year's Statehood process, they felt distrustful of politicians and this lack of confidence contributed to their decision to vote No.<sup>140</sup>

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136 'That the Legal and Constitutional Affairs Committee of the Legislative Assembly (a) inquire into the appropriate measures to facilitate Statehood by 2001; and (b) the Committee consult widely with the Territory community and report its progress with recommendations to the Legislative Assembly within six months of the day'.

137 *Report into appropriate measures to facilitate Statehood*, above n 9.

138 *Ibid*, Chapter 4 'Reasons for the "No" vote in the October 1998 Statehood Referendum, 31.

139 *Ibid* 33. See also *The long road to statehood*, above n 10, 11 regarding exclusion of a former Chief Minister of the Northern Territory and Chair of the Statehood Committee, from the Constitutional Convention.

140 *Report into appropriate measures to facilitate statehood*, above n 9, 34.

And this comment:

Another issue which Territorians raised consistently throughout the Standing Committee's consultations was their concern about the constitutional development process in 1998 and the role of the Chief Minister. A regular comment was that people voted against "Stonehood" not Statehood. Many comments reflected a mistrust of the then Chief minister and the Northern Territory Government.<sup>141</sup>

The most telling summative assessment of the miscued political approach to these statehood issues in 1998 was from market research revealing that 'for those who voted No, three reasons relating to the Chief Minister, and/or politicians generally, rated in the top six'.<sup>142</sup> The Report made the general observation, gleaned from different sources,<sup>143</sup> that Territorians did support statehood and wanted the process of constitutional development to continue.<sup>144</sup> In keeping with this view, the Committee recommended, *inter alia*, that the Northern Territory should recommence the process of statehood, without a fixed timetable<sup>145</sup> and that an extensive public education campaign be conducted about what Statehood means and the process of constitutional development.<sup>146</sup>

It is from these April 1999 recommendations, with the election of a new Northern Territory government in August 2001, that statehood was returned to the political agenda, and activated by the announcement of a community based campaign for statehood,<sup>147</sup> the establishment of a Northern Territory Statehood Steering Committee,<sup>148</sup> and the appointment of a Minister for Statehood.<sup>149</sup> Subsequent procedural developments have been mentioned previously in this article.<sup>150</sup>

The fraying in 2011 of bipartisanship, in which Opposition politicians declined an earlier commitment to allow the election of the Constitutional Convention delegates in March 2012 for a 2012 Convention, is then properly seen in this

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141 Ibid 36. See also *The long road to statehood*, above n 10, 11, citing the evidence of a member of Territorians for a Democratic Statehood, former MLA Mr John Bailey.

142 *Report into appropriate measures to facilitate statehood*, above n 9, 36. The three reasons referred to as a main reason for the No vote were 'Don't like Shane Stone', 'Too political – Chief Minister pushing it' and 'Arrogance of politicians'.

143 Namely public and individual meetings, written submissions and independent market research.

144 *Report into appropriate measures to facilitate statehood*, above n 9, 38.

145 Ibid 8, Rec 1.

146 Ibid Rec 3.

147 Chief Minister Clare Martin, Speech to the Charles Darwin Symposium Series 22 May 2003, 2 referred to in *The Long Road to Statehood*, above n 10, 13.

148 Ibid 13. The Statehood Steering Committee comprised majority community membership, and several members of the Legislative Assembly.

149 Ibid.

150 Refer to the information under the section 'Introduction' above.



historical context. It carries ongoing risks of adverse public perceptions of politicians and a partisan political process, clearly demonstrated in the 1998 experience, militating against and potentially frustrating timely progress towards and the realisation of statehood. Indeed, it was the adverse political influences and processes from the 1998 experience which shaped the features of a high level of community engagement and in building community support in the new statehood processes from the establishment of the Statehood Steering Committee in 2004.<sup>151</sup>

The constitutional convention and the failure of the referendum in 1998 caused significant reflection and evaluation of the move towards Statehood. A major outcome of that reflection was the determination that any move towards Statehood must not only have popular support but also needs to be shaped by the people of the Territory. This led to the formation of a Statehood Steering Committee during 2005 with majority community membership and the driving of the Statehood program by the Assembly, particularly through the Legal and Constitutional Affairs Committee, rather than through the Government and its agencies.<sup>152</sup>

These characteristics should be obvious to present members of the Legislative Assembly, in both the 2011 iteration of statehood issues, but also in their departure from these guiding principles instituted in 2004–2005, if they are eventually to overcome the type of political and methodological deficiencies that led to the defeat of the 1998 referendum.

Instead, critical awareness within the Legislative Assembly of that historical perspective as tempering political responses is clearly missing. Support for statehood and its attainment are necessarily continuing core articles of faith for both political parties. However, the common rhetoric of that public political position has not recently been replicated through political conduct towards the goal of statehood. The parallel qualities of the persistence of the statehood agenda and embarrassing failings and indulgences in political approach are readily discernable to public opinion. These matters are compounded by the protracted time frame, the lack of discernable progress, the expenditure of substantial sums of money and the persistence of illusory concerns as to what statehood might mean and what changes could occur. These characteristics signify statehood as a constant, but elusive characteristic in Northern Territory politics, a subconscious aspiration and principle, one notoriously difficult to attain. These historical and practical statehood issues should highlight to Legislative Assembly politicians the risks of undermining years of difficult progress made towards statehood, through the fracturing of bipartisanship.

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151 For example, refer to *Constitutional Paths to Statehood* above n 11; Northern Territory Statehood Steering Committee *Activity Report 2006–2008*, above n 10.

152 *Report on Statehood Program*, above n 6, 2.

## V A COMMONWEALTH THAT IS RETICENT, SCEPTICAL AND REQUIRES PERSUASION

### A *Persuading the Commonwealth on Statehood*

The significance of the developments in the Northern Territory Legislative Assembly in 2011 becomes more obvious within an understanding of the essentially passive approach by the Commonwealth to the progression of statehood. The Commonwealth has sequentially, and in a bipartisan manner, adopted an approach requiring the impetus for statehood to emerge from the Northern Territory itself, and for the Commonwealth be persuaded that the Northern Territory has both a plausible plan and a commitment to its achievement. This approach has been variously expressed,<sup>153</sup> including after the 1998 Convention and failed referendum by both Coalition<sup>154</sup> and Labor ministers.<sup>155</sup>

The current Commonwealth position emerged in response to the House of Representatives Standing Committee on Legal and Constitutional Affairs recommendation.<sup>156</sup> On 22 October 2009, the Government Response was tabled in Parliament,<sup>157</sup> supporting the attainment of statehood, setting down stringent pre-conditions and providing the Commonwealth with several escape clauses in negotiation to deny, delay or qualify the granting of statehood:

The Commonwealth Government supports in principle the granting of statehood to the Northern Territory, subject to the resolution of outstanding policy and constitutional issues by the Commonwealth and Northern Territory Governments,

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153 See *The Long Road to Statehood*, above n 10, 10 (announcement of PM Howard 11 August 1998); *Report into appropriate measures to facilitate Statehood*, above n 9, 19 (address of Commonwealth Minister for Territories, Hon Alex Somlyay to Legislative Assembly, 11 August 1998).

