

## Managing a Unique Natural Environment

*Norfolk Island is a special place. Special for its environment and the wild species it supports; special for its human history and culture. The conservation of our natural environment and cultural heritage is of paramount importance to the island's future and the way of life of all who live on Norfolk. Without sound and effective management of our environment, we can expect a decline in biological diversity, degradation of habitats and loss of cultural and heritage values. This would be accompanied by a decline in tourism and thus in economic activity.*<sup>1</sup>

*Norfolk Island provides a text book example, in microcosm, of the broad and complex problem of conservation, which includes more than the preservation of wildlife. It means concern for buildings old and new, for the effects of such things as roads, vehicle numbers, power lines, water supply and sewerage development on the quality of the landscape and the environment. In other words, it calls for the recognition of something beyond short term material values.*<sup>2</sup>

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- 1 Extract from the Norfolk Island Government's submission to the 1999 Senate Environment, Recreation, Communications and Arts Legislation Committee's Inquiry into the Environment Protection and Biodiversity Conservation Bill.
  - 2 Sir Garfield Barwick, 1968, *The Conservation of Norfolk Island* (Foreword), Australian Conservation Foundation, Victoria, p. 2.

## An Island Environment

- 2.1 Any assessment of land use, planning and management on Norfolk Island requires at the outset an assessment of the importance of Norfolk Island's environment and its preservation. It is the environment and its protection that provides the primary context and justification for land use planning and management. Moreover, an aim of the Federal Government – as stated in the annual reports currently under examination – is to ensure that the 'environment', especially those aspects that are matters of national environmental significance, are protected. In this context, environment extends beyond flora and fauna to include cultural and heritage aspects and values.<sup>3</sup>
- 2.2 There can be no doubt that Norfolk Island's environment is important locally, nationally and internationally. Norfolk Island has significant national and international cultural heritage and archaeological value due to its four periods of human settlement – that is, Polynesian, two convict settlements and the relocation of the Pitcairn Islanders in 1856, its close association with the establishment of Sydney and the relative lack of large scale development on the Island.
- 2.3 Islands such as Norfolk are also biologically significant for a range of reasons. These include their limited space; restricted habitats; limited flora and fauna as compared with continental areas; the uniqueness of island biota due to the presence of endemic, relict and specialised species; their value as refuges; and their ability to act as reservoirs for the conservation of genetic material.<sup>4</sup> The Department of the Environment and Heritage recently acknowledged that:

Remote islands [*such as Norfolk Island*] are of particular biological importance. Their plants and animals often originate by chance dispersal over vast distances of ocean and

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- 3 Section 528 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) – the main Federal environmental law – defines the 'environment' to include:
- a) ecosystems and their constituent parts, including people and communities;
  - b) natural and physical resources;
  - c) the qualities and characteristics of locations, places and areas; and
  - d) the social, economic and cultural aspects of a thing mentioned in paragraph (a), (b) or (c).
- 4 *What the Environment Protection and Biodiversity Conservation Act 1999 means for Norfolk Islanders*, Consultation Draft, Department of the Environment and Heritage, November 2003. Available:  
<http://www.deh.gov.au/biodiversity/publications/norfolk-island/overview.html>

in isolation from other populations; are subject to different evolutionary pressures; and may evolve into unique, or endemic, island forms.<sup>5</sup>

- 2.4 The Territory has 51 endemic plant species or subspecies recorded, with 47 species found only in the Norfolk Island group. 58 per cent of the Island's bird species are endemic.<sup>6</sup> Plants and animals that have evolved in an island ecosystem are often quite vulnerable to extinction. A high proportion of native or endemic vertebrates have become extinct since European settlement.<sup>7</sup> A significant number of Norfolk Island's species of native plants are considered rare or vulnerable.<sup>8</sup>
- 2.5 Norfolk Island is at the southern biogeographical limit of many tropical marine organisms, including coral. As such, the Island's waters, including the Kingston reef and lagoon, form a unique and important environment in terms of world conservation and scientific research.<sup>9</sup> Around 220 species of fish and corals have been identified in these waters to date. Two are endemic to Norfolk Island. 95 species have been identified in the Kingston lagoon – the Island's main

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5 *What the Environment Protection and Biodiversity Conservation Act 1999 means for Norfolk Islanders*, Consultation Draft, Department of the Environment and Heritage, November 2003. Available:

<http://www.deh.gov.au/biodiversity/publications/norfolk-island/overview.html>

6 Norfolk Island Planning Report Norfolk Island Plan Planning Subdivision Code, NCA, 1996. DEH website and Plan of Management for NI National Park – available at <http://www.deh.gov.au/parks/publications/norfolk-pom.html>

7 Jurd (ed), *The Norfolk Island Environment Book*. Published by Australian National Parks and Wildlife Service, Commonwealth of Australia, 1989. See also *Rare and Endangered Plants of Norfolk Island*, Sykes and Atkinson, DSIR, NZ, 1988; Commonwealth Grants Commission, *Report on Norfolk Island*, 1997; Australian Conservation Foundation, *Conservation of Norfolk Island*, 1968; Butland, G. J. 1974, *Report to the Department of the Capital Territory of the Australian Government on a Long Term Population Study of Norfolk Island*; and Hoare, M. 1999, *Norfolk Island: A Revised and Enlarged History 1774-1998* (5<sup>th</sup> Ed), Central Queensland University Press, St. Lucia, Queensland.