154 *The Long Road to Statehood*, above n 10, 33–4 (meeting of NT Minister for Statehood and Shadow Minister for Statehood with Attorney General Philip Ruddock on 6 February 2007); Information Paper *What Might the Terms and Conditions of Northern Territory Statehood be?*, above n 50, 16 ‘Mr Ruddock indicated that 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’; ‘Ruddock questions NT’s statehood push’, ABC News Online 7 February 2007 <<http://www.abc.net.au/news/2007-02-07/ruddock-questions-nts-statehood-push/2188682>>.

155 See *What Might the Terms and Conditions of Northern Territory Statehood be?*, above n 154, 12 (Home Affairs Minister Bob Debus), 16 (Attorney General Robert McClelland).

156 *Long Road to Statehood*, above n 10, 37, para 3.63: ‘The Committee recommends that the Australian Government update and refine its position on Northern Territory statehood and recommence work on unresolved federal issues’.

157 Commonwealth Parliament *Parliamentary Debates*, House of Representatives, 22 October 2009, 10761, *Government Response to the House of Representatives Standing Committee on Legal and Constitutional Affairs Report to 41<sup>st</sup> Parliament The Long Road to Statehood*, (Mr Albanese) (hereafter referred to as *Government Response*).

and the Commonwealth Parliament's consideration of any proposed terms and conditions of statehood.

The Commonwealth Government expects that the Northern Territory Government will continue to be the driving force for this constitutional change. It remains the responsibility of the Northern Territory Government to present the Commonwealth Government with a clear and detailed proposal, based on a sound financial, legal and social foundation, supporting their aim to become a State of the Commonwealth of Australia. The proposal must also demonstrate that it is based on broad consultation with, and support from, Northern Territory residents....

The Northern Territory will need to show clearly that statehood can be achieved and maintained without additional financial impost on the Commonwealth Government. Any specific terms and conditions that the Northern Territory Government considers essential for establishing the State should also be presented for Commonwealth Government consideration.<sup>158</sup>

A common problem raised in the past has been the ambiguity of the Commonwealth position and a lack of Commonwealth engagement in actively progressing statehood in collaboration with the Northern Territory.<sup>159</sup> Whilst the above Government Response does 'update and refine its position on Northern Territory statehood'<sup>160</sup> its porous language gives wide scope for calibrated responses, or no responses, to Northern Territory initiatives. It indicates that the Commonwealth response will be cautious, interactive and evolutionary, with no specified time frame,<sup>161</sup> and that the Commonwealth retreats from a primary role in activating change.<sup>162</sup> This highly nuanced position of the Commonwealth signals to Northern Territory Government and Opposition politicians alike that public engagement, including parliamentary

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158 *Government Response*, above n 157. The Response also states that the proposal should present the Northern Territory Government's preferred approach to a range of unresolved policy issues for Northern Territory statehood raised in the report.

159 See *Long Road to Statehood*, above n 10, 11–12, 32–3; Northern Territory Statehood Steering Committee Northern Territory Parliament *Submission to House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into the Federal Implications of Northern Territory Statehood*, (2007) 6; *What Might the Terms and Conditions of Northern Territory Statehood be?* above n 50, 13–14. The failure to resolve terms and conditions of statehood with the Commonwealth prior to the 1998 referendum was seen as contributing to the referendum negative vote.

160 *Government Response*, above n 157.

161 For example, *Government Response*, above n 157, states 'Any specific terms and conditions that the Northern Territory Government considers essential for establishing the State should also be presented for Commonwealth Government consideration'; 'As the Northern Territory Government develops and presents the details of its proposal, the Commonwealth Government will develop its preferred approach to the constitutional issues that will arise'.

162 For example, *Government Response*, above n 157, states: 'The Commonwealth Government expects that the Northern Territory Government will continue to be the driving force for this constitutional change'; 'The report argues that the Commonwealth has a role to play in helping to shape discussions on the terms and conditions of the potential new State'.

debate, on statehood issues is located within a Commonwealth established framework, in which the Commonwealth will engage with the statehood issue when it chooses and on its terms.<sup>163</sup>

The dangers of a fractured position between opposing politicians within the Legislative Assembly in progressing statehood are also apparent for further reasons related to this nuanced Commonwealth position. First, the Commonwealth in granting statehood to the Northern Territory will be subjecting itself to a range of constitutional restrictions, not presently applicable under the Commonwealth constitutional territories power.<sup>164</sup> In addition, the Commonwealth has its own interests in retaining the Northern Territory as a territory of the Commonwealth, subject to the territories power, whether for direct legislative action in response to identified social problems, under test conditions which may then be applied to similar situations elsewhere,<sup>165</sup> or for reasons of minimising political reaction in the capacity to locate legislative responses to controversial topics within a remote geographical area.<sup>166</sup> The Commonwealth will obtain no budgetary advantage from the granting of statehood to the Northern Territory<sup>167</sup> and

163 Which may also be as ‘the Commonwealth also wishes to avoid potential criticism that it is meddling in domestic Territory politics in regard to statehood issues, many of which ...are complex and unresolved’: *The Long Road to Statehood*, above n 10, 35.

164 In particular, refer to the various sections of the *Commonwealth Constitution* reflecting an equality of treatment of states – s 51(ii)(no discrimination between Commonwealth taxation laws between states), s 51(xxxi) (Commonwealth laws for the acquisition of property on just terms), s 92 (freedom of interstate trade), s 99 (Commonwealth not to give preference to one state in relation to any law of trade, commerce or revenue), s 106 (continuing existence of the *Constitution* of each State until altered in accordance with the *Constitution* of the State), s 117 (rights of out of state residents), s 118 (recognition of the laws of states), s 119 (protection of states from invasion and violence), and s 123 (alteration of the limits of states).

165 For example, the Federal Government intervention into the Northern Territory, following release of the *Little Children are Sacred* Report, above n 109: *Northern Territory National Emergency Response Act 2007* (Cth); and in income management of Centrelink welfare benefits, including the issue of a basics card quarantining a proportion of benefits for essentials expenditure: *Social Security and other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth). A five year trial of income management, based on the Northern Territory experience, was organised in July 2012 in 5 selected centres outside of the Northern Territory: see ‘Welfare card pays out on poor’ *Sydney Morning Herald* 7 August 2011. See further ‘Coalition bid to expand welfare quarantining’ *The Australian* 1 October 2013, 1. The Federal Government intervention is planned to be extended into the Northern Territory for a further ten years: see *Stronger Futures in the Northern Territory Act 2012* (Cth).

166 For example, storage of radioactive waste at Muckaty Station near Tennant Creek: *National Radioactive Waste Management Act 2010* (Cth).

167 ‘The Northern Territory has been treated as a state with regard to its financial relationship with the Commonwealth since 1988. The financial relationship between the Territory and the Commonwealth would not change upon a grant of statehood’: *The long road to statehood*, above n 10, 78. The Commonwealth Grants Commission GST relativity for the Northern Territory is 5.3, meaning that 5.3 times per person more than the state average is received in the Northern Territory: Commonwealth Grants Commission *Report on GST Revenue Sharing Relativities – 2010 Review* Vol 1, 2 cited in Gary Johns, ‘Statehood Stalemate: a modest proposal’ Paper, Northern Territory Library,

indeed may incur further financial obligations, particularly if subject matters currently reserved to the Commonwealth become the responsibility of the new state. Further, the manner and act of deferring the election of Convention candidates by the Legislative Assembly might itself be seen as evidence, or provide an adverse inference by the Commonwealth, of a hesitation or lack of commitment to realising statehood.<sup>168</sup>

Legislative Assembly politicians and Commonwealth Parliament Northern Territory politicians in 2011 displayed a practical failure to respond to and operate within the realpolitik of the preconditions and framework established by the Commonwealth. The Northern Territory Legislative Assembly debate in November 2011 too readily substituted immediate political advantage, real or illusory, as if in a vacuum, instead of approaches attuned to the Commonwealth position, which implicitly demands a substantive bipartisanship on this issue.

## B *Negotiating with the Commonwealth: Northern Territory Aspirations and Political Realities*

The above circumstances, including from the Government Response to the *Long Road to Statehood*, further underline the need for bipartisanship in that, even within ‘a clear and detailed proposal’, the decision to grant statehood intersects with the difficult task of establishing terms and conditions of statehood. Ultimately, these are decisions for the Commonwealth Parliament under s121 of the *Commonwealth Constitution*,<sup>169</sup> or more practically, the Commonwealth executive’s capacity to negotiate the passage of statehood legislation through the Commonwealth Parliament, following negotiations with the Northern Territory. The issues emerging from the preferred constitutional mechanism for conferring statehood,<sup>170</sup> s121 of the *Commonwealth Constitution*,<sup>171</sup> also

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Parliament House, 13 May 2011.

168 See point made Northern Territory *Parliamentary Debates*, Legislative Assembly, 30 November 2011, 13 (Mr Gunner).

169 ‘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 point is also highlighted by phrases of the *Government Response*, above n 157: ‘The Commonwealth Government supports in principle the granting of statehood to the Northern Territory, subject to...the Commonwealth Parliament’s consideration of any proposed terms and conditions of statehood’; ‘Any specific terms and conditions that the Northern Territory Government considers essential for establishing the State should also be presented for Commonwealth Government consideration’.

170 See *Constitutional Paths to Statehood* above n 11, 4; The Statehood Steering Committee agreed with the earlier Select Committee that section 121 was the preferred method. See also Anne Twomey ‘A Constitution for a new State: Dilemmas for the Northern Territory’ (2007) 18 *Public Law Review* 200, 202; *Final Report and Recommendations*, above n 13, 4; *Long Road to Statehood*, above n 10, 14, 41.

171 The other method of obtaining statehood for the Northern Territory would be the holding of a s 128 referendum, attracting the support of a majority of voters in a majority of states to make

underline the desirability of political unity in navigating contentious aspects of the Commonwealth's application of the scope of the power.

The first area relates to the debate about whether the Northern Territory would, within the language of s 121, be admitted or be established as a state of the Commonwealth. The balance of authority favours the view that as an existing self governing political entity, the Northern Territory would be admitted as a state of the Commonwealth.<sup>172</sup> The ability to use s 121 of the *Commonwealth Constitution* for the purposes of making a territory a state is confirmed by the definition of 'states' in covering cl 6 of the *Commonwealth of Australia Constitution Act*.<sup>173</sup>

The significance of the point of admission of a state is seen in relation to the effects of s 106 of the *Commonwealth Constitution*.<sup>174</sup> As an admitted state, the source of authority for a new Northern Territory state constitution would be the popular sovereignty of the Northern Territory people 'as evidenced by their popular acceptance of the form of the *Constitution* in a referendum and the actions of their elected representatives in negotiating and agreeing to the grant of Statehood',<sup>175</sup> in contrast to the establishment of a state, the source of authority for its *Constitution* deriving from the *Commonwealth Constitution*. For an admitted state, s 106 of the *Commonwealth Constitution* would continue the new state constitution as at the time of admission, with its source outside of the *Commonwealth Constitution*.<sup>176</sup> Other arguments made around

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the necessary changes to create the Northern Territory as a state within the Commonwealth of Australia. 'This method would require significant national support and has therefore not been supported by those proposing Statehood for the Northern Territory because of fears that such a referendum would fail': Twomey, above n 170, 202.

172 See *Long Road to Statehood*, above n 10, 42; R Lumb 'The Northern Territory and Statehood' (1978) 52 *The Australian Law Journal* 554, 559: 'it is more appropriate to describe at least those Territories which have attained responsible and representative government as being 'admitted' to the Commonwealth as new States rather than as being 'established'... It is therefore proper to interpret the phrase 'admit to the Commonwealth' in s 121 as including the admission of a Territory into the Federation of the States'; Chris Tappere 'New States in Australia: The Nature and Extent of Commonwealth Power Under Section 121 of the *Constitution*' (1987) 17 *Federal Law Review* 223, 229; G Moens and J Trone *The Constitution of the Commonwealth of Australia Annotated* (Butterworths, 5<sup>th</sup> ed, 2001), 386; J Toohey 'New States and the Constitution: An Overview' in Peter Loveday and Peter McNab (eds) *Australia's Seventh State* (Northern Australia Research Unit ANU, 1988), 4: 'admission seems the appropriate description in the case of the Northern Territory, a political entity with a large measure of autonomy'.

173 Tappere, above n 172, 227. Covering clause 6 defines states as (inter alia) 'such colonies or territories as may be admitted into or established by the Commonwealth as States'.

174 Section 106 of the *Commonwealth Constitution* states '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'.

175 Twomey, above n 170, 203

176 Lumb raises a similar argument in relation to s.106 for an admitted state (a political community



s 106 of the *Commonwealth Constitution* in relation to an admitted state are that s 106 might protect and preserve state constitutions from the effects of Commonwealth legislation<sup>177</sup> and that it affirms the continuation of state plenary legislative power, as subject to the *Commonwealth Constitution*.<sup>178</sup>

The greatest focus in invoking s 121 of the *Commonwealth Constitution* in relation to admission of the Northern Territory as a state is necessarily upon the imposition of terms and conditions as the Commonwealth Parliament thinks fit.<sup>179</sup> This constitutional scope of the terms and conditions phrase will require a high degree of political consensus between Opposition and Government to communicate a persuasive and consistent case to the Commonwealth for the fullest degree of statehood, particularly if official aspirations within the Northern Territory are to be realised. The experience from the 1998 referendum in the lack of resolution of the terms and conditions of statehood<sup>180</sup> as contributing to the defeat of the referendum, indicates the risks of such uncertainty.<sup>181</sup>

The critical consideration is the combined factors of the scope of the terms and conditions aspect of the s 121 power, the constitutional limits relating to states upon that power, and the expressed aspirations of Northern Territory politicians and others for equal statehood, including a somewhat contradictory assertion of separating the drafting of a Northern Territory *Constitution* from the Commonwealth imposition of terms and conditions of statehood. This complex conjunction emphasises why consensus and bipartisanship are essential to advocacy for the strongest case to advance statehood, and for influence upon the formation of legislation.