8 Of the 178 species of plants native to Norfolk Island, at least 46 are thought to be in danger of extinction. 11 of these species have fewer than 50 individuals remaining. Threats to these species include invasive weeds and predation by rats. One species, the Mountain Procris, grows in only seven sites on the island, with a total of just 76 mature plants. Another species, known locally as the "Kurrajong", numbers only 155 mature plants and the population is severely fragmented. See Media Release, Federal Minister for the Environment and Heritage, The Hon. Dr David Kemp, 13 November 2003, "Added Protection for Norfolk Island's Unique Plants" See also *What the Environment Protection and Biodiversity Conservation Act 1999 means for Norfolk Islanders – Consultation Draft*, Department of the Environment and Heritage, November 2003. Available:

<http://www.deh.gov.au/biodiversity/publications/norfolk-island/overview.html>

9 Jurd (ed), *The Norfolk Island Environment Book*. Published by Australian National Parks and Wildlife Service, Commonwealth of Australia, 1989.

recreation area – which supports a fish and coral community found nowhere else on the coastline. It is considered likely that more undiscovered species occur there.<sup>10</sup>

- 2.6 The Island's economic future currently depends largely on its environment. The Island's natural beauty and cultural heritage are the major drawcard for the Island's principal industry and source of revenue, tourism. The self-identity of the Island community arguably also depends crucially on a healthy land and marine environment and a commitment to sustainable development.
- 2.7 The above point to the fact that the current and future arrangements for Crown land on Norfolk Island assume considerable importance from an environmental management perspective, particularly given the Island's small size. Crown land constitutes one third of the Island.<sup>11</sup> It contains pockets of remnant natural vegetation, comprises much of the Island's coastline or coastal zone, comprises most of the land adjacent to the National Park, and includes the last significant area of land on the Island with a rural aspect that has not been broken up into small land holdings or extensively developed for residential and commercial purposes. What happens to and on that land is clearly important to the Island as a whole.
- 2.8 The above also explains why Federal Parliament concluded in 1999 that there are matters of national environmental significance on Norfolk Island. On that basis, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the EPBC Act) was extended to Norfolk Island.<sup>12</sup> In agreeing to extend the Act, Federal Parliament rejected arguments by the then Norfolk Island Government that application of the Act to Norfolk Island was unnecessary as there was a range of Norfolk Island conservation legislation in place; and that extension of the Act would be contrary to the advancement of the Territory's self-government and the Territory Government's

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10 Jurd (ed), *The Norfolk Island Environment Book*. Published by Australian National Parks and Wildlife Service, Commonwealth of Australia, 1989. See also Peter Davidson, 1997, Norfolk Island Kingston and Arthur's Vale Historic Area, Water Quality Management Plan.

11 The total area of Norfolk Island is 3327 hectares of which, as at the end of September 2003, 1697 was freehold, 860 was Crown land and 770 hectares were Crown leasehold.

12 Senate Standing Committee on the Environment, Communications, Information Technology and the Arts, *Report on the Environment Protection and Biodiversity Conservation Bill 1998 & Environmental Reform (Consequential Provisions) Bill 1998*, April 1999, para 5.53.

ambitions for control of Crown land and the National Park.<sup>13</sup> The responsible Senate Committee noted that the aim of the Act is “to provide a national environmental scheme, which produces an effective and efficient national approach to environmental management” and that it would be inappropriate to exclude Norfolk Island, an Australian Territory, from that scheme.<sup>14</sup> In its view, “to do so would result in an undesirable gap in environment protection and biodiversity conservation in Australia”.<sup>15</sup>

## Potential Pressures and Threats

2.9 Threats to the Island’s environment do exist and need to be managed. This has been acknowledged by both the Norfolk Island and Federal Governments. In 1995, for example, a joint Federal-Norfolk Island Land Task Force highlighted the fact that Norfolk Island’s limited natural resources (that is, its environment, its fresh water supplies, visual amenity, character and even the Island’s cultural identity) can be threatened by inappropriate development and by population and commercial pressures, yet must be protected to provide livelihoods for present and future generations of Island residents.<sup>16</sup> The Task Force had been established by the Federal and Norfolk Island Governments in 1994 to address longstanding problems with land management and planning on Norfolk Island, including:

- no statutory land use or development zoning and zoning controls;
- no effective environmental assessment and controls; and

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13 See Norfolk Island Government, Submission to the Senate Standing Committee on the Environment, Recreation, Communications and the Arts Inquiry into the Environment Protection and Biodiversity Conservation Bill 1998.

14 Senate Standing Committee on the Environment, Communications, Information Technology and the Arts, *Report on the Environment Protection and Biodiversity Conservation Bill 1998 & Environmental Reform (Consequential Provisions) Bill 1998*, April 1999, para 5.53.

15 Senate Standing Committee on the Environment, Communications, Information Technology and the Arts, *Report on the Environment Protection and Biodiversity Conservation Bill 1998 & Environmental Reform (Consequential Provisions) Bill 1998*, April 1999, para 5.53.