It is apparent that the Commonwealth Executive is able to enter into negotiations with the Northern Territory regarding the terms and conditions

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with a constitution already formed, that is a territory which has attained a degree of autonomy) in that 'The function of the Federal Parliament is to ratify such a *Constitution* ... and to approve admission on terms and conditions. It is not the function of the Parliament to establish or create a State Constitution': Lumb, above n 172, 559.

177 Twomey, above n 170, 204; Graham Nicholson 'Constitutionalism in the Northern Territory and Other Territories' (1992) 3 *Public Law Review* 50, 54.

178 Twomey, above n 170, 204.

179 This is reflected in the *Government Response*, which notes that 'Any specific terms and conditions that the Northern Territory Government considers essential for establishing the State should also be presented for Commonwealth Government consideration': *Government Response*, above n 157.

180 See *Long Road to Statehood*, above n 10, 11–12.

181 The need for an agreed process to determine terms and conditions, prior to a plebiscite or referendum about statehood, has been expressed again: *Submission to House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into the Federal Implications of Northern Territory Statehood*, above n 159, 1, 2.

of statehood, but that the legal making or imposition of terms and conditions under the s 121 power must be achieved by legislation of the Commonwealth Parliament.<sup>182</sup> The real prospect of an unequal or differentiated form of statehood as appropriate for the Northern Territory,<sup>183</sup> will be contentious within the Northern Territory, in both terms and duration. This aspect has taken on some distinctive features, which if to have the best prospect of acceptance by the Commonwealth, will require strong political consensus and bipartisanship.

### C *Separating Development of a new Northern Territory Constitution from Negotiation of Terms and Conditions of Statehood with the Commonwealth*

A consistent theme in Northern Territory statehood documentation has been the assertion of popular sovereignty in the form of a referendum approving a new Northern Territory *Constitution*, which the Commonwealth should then legislate for, distinct and separate from the negotiation of terms and conditions of statehood with the Commonwealth:

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...

The processes for the new State *Constitution* are quite different. In the SSC's view these are matters for Territorians alone. In accordance with democratic principles, Territorians should have the say on the formation and content of this document. It is for Territorians to determine this process. It should not be a matter for Commonwealth intrusion or dictation. Once the new State *Constitution* is adopted by Territorians in accordance with their own processes, it is then for the Commonwealth Government and Parliament to decide whether to accept it or reject it.<sup>184</sup>

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182 Twomey, above n 170, 212; Tappere, above n 172, 230: 'The Executive could undoubtedly enter into any agreement with a potential State as to terms and conditions but the only way the Parliament can impose them is via legislation'.

183 *What Might the Terms and Conditions of Northern Territory Statehood be?*, above n 154, 14.

184 *Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into the Federal Implications of Northern Territory Statehood*, above n 159, 3 and 8. See also the very similar procedures set out for the drafting of a new Northern Territory *Constitution*, a referendum to approve the new *Constitution* within the Northern Territory, then enactment of legislation by the Commonwealth: *Long Road to Statehood*, above n 35, 28 and *Report on Statehood Program*, above n 6, 3 citing Recommendations of the Statehood Steering Committee (especially Recommendations 8 to 10) and the draft constitutional framework document, 12 and Appendix E Constitutional Framework Document.

Two points are worthy of observation here. One is the insistence that the determination of a new Northern Territory *Constitution* is a matter for Territorians alone.<sup>185</sup> The other is that of a strict separation of the negotiated terms and conditions of statehood with the Commonwealth from that constitutional determination by Territorians.<sup>186</sup>

This division is perhaps best comprehended as a reaction to the failed experience of the 1998 convention and referendum, where the draft constitution proposed was not the product of a popular sovereignty mechanism, and the referendum was not contemporaneously informed by a set of principles, agreed with the Commonwealth, for the conferral of statehood. The methodology might also be considered as a reaction to the Commonwealth's consistent position of the Northern Territory having to take responsibility for, and be the driving force, for constitutional change. As a reaction, the apparent inflexibility of this stated position may well prove impractical and unworkable in negotiating with the Commonwealth. In such circumstances, it again becomes apparent that political consensus and bipartisanship amongst Northern Territory politicians is critical to effectively advancing the statehood claim, by modifying, compromising or finessing the stated position so it addresses the strength of the Commonwealth position.

## VI ACHIEVING EQUALITY OF THE NORTHERN TERRITORY WITH THE OTHER STATES

### A *A Commitment to Eventual Equality*

A foundation principle consistently advanced in Northern Territory statehood documentation is a commitment to eventual equality with other existing states,<sup>187</sup> seen as the only worthwhile basis for proceeding to statehood.<sup>188</sup>

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185 See *Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into the Federal Implications of Northern Territory Statehood*, above n 184: 'The SSC also takes the view the Commonwealth should have no role in preparing a proposed Northern Territory constitution provided such a constitution is consistent with the *Commonwealth Constitution* and the Australia Acts', and *What Might the Terms and Conditions of Northern Territory Statehood be?* above n 50, 15

186 *What Might the Terms and Conditions of Northern Territory Statehood be?*, above n 50, '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'.

187 See Statehood Steering Committee Position Statement, para 2 extracted in *The long road to statehood*, above n 10, 24; *What Might the Terms and Conditions of Northern Territory Statehood be?* Above n 50, 13, 14; *Submission to House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into the Federal Implications of Northern Territory Statehood*, above n 159, 3.

188 *Submission to House of Representatives Standing Committee on Legal and Constitutional Affairs*

A central conception of this equality is that the Northern Territory, with a new *Constitution* endorsed by referendum, be able to avail itself of the protection of s 106 of the *Commonwealth Constitution*,<sup>189</sup> meaning 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>190</sup> or that ‘States generally would object to the Commonwealth imposing and controlling means of amending the State’s *Constitution*, simply as a matter of principle’.<sup>191</sup>

Likewise, there are a range of legislative topics,<sup>192</sup> which are presently reserved from the Legislative Assembly, which would require negotiation with the Commonwealth in consideration of the terms and conditions of statehood. Broadly speaking, the documented aspirations within the Northern Territory about these topics reflect the twin themes of equality with the position of existing states and certainty for the Northern Territory electorate in its referendum role in approving a new constitution.

Ownership of uranium resources and with it control of uranium mining has been considered to be a feature synonymous with statehood<sup>193</sup> and

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*Inquiry into the Federal Implications of Northern Territory Statehood*, above n 159: ‘The SSC acknowledges an immediate adoption of absolute equality by the Commonwealth is unlikely; however, the SSC contends eventual equality of the Northern Territory as a new State with existing States (except in so far as the *Commonwealth Constitution* confers certain rights on original States only) should be the focus of any process toward Statehood for the Northern Territory’.

189 Namely that the new constitution of the admitted state continue ‘until altered in accordance with the *Constitution* of the State’.

190 *Submission to House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into the Federal Implications of Northern Territory Statehood*, above n 159, 8.