16 Report of the Norfolk Island Land Review Working Group, May 1995. An example of the wide range of risks that must be managed is the outbreak of viral illnesses on-island in 1991-92 said to be caused by sewerage polluting water supplies. The publicity generated had an adverse effect on the Island’s tourism industry. Following this episode, the Commonwealth provided over \$2 million to assist in implementing a Water Assurance scheme for Norfolk Island. See Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, p. 111. Hoare M, *The Winds of Change. Norfolk Island 1950-1982*, Institute of Pacific Studies, Suva 1983, pp 77-78. See also [www.dotars.gov.au/terr/norfolk/fed\\_assistance.htm](http://www.dotars.gov.au/terr/norfolk/fed_assistance.htm).

- no administrative review of land use and management decision-making.<sup>17</sup>
- 2.10 The 1994-95 Task Force recommended the introduction of a new comprehensive land administration scheme. The Task Force's report was endorsed by both Federal and Norfolk Island Governments. It led to a new land administration package being enacted by the Norfolk Island Legislative Assembly in 1996 and 1997, following a considerable investment of financial and human resources by both Governments.<sup>18</sup> Administration and enforcement of the new regime was and is a Norfolk Island responsibility. As such, the efficacy of the new land management and planning scheme depended on the Territory Government allocating adequate financial and administrative resources to ensure the scheme's effective operation. It also depended on the Territory Government developing and then enacting subordinate legislation (for example, codes and plans of management) and establishing the mechanisms such as boards and registers on which the successful operation of the new scheme depended.<sup>19</sup> The latter did not occur.<sup>20</sup> The findings of various independent inquiries indicate that an explanation for this failure may be the significant responsibilities devolved onto the Norfolk Island Government (at its request) coupled with that Government's lack of administrative and financial capacity to meet those responsibilities.<sup>21</sup>
- 2.11 In 1997, a review by the Commonwealth Grants Commission concluded that the standard of general conservation and environmental services provided by the Norfolk Island Government

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17 Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, pp. 135-136..

18 Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, pp. 135-136. The Grants Commission noted that over \$500,000 had been spent on developing and implementing the 1994-5 land review process, with the Federal Government covering two thirds of all costs.

19 For example, building, roads, public health codes and plans of management of reserves. It is relevant to note that the 1994-95 Federal-Norfolk Island Task Force also considered that a precondition for consideration of the transfer of land management to the Norfolk Island Government should be the satisfactory completion by the Administration of all remaining components of the new land management regime; and evidence of the provision of a satisfactory level of human and other resources for their ongoing effective discharge.

20 Department of Transport and Regional Services, Submissions, p. 27.

21 These difficulties have been identified by various inquiries. See, for example, Joint Standing Committee on the National Capital and External Territories, December 2003, *Quis custodiet ipsos custodes?: Inquiry into Governance on Norfolk Island*, Canprint, Canberra, and the inquiries and reports cited therein.

was below mainland standards.<sup>22</sup> It did so after receiving submissions which argued that the Norfolk Island Government “had neglected the environment for many years and that it had no conservation strategy, no policy on strategic planning and no management plans”.<sup>23</sup> The Commission noted that equivalent communities on the mainland “are covered by comprehensive building, planning and environment protection legislation”.<sup>24</sup> It also noted that sites listed on the Register of the National Estate (RNE) and outside of KAVHA lacked comprehensive management.<sup>25</sup>

- 2.12 Notwithstanding these findings, the Commission refrained from making any specific recommendations in this regard, noting that a new land package had recently been enacted and had not been in place for sufficient time to enable an assessment to be made of its effectiveness.<sup>26</sup> However, the Commission did stress that appropriate administrative resources and arrangements had to be provided and put in place by the Norfolk Island Government before any transfer of land management responsibilities occurred. Importantly, the Commission also stated that the Federal Government had an obligation to ensure that minimum standards are met in respect of services provided to Island residents.<sup>27</sup> This includes environmental and planning services.
- 2.13 The above may explain in part why, in June 2000, the then Minister for Regional Services, Territories and Local Government, Senator the Hon. Ian Macdonald, announced the establishment of a further joint Commonwealth – Norfolk Island Task Force to assist the Norfolk

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22 Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, p. 135.

23 Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, p. 133.

24 Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, p. 134.

25 Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, p. 133. See also pp 134-138.

26 Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, p. 136. The Commission also concluded that certain government services on Norfolk Island were not being provided by the Territory Government at equivalent mainland services. It found that the Norfolk Island Government had the capacity to fund the provision of these services at that standard, but was failing to do so. For this reason, the Commission apparently concluded that there were no financial constraints to the transfer of land management to the Norfolk Island Government (see p. 175, 215). See also its findings and recommendations in respect of KAVHA, the National Park, and administrative and financial capacity. See pp. 212-218.

27 Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, pp. 216-218.

Island Government to undertake the review of the Norfolk Island Plan and to finalise the outstanding components of the land administration package enacted in 1996 -1997.<sup>28</sup> These included:

- implementation of the requirements of the *Heritage Act 1996* (NI);
- preparation of a Plan of Management for the reserves - as required by the *Public Reserves Act 1997* (NI); and
- preparation of the codes required in order for the *Roads Act 1996* (NI), *Public Health Act 1996* (NI), and *Building Act 1996* (NI) to operate.<sup>29</sup>

2.14 Federal financial and other assistance was provided to finalise this. As noted above, it was originally envisaged that these crucial aspects of the land management regime would have been undertaken by the Norfolk Island Government alone. The Committee understands that the review of the Norfolk Island Plan and finalisation of the outstanding components of the land package is now nearing completion.<sup>30</sup>

## **Proposed Freeholding of Crown Land on Norfolk Island**

2.15 In making the above announcement, the Federal Minister also stated that the Federal Government would consider withdrawing from ownership of certain areas or types of Crown land in Norfolk Island. The announcement was significant in that, as explained above, Crown land on Norfolk Island comprises approximately one third of the Island and is important from an environmental management perspective. This may explain why the Federal Minister also made it clear that any withdrawal by the Commonwealth from land ownership was conditional on the satisfactory completion of the outstanding components of the land package. As mentioned above, it is expected that the latter are to be finalised shortly and that the Federal Minister for Local Government, Territories and Roads will be

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28 The Norfolk Island Plan is a statutory Development Plan made under Norfolk Island planning laws and is the Territory's Government's principal land management and planning tool.

29 Department of the Environment and Heritage, Submissions, pp. 236-237.

30 Mr Ivens Buffett, Transcript, 18 February 2003, p. 3.



able to consider the possible transfer of selected Crown leases shortly thereafter.<sup>31</sup>

## Management Arrangements for Crown Land

- 2.16 Crown land on Norfolk Island remains vested in the Crown in right of the Commonwealth. This is reflected in section 62 of the *Norfolk Island Act 1979* (Cth), which vests responsibility for disposing of Crown land on Norfolk Island – other than by a lease or licence – in the Federal Minister for Territories.
- 2.17 The fact that the Crown land is vested in or ‘owned’ by the Commonwealth does not automatically mean that the Federal Government is responsible for the day to day administration of that land or for regulating activities on it. Rather, this remains the responsibility of the Norfolk Island Government – as intended by the *Norfolk Island Act 1979* (Cth).<sup>32</sup> As explained, the intent of that Act is that the Norfolk Island Government shall be primarily responsible for the delivery of government services on the Island. To that end, the Territory Government has been provided with broad legislative and executive powers under that Act to enact and then administer and fund laws on a wide range of subjects.<sup>33</sup> This extends to planning and land management, which is carried out on Norfolk Island by Territory Ministers and officials under a range of laws enacted by the Norfolk Island Legislative Assembly.

## Leased or Licensed Crown Land

- 2.18 One such Norfolk Island law is the *Crown Lands Act 1996* (NI), which provides for the lease or licensing of Crown land.<sup>34</sup> It provides that the Administrator may issue licences or leases in respect of vacant

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31 The Department of Transport and Regional Services has advised that the last of the land initiative prerequisites were expected to be in place by early March 2004. The Committee is advised by the Department that, as of 3 May 2004, no titles have been transferred.

32 See Chapter One for a description of the *Norfolk Island Act 1979* (Cth).

33 See Joint Standing Committee on the National Capital and External Territories, December 2003, *Quis custodiet ipsos custodes?: Inquiry into Governance on Norfolk Island*, Canprint, Canberra, pp. 35-39.

34 There are 135 Crown leases subject to the transfer proposal of the Federal and Norfolk Island Governments comprising 26 rural leases, 51 residential leases and 58 rural/residential leases. Not subject to the possible offer of freehold title as part of the current joint land initiative are: 27 licences to occupy, commercial and special purpose leases; 52 portions classified as vacant Crown land; 8 rural and residential leases within Kingston and Arthur's Vale Historic Area; and 8 rural and residential leases that straddle the Kingston and Arthur's Vale Historic Area boundary.

Crown land. In doing so, the Administrator acts as part of the Territory Executive and relies on the advice of the Norfolk Island Government subject to any contrary instructions that may be issued by the Federal Territories Minister.<sup>35</sup> The Federal and Norfolk Island Governments have agreed on a set of standing instructions governing the leasing of vacant Crown land. Once agreed, these were then issued by the Federal Territories Minister to the Administrator under the *Norfolk Island Act 1979* (Cth). As such, the Administrator must abide by them when exercising powers under the *Crown Lands Act 1996* (NI).

- 2.19 Subject to the above, the Administrator also acts on the advice of the Norfolk Island Government in respect of applications to use Crown land for industrial or commercial activities. This recognises the fact that the regulation and administration of industry and manufacturing on the Island is primarily a Norfolk Island Government responsibility and is carried out by Territory Ministers and officials. The Territory's planning laws also extend to and govern certain activities on Crown land. All proceeds arising from the use of Crown land on Norfolk Island – for example, leasehold rents, licence fees, timber royalties – are paid to the Norfolk Island Government or Administration.

## Public Reserves

- 2.20 Approximately 234 hectares of Crown land outside the National Park has been proclaimed as public reserves under the *Public Reserves Act 1997* (NI).<sup>36</sup> That Act vests the care and control of public reserves in the Administrator. As in the case of the *Crown Lands Act 1996* (NI), the Administrator relies on the advice of the Norfolk Island Government when exercising powers under the *Public Reserves Act 1997* (NI).
- 2.21 Day to day management of the Island's public reserves is undertaken by the Conservator of Public Reserves. The Conservator is the senior Norfolk Island public servant and an officer of the Norfolk Island

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35 Section 7, *Norfolk Island Act 1979* (Cth). See also *Island Industries Pty Ltd v The Administrator of Norfolk Island* [2003] NFSC1.