191 Twomey, above n 170, 213. Twomey also discusses whether s 121 of the *Commonwealth Constitution*, can support a condition imposed on an admitted state which is of continuing effect, (for example a manner and form restriction prescribing a method of change of the new constitution of the admitted state) or whether the effect of s 121 would be spent upon the admission of the state: Twomey, above n 170, 213. Such a law purporting to impose continuing conditions upon the admitted State *Constitution* may also be repugnant to s 2 of the *Australia Act*: Twomey, above n 170, 213.

192 See the relevant provisions currently reserving to the Commonwealth the subject matters of uranium mining, national parks, industrial relations and Aboriginal land rights: See *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (national parks); s 53(5) of the *Northern Territory (Self-Government) Act 1978* (Cth) (industrial relations); reg 4(2) of the *Northern Territory (Self-Government) Regulations 1978* (Cth) excludes from the matters in respect of which Northern Territory ministers have executive authority under reg 4(1), matters relating to the mining of uranium or other prescribed substances within the meaning of the *Atomic Energy Act 1953* (Cth) and rights in respect of Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

193 See *What Might the Terms and Conditions of Northern Territory Statehood be ?*, above n 50, 25; *Submission to House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into the Federal Implications of Northern Territory Statehood*, above n 159, 13; *Long Road to Statehood*, above n 10, 89.

desirable as avoiding the claimed confusion about the current division of Commonwealth and Northern Territory responsibilities over uranium mining, as adversely affecting growth and expansion.<sup>194</sup> Control and maintenance of Kakadu and Uluru-Kata Tjuta National Parks is currently vested in the Commonwealth, but under the principle of equality with existing states,<sup>195</sup> it is a matter requiring consideration, even if following a negotiated process and agreement transferring ownership and existing leases with traditional owners, the Commonwealth continues to administer these national parks.<sup>196</sup> The Commonwealth also retains power over industrial relations in the Northern Territory and present and past Commonwealth approaches suggest that the Commonwealth would be reluctant to confer industrial relations jurisdiction on the Northern Territory upon statehood.<sup>197</sup> It has been suggested that the matter of conferral of industrial relations powers should be the subject of Government to Government negotiations,<sup>198</sup> with various options being the establishment of state based industrial relations system, a referral of industrial relations matters back to the Commonwealth, or the pursuit of an intermediate option.<sup>199</sup>

The sensitivity of these presently reserved legislative topics suggests that future negotiations about their transfer to the legislative and executive power of the Northern Territory might well be complicated or compromised by a want of confidence in the history of Legislative Assembly parliamentary conduct. Such conduct could be raised by the Commonwealth, otherwise inclined to the granting of statehood, as justifying a prudent course of permanently withholding, delaying, or phasing in subject to conditions, the transfer of any or each of these matters to a new state of the Northern Territory.

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194 See *What Might the Terms and Conditions of Northern Territory Statehood be ?*, above n 50, 24–25 as to the economic contribution made by mining to the Northern Territory economy; *Submission to House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into the Federal Implications of Northern Territory Statehood*, above n 159; *Long Road to Statehood*, above n 10, 90–91.

195 See *Long Road to Statehood*, above n 9, 94; *What Might the Terms and Conditions of Northern Territory Statehood be ?*, above n 50, 24; *Submission to House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into the Federal Implications of Northern Territory Statehood*, above n 159, 18.

196 See *Long Road to Statehood*, above n 9; *What Might the Terms and Conditions of Northern Territory Statehood be ?*, above n 50, 24; *Submission to House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into the Federal Implications of Northern Territory Statehood*, above n 159.

197 *What Might the Terms and Conditions of Northern Territory Statehood be ?*, above n 50, 27; *Submission to House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into the Federal Implications of Northern Territory Statehood*, above n 159, 23

198 *What Might the Terms and Conditions of Northern Territory Statehood be ?*, above n 50; *Submission to House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into the Federal Implications of Northern Territory Statehood*, above n 159.

199 *Long Road to Statehood*, above n 10, 76–77.

## B Commonwealth Parliamentary Representation

Included within the s 121 *Commonwealth Constitution* capacity to impose terms and conditions on the admission or establishment of a state, is the separate clause of the extent of representation of the new state in either House of Parliament.<sup>200</sup> Again, this is a contentious area where there is potentially a significant gap between Northern Territory aspirations and the limits of acceptability for the Commonwealth. For the Northern Territory, representation relates to the principle of eventual equality<sup>201</sup> and also to the issue of clarity of terms and conditions of statehood prior to a statehood referendum within the Northern Territory.<sup>202</sup> For the Commonwealth, the issue raises the application of the nexus provision in s 24 of the *Commonwealth Constitution*<sup>203</sup> – the granting of additional senators to the Northern Territory will in turn require an increase in the number of members of the House of Representatives, the new electorates being distributed amongst the other states.<sup>204</sup> Reconciling these competing considerations in forming the terms and conditions of statehood will require qualities of progression and compromise, and an awareness of how the politically and constitutionally increased representation will resonate with voters and governments in the existing states. Various formulae to increase representation based on timing and population have been advanced.<sup>205</sup> The overall point is that consensus and bipartisanship realistically informing a negotiating position with the Commonwealth is more likely to yield more favourable terms and conditions of representation.

200 Section 121 of *Commonwealth Constitution* ‘including the extent of representation in either House of Parliament, as it thinks fit’.

201 *What Might the Terms and Conditions of Northern Territory Statehood be ?*, above n 50, 29.

202 *Submission to House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into the Federal Implications of Northern Territory Statehood*, above n 159, 10.

203 ‘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’. Opinion differs as to whether the nexus requirement would apply in the case of a new state. However, elsewhere, the phrase ‘original state’ is used to confine the reach of constitutional provisions, from subsequently admitted or established states: see the last paragraph of *Commonwealth Constitution*, s 24.

204 See the second paragraph of s 24 of the *Commonwealth Constitution*: ‘The number of members chosen in the several States shall be in proportion to the respective numbers of their people...’ (apportionment of the number of House of Representatives seats in each state based on a population quota). See *Long Road to Statehood*, above n 10, 68 and Appendix F: Indicative House of Representatives division allocation

205 See *Long Road to Statehood*, above n 10, 70 ‘grant the new State an additional two Senators with the possibility of additional Senators in future subject to certain time and/or population requirements as agreed between the Territory and the Commonwealth’; *What Might the Terms and Conditions of Northern Territory Statehood be ?* above n 50, 29 ‘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’.



### C *Extending State Constitutional Guarantees to a New State*

One of the clear benefits of the attainment of statehood would be the extension of state referenced constitutional guarantees to the new state,<sup>206</sup> which would constrain the terms and conditions imposed upon a new state of the Northern Territory, including legislated issues of inequality or differentiation.