36 The following are reserves under the *Public Reserves Act 1997* (NI): Anson Bay Reserve: 5.45 ha; Ball Ball Reserve: 28.72 ha; Bumbora Reserve: 5.5 ha; Cascade Reserve: 32.45 ha; Headstone Reserve: 11.372 ha; Hundred Acres Reserve: 22.34 ha; Middleridge Reserve: 0.2 ha; Nepean Island Reserve: 10 ha (approx); Point Ross Reserve: 7.952 ha; Selwyn Reserve: 21.21 ha; Two Chimneys Reserve: 14.04 ha; Cemetery Reserve: 2.18 ha; Government House Grounds Reserve: 7.35 ha; Kingston Common Reserve: 29.57 ha; Kingston Recreation Reserve: 4.57 ha; Point Hunter Reserve: 30.91 ha; and War Memorial Reserve: 0.0008 ha.

Parks and Forestry Service. The Forestry Service implements plans of management for public reserves, undertakes forestry operations in the Forestry Zone of the Park and in public reserves, and is responsible for noxious weed control, stock inspection on public lands, and Crown lease inspections.<sup>37</sup> Many of the Island's public reserves were originally established under Norfolk Island legislation for purposes other than conservation. However, their importance today is recognised by the fact a majority of the public reserves are also listed on the Registrar of the National Estate under federal environmental laws.

## Federal Environmental Laws

2.22 While Norfolk Island laws apply to and govern activities affecting the Island environment, federal environment laws can also apply in some circumstances. As mentioned above, the EPBC Act has been extended to the Island. On Norfolk Island, the Act protects:

- threatened species, ecological communities, migratory species and marine species which are listed under the EPBC Act;
- the marine environment (including the sea around Norfolk Island out to 200 nautical miles)
- the environment of any land owned by or leased to or from the Federal Government (that is, Crown Land, including the Norfolk Island National Park);
- the Norfolk Island environment (from actions by Federal Government agencies); and
- places of national heritage listed under the EPBC Act.<sup>38</sup>

2.23 In short, the EPBC Act provides that nobody can take an 'action' that may have a significant impact on any of these things unless they have the prior approval of the Federal Minister for the Environment and Heritage. This means, for example, that approval is required under the Act for any action that is likely to have a significant impact on the Island's marine environment or Crown land on Norfolk Island.

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37 Department of the Environment and Heritage, *Norfolk Island National Park and Norfolk Island Botanic Garden Plans of Management*, p. 11. Available: [http://www.deh.gov.au/parks/publications/pubs/norfolk\\_plan.pdf](http://www.deh.gov.au/parks/publications/pubs/norfolk_plan.pdf)

38 *What the Environment Protection and Biodiversity Conservation Act 1999 means for Norfolk Islanders*, Consultation Draft, Department of the Environment and Heritage, November 2003. Available: <http://www.deh.gov.au/biodiversity/publications/norfolk-island/overview.html>

Administrative Guidelines issued under the Act provide guidance on determining whether an action has, will have, or is likely to have a significant impact on a matter of national environmental significance.<sup>39</sup>

- 2.24 Importantly, the term 'environment' is defined by the Act to mean all natural, social and cultural aspects of the area or land in question. This includes all animal and plant life, the soil, water and air, and even things like buildings and access for recreation may qualify for protection. In respect of the marine environment, for example, the Act may apply to any proposed new ventures that could cause major pollution, destroy undersea habitats for marine life or kill sea creatures. This may include new wharfs, offshore installations or even a new project on the Island itself that results in significant environmental impact.<sup>40</sup>
- 2.25 All actions that require approval under the EPBC Act must undergo environmental impact assessment before they can take place. This involves gathering and analysing information about the project and its impacts, consulting widely and considering ways to minimise any significant impacts. This ensures the Minister has enough information to make an informed decision about whether to approve a proposed action. Assessment is also designed to allow the public to comment on a proposal.<sup>41</sup>
- 2.26 Different assessment approaches will be appropriate in different circumstances. The Minister must choose one of the following assessment options:
- assessment on preliminary documentation;
  - a Public Environment Report (PER);
  - an Environmental Impact Statement (EIS);
  - a Public Inquiry; or
  - an accredited process (that is, on a project by project basis).

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39 See <http://www.deh.gov.au/epbc/assessmentsapprovals/guidelines/index.html>.