These guarantees are extensive,<sup>207</sup> reflecting the *Commonwealth Constitution* being ‘guided by the general principle of equality in its treatment of states’.<sup>208</sup> As a High Court justice, speaking extra curially, observed:

It is unlikely that the High Court would permit the imposition of any term or condition which derogated from the rights in relation to States as enshrined in... provisions of the *Constitution* .... There is nothing in the *Constitution* which supports a confinement of these provisions to original States; on the contrary, the *Constitution* evinces a clear intention that a reference to ‘States’ is a reference to both original and new States. In the first place, the definition of ‘States’ in cl.6 of the *Constitution Act* includes ‘such colonies or territories as may be admitted into or established by the Commonwealth as States’. Furthermore, the scheme of the *Constitution* is to make express reference to ‘Original States’ where it is intended that a provision be restricted in that regard.<sup>209</sup>

Similarly, as a state, the Northern Territory would be subject to application of the implied doctrine of intergovernmental immunities.<sup>210</sup>

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206 See G Nicholson, ‘The Constitutional Status of the Self-Governing Northern Territory’ (1985) 59 *Australian Law Journal* 698, 708: ‘The residents of the Northern Territory remain deprived of the constitutional guarantees of most of the residents of Australia, such as they may be.... This position would be rectified if the Northern Territory became a new State, in which event it would seem that constitutional guarantees applicable to existing States would also apply to the new State except insofar as those guarantees are expressed by reference to “original” States’.

207 The state referenced rights include: s 51(ii) (no discrimination in taxation laws between States or parts of states), s 51(xxxi) (Commonwealth laws for the acquisition of property in a state to be on just terms), s 92 (trade, commerce and intercourse among the States to be absolutely free), s 99 (Commonwealth shall not by any law or regulation of trade, commerce or revenue, give preference to one State or any part thereof over another State or any part thereof), s 117 (residents in any State not to be subject in any other State to any disability or discrimination), s 118 (full faith and credit to be given to the laws, Acts, records and judicial proceedings of the States), s 119 (protection of States against invasion and on the application of the Executive Government of the State, against domestic violence), s 123 (no alteration of State boundaries without consent of State Parliament). In *Wurridjal v Commonwealth* (2009) 237 CLR 309, a majority of the High Court found that Commonwealth laws operating in the territories are subject to the just terms requirements of s 51(xxxi), overruling *Teori tau v Commonwealth* (1969) 119 CLR 564.

208 *Long Road to Statehood*, above n 10, 39.

209 See Toohey, above n 172, 9. See also *Submission to House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into the Federal Implications of Northern Territory Statehood*, above n 159, 7 and Twomey, above n 172, 211 ‘It is unlikely that s 121 would be interpreted as permitting the Commonwealth Parliament to alter the effect of constitutional provisions applying to the States, except as regards representation in the Parliament’.

210 *Austin v Commonwealth* (2003) 215 CLR 185; *Clarke v Commissioner of Taxation* (2009) 240 CLR 272.

In each of these examples, the capacity of Northern Territory politicians to achieve, maintain and implement consensus for precursor *procedural* items such as elections for, and conduct of, a Constitutional Convention, becomes a public statement and indicative precursor to the difficult task of negotiating legislative and constitutional reforms required for statehood. In 2011, Legislative Assembly politicians too readily forgot that the timing of elections for Convention delegates is but a starting point, following an extended Statehood Steering Committee process of community engagement and consultation, and Constitutional Convention Committee planning, for more concrete steps to attaining statehood. That starting point exists within the framework of key aspects of the Government Response, touching upon issues for the Convention.<sup>211</sup> It is this need amongst Territory politicians for developing a coherent and contextual appraisal of the necessary legislative and other steps, giving substantive meaning to the public bi-partisan political position supporting statehood, which becomes most apparent.

## VII THE INDIGENOUS COMMUNITIES' DE FACTO VETO OVER STATEHOOD

A further major issue of concern impacted by the fraying of the bipartisan approach in the Legislative Assembly in 2011 is its disproportionate impact upon the ability to attract support for statehood amongst Indigenous Territorians. The voting patterns in the 1998 referendum against statehood by Indigenous Territorians,<sup>212</sup> mobilised by the ATSIC and Aboriginal Land Councils,<sup>213</sup> were critical to its failure. Within the conditions set down by the Commonwealth in the Government Response, Indigenous Territorians may be characterised as having a de facto veto over the Northern Territory statehood process:

It appears that the Land Councils have the power to derail the statehood process if they are not satisfied with the government response to the Kalkaringi and Batchelor statements...The Committee notes that discussions between the

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211 These include 'the resolution of outstanding policy and constitutional issues by the Commonwealth and Northern Territory Governments', 'proposed terms and conditions of statehood', and 'broad consultation with and support from Northern Territory residents': *Government Response*, above n 157.

212 See *Report into appropriate measures to facilitate statehood*, above n 9, 31, 39. About 70% of the Northern Territory Aboriginal population voted 'No' in the 1998 statehood referendum: *Long Road to Statehood*, above n 10, 57. Approximately 27% of the Northern Territory population is Indigenous, and trending towards voting as a block: *Report into appropriate measures to facilitate Statehood*, above n 9, 38.

213 'There was a fear that Statehood would increase the power of the NT Government, a strong lobby for the No vote from ATSIC, the Central Land Council and the Northern Land Council...and no knowledge of the provisions of the Draft *Constitution*': *Report into appropriate measures to facilitate statehood*, above n 9, 31.

Northern Territory Government and its Aboriginal community may very well determine the outcome of a future referendum on statehood.<sup>214</sup>

In 1998, Northern Territory Indigenous communities produced two documents from constitutional conventions,<sup>215</sup> the Kalkaringi Statement<sup>216</sup> and the Batchelor Statement,<sup>217</sup> collectively known as the Indigenous Constitutional Strategy: Northern Territory.<sup>218</sup> The Kalkaringi Statement ‘set out a number of Aboriginal rights covering self-determination, land rights, rights to sacred sites, human rights and rights to political participation, services and infrastructure, education and justice,’ withholding consent to the draft constitution and requiring good faith negotiations by the Northern Territory government.<sup>219</sup> The Batchelor Statement endorsed the Kalkaringi resolutions<sup>220</sup> and made further resolutions in relation to Aboriginal Land Rights and Other Rights,<sup>221</sup> Human Rights,<sup>222</sup> Education,<sup>223</sup> Good Government, Self Government and Political Participation,<sup>224</sup> Aboriginal Self-Government and Self-Determination,<sup>225</sup> Political Participation<sup>226</sup> and Constitutional Process.<sup>227</sup> Of particular contemporary significance to the achievement of statehood are Batchelor Statement resolutions 37 and 38:

The Convention affirms the principle embodied in the Kalkaringi Statement Aboriginal people will not consent to Northern Territory statehood until and unless their rights and interests are recognised, enhanced and protected in its *Constitution* and the NT Government is willing to enter into good faith negotiations under a framework agreement which will allow recognition of Aboriginal self-government.<sup>228</sup>

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214 *Long Road to Statehood report*, above n 10, 54, 58.

215 See Garth Nettheim, ‘Aboriginal Constitutional Conventions in the Northern Territory’ (1999) 10 *Public Law Review* 8.

216 Constitutional Convention of the Combined Aboriginal Nations of Central Australia *Kalkaringi Statement*, Kalkaringi, (17–20 August 1998).