40 *What the Environment Protection and Biodiversity Conservation Act 1999 means for Norfolk Islanders*, Consultation Draft, Department of the Environment and Heritage, November 2003. Available:

<http://www.deh.gov.au/biodiversity/publications/norfolk-island/overview.html>

41 *What the Environment Protection and Biodiversity Conservation Act 1999 means for Norfolk Islanders*, Consultation Draft, Department of the Environment and Heritage, November 2003. Available:

<http://www.deh.gov.au/biodiversity/publications/norfolk-island/overview.html>

- 2.27 Once the environmental assessment process is complete, the Minister must decide whether to approve the action within 30 business days. In deciding whether to approve an action and what conditions to impose, the Minister must consider relevant environmental impacts and economic and social matters. In considering these matters, the Minister must also take into account:
- the principles of ecologically sustainable development;
  - the assessment report on the impacts of the action (or the report of a commission of inquiry);
  - the documentation provided by the person proposing the project (for example, an environmental impact statement);
  - any other information available to the Minister on the relevant impacts of the action; and
  - relevant comments from other Federal Government Ministers (such as information on social and economic factors).<sup>42</sup>
- 2.28 An approval issued by the Minister is a legal document saying that the project can proceed. Most approvals have conditions that must be complied with. Anyone working directly for, or as a contractor to, the holder or owner of an EPBC Act approval is also bound by that approval. It is the owner's responsibility to ensure the approval and its conditions are followed.<sup>43</sup>
- 2.29 Importantly, the EPBC Act allows the Federal Environment Minister to require proposed actions to be referred to him or her for a preliminary assessment as to whether they may be likely to have a significant impact on the matters of environmental significance outlined above and, therefore, require approval and detailed assessment under the Act as described above. Apart from requiring approval of actions, the Act also establishes systems for issuing permits to take, catch, interfere with or kill listed species and

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42 *What the Environment Protection and Biodiversity Conservation Act 1999 means for Norfolk Islanders*, Consultation Draft, Department of the Environment and Heritage, November 2003. Available:

<http://www.deh.gov.au/biodiversity/publications/norfolk-island/overview.html>

43 *What the Environment Protection and Biodiversity Conservation Act 1999 means for Norfolk Islanders*, Consultation Draft, Department of the Environment and Heritage, November 2003. Available:

<http://www.deh.gov.au/biodiversity/publications/norfolk-island/overview.html>

ecological communities on Commonwealth (Crown) land or in the marine area.<sup>44</sup>

- 2.30 The EPBC Act requires recovery and threat abatement plans to be prepared and implemented for those species listed under it. Importantly, the Act also expressly allows for the provision of federal financial and other assistance to State and Territory Governments and to individuals to help with the implementation of such plans.<sup>45</sup> The Act also allows for the Federal Government to enter into conservation agreements with State and Territory Governments and with individuals to provide for the protection and conservation of biodiversity. This would extend to biodiversity on Norfolk Island.<sup>46</sup>

## A Dual System of Environmental Protection

- 2.31 Notwithstanding the above, the Norfolk Island Government may still have to approve the project or issue permits, licences or authorisations under any applicable Norfolk Island laws – such as Norfolk Island planning laws – before the action in question can occur.<sup>47</sup> There is then a dual system of environmental laws and protection. Activities on the Island are governed by a range of Norfolk Island planning and land management laws, administered and enforced by Norfolk Island Ministers and officials. In some circumstances, however, federal environmental laws may apply. The Committee understands that, in such cases, a two stage approval process would apply - that is, approval by Norfolk Island authorities under Norfolk Island laws and then by federal authorities under federal environmental laws. This situation also applies in the Australian States and other self-governing Territories.

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44 *What the Environment Protection and Biodiversity Conservation Act 1999 means for Norfolk Islanders*, Consultation Draft, Department of the Environment and Heritage, November 2003. Available:

<http://www.deh.gov.au/biodiversity/publications/norfolk-island/overview.html>

45 See sections 281 & 286, *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

46 See section 304, *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

47 *What the Environment Protection and Biodiversity Conservation Act 1999 means for Norfolk Islanders*, Consultation Draft, Department of the Environment and Heritage, November 2003. Available:

<http://www.deh.gov.au/biodiversity/publications/norfolk-island/overview.html>

See also paras 3.22-3.26 of this report for an example where a development on the Island was subjected to the new Environment Protection and Biodiversity Conservation laws.

## Rationale for and Reaction to the Federal Freeholding Proposal

- 2.32 In announcing the freeholding proposal, the then Federal Territories Minister stated that the premise for the proposal was that Norfolk Island residents, like other Australians, should be able to own the land on which they live or operate their businesses. Reference was also made to the Commonwealth Property Principles – a set of Principles which had been established by the Federal Government in 1996 as the basis for the continued ownership and development of Commonwealth property.<sup>48</sup> In essence, the Principles stated that land owned by the Federal Government should generally only be retained if it was in the public interest. A key consideration was whether the land had some national significance (for example, land having symbolic significance, heritage and environmental significance, significant public usage or continued ownership would be cost effective for Government).
- 2.33 The freeholding proposal was limited to certain types of leased Crown land: namely Crown land leased for residential purposes. As such, some 135 leaseholders and their properties were potentially affected. The Committee understands that Federal Government representatives subsequently advised Island residents that, once the current land transfer process had been finalised, consideration would then be given to the possibility of freeholding of other types of licensed or leased Crown land (mainly Crown land used for commercial purposes). Crown land that was obviously of national significance - such as Crown land falling in the Kingston and Arthur's Vale Historic Area (KAVHA) and in the National Park and Botanic Gardens - was expressly excluded from the freeholding proposal.
- 2.34 The proposed terms of the transfer (which were outlined to leaseholders in March 2002) were based on a payment to the Federal Government of 10 percent of the 1996 Unimproved Capital Value of the lease to be freeholded plus an instrument fee of \$200 per transfer. It is understood that flexible arrangements for payment of this 'price' would be offered to relevant lessees to ensure that they were not unfairly disadvantaged. To avoid any speculative activity, there was to be a moratorium on the issue or transfer of Crown leases until the land transfer process was finalised.

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48 See Commonwealth Property Principles, Department of Finance & Administration website. Available: [http://www.finance.gov.au/budgetgroup/Other\\_Guidance\\_Notes/commonwealth\\_property\\_principl.html](http://www.finance.gov.au/budgetgroup/Other_Guidance_Notes/commonwealth_property_principl.html)

- 2.35 In the interim, an environmental survey of the land to be transferred was to be undertaken by Federal Government consultants. The aim was to identify and assess any features of national environmental significance on the Crown land in question so as to assist in the protection of the environment post transfer. A survey report was also required to assist the relevant federal agencies comply with the requirements of the EPBC Act. In August 2002, the Department of Transport and Regional Services advised the Committee that the survey had been undertaken and a report prepared, which was under discussion with the Department of the Environment and Heritage and relevant landholders.<sup>49</sup> According to the Department of Transport and Regional Services, the survey had not identified any matters that would of themselves preclude the freeholding of Crown land.<sup>50</sup>
- 2.36 The Federal Government decided that freehold titles would be offered directly to the leaseholders concerned. Any leaseholders choosing not to convert their titles to freehold would remain Crown leaseholders. This land would not be offered for private sale or transferred to the Norfolk Island Government to manage. The Committee understands that one reason for this was the representations made by affected leaseholders expressing concern at the prospect of the Norfolk Island Government gaining control over their properties.<sup>51</sup>
- 2.37 Although the land initiative is said to enjoy widespread support within the community (notably among lessees), the Committee received written submissions and oral evidence from some individuals and interest groups opposed to the Crown land transfers. The Australian Conservation Foundation (ACF), for example, opposed the transfer of the control and ownership of the Crown leasehold on the grounds of protecting the national environmental interest.<sup>52</sup> The ACF submitted that the land transfer, in conjunction with the development of the new Norfolk Island Plan (which the ACF saw as flawed), would:

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49 See Department of Transport and Regional Services, Submissions, p. 38.

50 This finding by the Department of Transport and Regional Services (DoTaRS) predated the announcement by the Federal Environment Minister that 46 plant species on Norfolk Island will be listed as threatened species under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). Media Release, Federal Minister for the Environment and Heritage, The Hon. Dr David Kemp, *Added Protection for Norfolk Island's Unique Plants*, 13 November 2003. DoTaRS has since advised that it is to refer the issue of land transfers to the Federal Environment Minister for assessment under the EPBC Act.

51 That is, as opposed to the current system whereby the Federal Government is involved through the ability to issue instructions to the Administrator. See paragraph 2.18.

52 Australian Conservation Foundation, Submissions, p. 118.



seriously reduce protection for the four main features of national and international significance on Norfolk Island; namely: the indigenous flora and fauna; the Norfolk Island coastline; the authentic remains of the convict settlements centred on Kingston; and the characteristic beauty of the associative rural landscape.<sup>53</sup>

- 2.38 The ACF urged the Committee to recommend against the freeholding of crown leases and to recommend against the granting of assent to the proposed Norfolk Island Plan. It also urged the Committee to recommend that the Federal Government work to gain agreement on the retention in the Plan of planning restrictions and processes governing development on the Island's cliff tops and coastline as well as in the 'viewshed' of KAVHA.<sup>54</sup> It also argued that there was a need to carry out the long-overdue assessment of a number of nominations to list properties on Norfolk Island on the RNE.<sup>55</sup>
- 2.39 These matters having been brought to its attention, the Committee wrote to the Minister for Regional Services, Territories and Local Government on 26 August 2002, requesting deferral of the proposed transfer of Crown leasehold land to freehold title until it had had the opportunity to conduct hearings on Norfolk Island and seek community input. The Minister responded in October 2002, stating that he was not prepared to defer the land transfers given the wide-ranging support it had among residents of Norfolk Island and the Norfolk Island Government.

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53 Australian Conservation Foundation, Submissions, p. 124.

54 The KAVHA viewshed was a zone established under the Territory's statutory planning scheme. It comprised the area adjacent to the boundary of the historic area in which a development could be seen from five designated viewing points within KAVHA. The aim was to ensure that KAVHA's setting and character was preserved through sympathetic development on the surrounding hills and slopes. Therefore, certain types of development had to be referred to the KAVHA Management Board for its consideration and advice to the Norfolk Island Planning Minister. This advice was not binding on the Norfolk Island Minister. The Committee understands that the 'viewshed' concept was abandoned in the development of the new statutory Norfolk Island Plan. Instead a set of planning principles was to be developed. The Committee is unaware of whether these planning principles have been developed and implemented.

55 Dr Geoff Mosley, Transcript, 28 March 2003, p. 156. The Committee understands that a large number of nominations for properties on the Island to be listed on the Register of the National Estate were made in the 1990s. These were not progressed by the Australian Heritage Commission as it wishes to develop and implement a joint assessment process in conjunction with the Norfolk Island Government and with Island residents. This led to the development of the new heritage laws for the Territory. See paragraphs 3.9 – 3.13.