217 Northern Territory Indigenous Constitutional Convention *Resolutions of the Northern Territory Aboriginal Nations on Standards for Constitutional Development*, Batchelor (December 1998) (Batchelor Statement).

218 *Indigenous Constitutional Strategy: Northern Territory* Printed as Annexure 6 to *Constitutional Paths to Statehood* above n 11, 1. See also Garth Nettheim ‘Indigenous Australian Constitutions’ (2001) 24 *University of New South Wales Law Journal* 840, 848 para 26, fn 33 ‘This document consolidates the Kalkaringi Statement and the *Standards for Constitutional Development*’.

219 *Long Road to Statehood*, above n 10, 53.

220 See *Batchelor Statement*, above n 217 (Resolution 1) (Adoption of the Kalkaringi Statement) and Resolution 6 (NT *Constitution* must recognise Aboriginal law through Aboriginal traditional law holders and Aboriginal law and governance structures).

221 *Ibid* Resolutions 9–13.

222 *Ibid* Resolutions 14–18.

223 *Ibid* Resolutions 19–20.

224 *Ibid* Resolutions 22–23, Resolutions 31–33.

225 *Ibid* Resolutions 24–30.

226 *Ibid* Resolutions 34–35.

227 *Ibid* Resolutions 36–42.

228 *Ibid* Resolution 37. The *Indigenous Constitutional Strategy*, above n 218, 1, states this matter as

The Convention Committee shall commence a process of negotiation with relevant political organs, government representatives and others regarding the further development and entrenchment of Indigenous rights and interests in the Federal and Northern Territory Constitutions, in particular the terms and conditions for the establishment of the Northern Territory as a state.<sup>229</sup>

Some important contemporary points arise in relation to the Indigenous Constitutional Strategy. First, it has been indicated that the framework agreement referred to in the Indigenous Constitutional Strategy is a current and ongoing pre-requisite to further constitutional development and that the lack of government action is a matter of concern.<sup>230</sup> Second, the Indigenous Constitutional Strategy specifies that ‘the Aboriginal Land Rights Northern Territory Act 1976 must remain Commonwealth legislation administered by the Commonwealth’<sup>231</sup> and that ‘common law and statutory rights, including those currently contained in the *Aboriginal Land Rights (Northern Territory) Act 1976* as well as those recognised or negotiated in coming years, must be recognised and afforded Constitutional protection’.<sup>232</sup> Third, the Indigenous Constitutional Strategy includes many other issues ‘not technically relevant to constitutional development for the Northern Territory; however, the land councils have recently indicated they consider them to be a prerequisite to Statehood’.<sup>233</sup> Many of these further issues relate to rights and interests to be recognised, protected and enhanced in a Northern Territory *Constitution*,<sup>234</sup> raising complicating and controversial issues regarding the constitutional entrenchment of a range of human rights,<sup>235</sup> not dissimilar to recent debate

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‘That a Northern Territory *Constitution* must contain a commitment to negotiate with Aboriginal peoples a framework agreement, setting out processes for the mutual recognition of our respective governance structures the sharing of power and the development of fiscal autonomies’.

229 *Batchelor Statement*, above n 217, Resolution 38; *Indigenous Constitutional Strategy*, above n 218, 5.

230 *What Might the Terms and Conditions of Northern Territory Statehood be ?*, above n 50, 22–23; *Submission to House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into the Federal Implications of Northern Territory Statehood*, above n 159, 21–22; *Long Road to Statehood*, above n 10, 55.

231 *Kalkaringi Statement*, above n 216, 2; *Indigenous Constitutional Strategy*, above n 218, 2; *What Might the Terms and Conditions of Northern Territory Statehood be ?*, above n 50, 23; *Submission to House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into the Federal Implications of Northern Territory Statehood*, above n 159, 22.

232 *Kalkaringi Statement*, above n 216, see similar statement in *Indigenous Constitutional Strategy*, above n 218, 2.

233 *Submission to House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into the Federal Implications of Northern Territory Statehood*, above n 159, 22.

234 See the extract relating to the *Batchelor Statement* Resolutions 37 and 38 above.

235 See the references to constitutional protection, constitutional recognition or constitutional guarantees in Resolutions 9, 11, 12, 15, 16, 19, and 22 of the *Batchelor Statement*. The *Indigenous Constitutional Strategy* similarly and variously seeks recognition, protection, affording, provision or guaranteeing of a range of rights in the Northern Territory *Constitution*, including the human rights in the principal United Nations human rights conventions, as well as the *Convention of the Prevention and Punishment of the Crime of Genocide*: See *Indigenous Constitutional*

at Commonwealth level about statutory charters of rights in the aftermath of the National Human Rights Consultation Report.<sup>236</sup> The Northern Territory Statehood Steering Committee noted the qualified scope for the land councils to change these requirements as part of a framework agreement as a prerequisite to statehood.<sup>237</sup> The rights identified in the Indigenous Constitutional Strategy as a stated pre-requisite to a framework agreement embody both a range of rights and constitutional protections of a kind not achieved in other Australian jurisdictions.<sup>238</sup>

The Indigenous Constitutional Statement's juxtaposition of these issues and its requirement of ongoing Commonwealth responsibility for the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), with the Commonwealth's expectation 'that the Northern Territory Government will continue to be the driving force for constitutional change' and that a statehood reform proposal 'must also demonstrate that it is based on broad consultation with and support from Northern Territory residents'<sup>239</sup> provides fertile grounds for a potentially complex and protracted series of problems.

Real concerns must then be raised of the consequential effects of an early and reactive lack of political consensus and bipartisanship, upon complex and multilayered statehood issues of this kind, where the leadership for their resolution lies not with the Commonwealth, but is entwined with the political disposition of the membership of the Legislative Assembly. The ability to obtain a framework agreement of minimum constitutional acceptance to indigenous Northern Territorians may well be a stumbling block likely to unravel progression towards statehood.

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*Strategy*, above n 218, under the sub headings 'Aboriginal Law', 'Aboriginal Self-Determination and Self-Government', 'Aboriginal Land Rights and Other Indigenous Rights', 'Sacred Sites and Significant Areas', 'Human Rights' and 'Essential Services and Infrastructure'.

236 Commonwealth of Australia National Human Rights Consultation *National Human Rights Consultation Report* (HREOC, 2009).

237 *What Might the Terms and Conditions of Northern Territory Statehood be?*, above n 50, 23 'Whilst it appears that the land councils are willing to revisit the requirements stated in (the framework agreement) as a prerequisite to Statehood, the statements contained therein appear to remain their starting position'.

238 See *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

239 *Government Response* above n 157, 58: 'Discussions with the Aboriginal community concerning the constitutional statements and a possible framework agreement ... is generally a matter for the Northern Territory Government'.

## VIII CONCLUSION

The above events relating to further delays in the extended statehood process highlight issues of wider importance relating to the legal and political processes necessary to progress and ensure achievement of statehood for the Northern Territory.

Readily apparent in maintaining a statehood focus within the Northern Territory legislature and executive is the need for political maturity embodying a legally accurate and informed appreciation of Commonwealth constitutional issues (including both the practical and symbolic significance of greater autonomy through the *Territories Self-Government Legislation Amendment (Disallowance and Amendment of Laws) Act 2011* (Cth)) and the scope of both the *Commonwealth Constitution* s 121 admission of a new state and s 122 territories power. From a sound legal appreciation must flow a commitment to political compromise and bi-partisanship, an acknowledgment of the responsibility of the Northern Territory political process to arrive at a plausible statehood proposal from the Commonwealth's perspective, as well as an ability to transcend the tone and tactics of political legislative and policy contestations within the existing authority of the Northern Territory Legislative Assembly and Executive.<sup>240</sup>

The Northern Territory political process needs to reconcile itself with the stark reality that statehood will have to be consistently and demonstrably earned through building and reconciling solid support of its varied constituency, then transforming that support into a realistic, timely and convincing case to the Commonwealth. In particular, there needs to be a consistency and congruence from both major political parties aligning public political party support for statehood with political conduct directed towards that objective. The important experiences of the 1998 convention and referendum demonstrate that public support for statehood is intricately linked to perceptions of the legitimacy and methodology of democratic consultation and involvement of the community regarding statehood, as sponsored by politicians.

The Northern Territory election of 25 August 2012, which resulted in the Country Liberal Party obtaining a majority of seats in the Legislative Assembly and forming government,<sup>241</sup> introduced a number of other practical considerations into the legal and political statehood mix. Of most obvious

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<sup>240</sup> See ss 6, 7 and 35 of the *Northern Territory (Self-Government) Act 1978* (Cth) and reg 4 of the *Northern Territory (Self-Government) Regulations 1978* (Cth).

<sup>241</sup> The Country Liberal Party won 16 seats, Labor 8 seats and a single Independent in the 25 seat Northern Territory Legislative Assembly. The success of the CLP was largely attributed to the shift in remote indigenous communities of support to the CLP, as reflected in the election of four prominent CLP indigenous representatives in the seats of Arafura, Stuart, Namatjira and Arnhem.



concern for proponents of statehood are the constitutionally and legally erroneous statements at both federal and territory level by members then in Opposition,<sup>242</sup> and now in Government,<sup>243</sup> as skewing debate and potentially undermining support for, and delaying, legislative processes preparatory to statehood. It is to be hoped that in any future debates concerning statehood issues that the ministers with the most relevant portfolios for the statehood issue<sup>244</sup> communicate clear and credible constitutional and legal advice as properly informing public debate, and that the two Northern Territory Federal representatives withdraw earlier comments and that their future contributions are more accurately informed in relation to constitutional and legal statehood issues.

Second, delays relating to statehood in 2011 and 2012 have been compounded by further political circumstances reshaping the new Northern Territory government's priorities. The issue of statehood was not prominent in the 2012 election campaign.<sup>245</sup> This reality was reflected in the legislative priorities and policy initiatives in the addresses by the Northern Territory Administrator and the new Chief Minister at the opening in October 2012 of the new Northern Territory Legislative Assembly,<sup>246</sup> neither of which mentioned the issue of statehood. However, on 6 December 2012, the Attorney General referred the Options for the Northern Territory to become a state to the Legal and

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242 As discussed and analysed in the earlier sections of this article in relation to constitutional misconceptions in the Commonwealth Parliamentary and Northern Territory Legislative Assembly debates.

243 In the 2013 Federal election, Senator Scullion was re-elected as one of two senators from the Northern Territory, and appointed as Minister for Indigenous Affairs in the Abbott government; Ms Griggs was re-elected as the CLP member for the Darwin based House of Representatives seat of Solomon.

244 Previously Hon Terry Mills, Chief Minister and Minister for Statehood; and the Hon John Elferink Attorney General. With the resignation of Terry Mills on 13 March 2013 and his replacement by Hon Adam Giles as Chief Minister, the Hon John Elferink assumed the Statehood portfolio. Significantly, Hon David Tollner, noted earlier in this article for various comments opposing the 2011 legislative initiatives towards statehood, was appointed Deputy Chief Minister of the Northern Territory Government. On 9 September 2013, further ministerial changes were made, and the Statehood portfolio was allocated to the newest minister, Hon Bess Price, Member for Stuart. See Northern Territory Chief Minister Media Release 9 September 2013 'Refreshed Ministerial Team' at <<http://www.newsroom.nt.gov.au/index.cfm?fuseaction=viewRelease&id=11408&d=5>>. The statehood portfolio has consequently moved from the most senior Northern Territory minister to the most junior Northern Territory minister in six months.

245 Formal campaigning began on 6 August 2012. For the issues dominating the campaign and focused on by the parties, see Parliament of Australia, 'Northern Territory Election 2012', Brenton Holmes (Department of Parliamentary Services Politics and Public Administration Section, 2012).

246 Northern Territory, Administrator of the Northern Territory Address to the Twelfth Legislative Assembly, Legislative Assembly, 23 October 2012 (Hon Sally Thomas, Administrator of the Northern Territory); Northern Territory, Ministerial Statement State of Territory's Financial Position by Chief Minister, Legislative Assembly 23 October 2012, (Mr Mills) which centred upon substantial budgetary re-structuring.

Constitutional Affairs Committee,<sup>247</sup> but specified no time line for inquiry and reporting.

Apart from these immediate pre and post–2012 election contextual factors, the delays occasioned in the lead up to the 2012 Northern Territory election highlight other points of discontinuity and disconnection. In the context of a statehood process that is now of ten years duration, itself shaped by an earlier failed process of similar duration, and having presently only completed an education and information campaign<sup>248</sup> and enacted enabling legislation for the election of constitutional convention delegates, two concerns raised in the consultative process highlight most the importance of bipartisanship and consensus. These are first, the lack of Northern Territory engagement with the Commonwealth on the terms and conditions of statehood pursuant to Section 121 of the Australian *Constitution*.<sup>249</sup> The second is the absence of Northern Territory engagement and progress with the Aboriginal Land Councils on a framework agreement.<sup>250</sup>

These two matters produce a multiplicity of contentious legal and policy issues which will need to be constructively and imaginatively negotiated, likely only to succeed within a politically unified approach. Much turns upon these considerations as to whether statehood will be realised or this renewed process will once more join the Territory tradition of grand ambitions meeting failed schemes, the article of faith of statehood failing to be matched to a cohesive constitutional, legal and political strategy.

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247 Northern Territory Parliament Letter of Attorney General Hon John Elferink to Lia Finocchiaro MLA Chair of Legal and Constitutional Affairs Committee 6 December 2012.

248 The first of three key aspects identified by the Statehood Steering Committee in *Constitutional Paths to Statehood*, above n 11, 1.

249 ‘This matter has been of ongoing concern to the SSC during its life and this concern is reflected in Recommendation Number 10 of this Report’: *Final Report and Recommendations* above n 13, 8.

250 Aboriginal organisations in the Northern Territory, particularly the land councils have indicated to the SSC that the 1998 Indigenous Constitutional Strategy Document ... is very much a living document and the Government’s lack of action on a number of fronts concerns them’: *What Might the Terms and Conditions of Northern Territory Statehood be ?*, above n 50, 22–3.