- 2.40 Of particular concern to the ACF is the provision in the new Plan for the subdivision of the Crown land properties which were to be freeholded. The ACF argued that removal of subdivision restriction on this area of land would have adverse environmental effects.<sup>56</sup> A Norfolk Island Government official disputed this in evidence given to the Committee, stating that, on pieces of land that the Commonwealth judges are of (environmental) concern and interest, the transfer will be subject to various covenants.<sup>57</sup> That is, the EPBC Act allowed the Federal Environment Minister, when transferring or freeholding Crown land considered to have heritage or environmental significance or features, to impose covenants on that land which were designed to protect those features after the land is transferred.
- 2.41 The Committee has some reservations about reliance on such covenants alone. One can reasonably question whether and how such covenants might effectively bind all successors in title to the land and, perhaps more importantly, who will be responsible for monitoring compliance with that covenant on an ongoing basis and who shall undertake and pay for any enforcement action, if required. Enforcement action would presumably require commencement of civil proceedings in the courts and, therefore, involve cost and delay. Gaining access to land for monitoring may be difficult once land has been freeholded.
- 2.42 Some witnesses also sought to link the question of the Commonwealth ownership of land to the future use and protection of Crown land. However, this view was not shared by the Commonwealth. In a letter to Norfolk Island householders in 2001, the then Minister, Senator the Hon. Ian Macdonald, noted that:

It has been suggested that rural leases should remain leasehold because the current Crown leasehold system offers some protection from subdivision and development of rural land. However, it is intended that the revised Norfolk Island Plan will be the primary means through which future subdivision and development on Norfolk Island should be controlled. Modern planning approaches across Australia mean that it is planning schemes, not who owns the land,

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56 The current Crown land management arrangements generally prohibit the subdivision of Crown land.

57 Mr Peter Davidson, Transcript, 18 February 2003, p. 8.

which determines what may be done with particular pieces of land.<sup>58</sup>

- 2.43 Mr Gerard Early of the Department of the Environment and Heritage stated that he did “not think that it would make much difference” whether land was freehold or Commonwealth leasehold for the purposes of federal environmental laws.<sup>59</sup> That is, the EPBC Act applies equally to Crown land and private land on Norfolk Island:

The threshold for the application of that legislation is having a significant impact on one of the matters of national environmental significance, or the environment, on Commonwealth land, and those matters of national significance apply equally to both private and crown land.<sup>60</sup>

- 2.44 This view is open to question. As stated earlier, Crown leasehold on Norfolk Island is important from an environmental and land management perspective. The EPBC Act currently protects the latter as it extends to actions having a significant impact on the environment on Commonwealth (Crown) land on Norfolk Island as well as the other matters of national environmental significance outlined earlier in the chapter. As explained above, the Act’s protection of Crown land’s ‘environment’ currently extends to an affected area’s ecosystems and their constituent parts (including people and communities), natural and physical resources, the qualities and characteristics of locations, places and areas, and to social, economic and cultural aspects.<sup>61</sup>

- 2.45 However, once Crown land is free-held, that land is no longer ‘Commonwealth land’ for the purposes of the EPBC Act. Therefore, the Act would only extend to the environment on that land if the action concerned could be characterised as having a significant impact on one of the listed matters of national environmental significance (for example, a listed species or ecological community). Determining whether an action may have such an impact on one of a narrow range of matters is also ambiguous and can be open to argument. This was evident from the Department of the Environment and Heritage’s comment that “it is a matter of judgment as to whether you think what you are going to do will have a significant impact”.<sup>62</sup> There is

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58 Department of Transport and Regional Services, Submissions, p. 106.

59 Mr Gerard Early, Transcript 28 March 2003, p. 171.

60 Mr G Early, Transcript, 28 March 2003, p. 171.

61 See paragraph 2.1.

62 Mr G Early, Transcript, 28 March 2003, p. 173. See also *Booth v Bosworth* [2001] FCA 1453.

then arguably a lesser degree of protection afforded by the Act to the environment once the relevant areas of Crown land – covering a significant proportion of the Island – have been freeholded.

2.46 On the above view, there is a *potential* for the land transfer to compromise environmental matters which are of national significance. However, after careful consideration, the Committee is satisfied that this potential risk is appropriately addressed by the following considerations and measures:

- Implementation of the new Norfolk Island land package;
- Staged implementation of the Land Transfer Process;
- Appropriate resourcing of the new Norfolk Island land package;
- Implementation by the Federal Government of the Committee's recommended good governance reforms;
- Federal Government scrutiny in the development of planning laws;
- Application of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth);
- Federal assistance for Norfolk Island landholders; and
- Ongoing Federal parliamentary monitoring.

### **Implementation of the new Norfolk Island Land Package**

2.47 The Federal and Norfolk Island Governments are jointly implementing a revised Norfolk Island planning and land management regime. In view of the importance of Crown land on Norfolk Island and the insistence to date on finalisation of an appropriate land package, the Federal Government has a responsibility to satisfy itself as to the appropriateness and effectiveness of the new regime before agreeing to freehold the residential Crown leases in question. Some new laws have only recently been enacted. Others are still being implemented. As such, time is required in order to allow the effectiveness of the new regime to be assessed.

### **Staged Implementation of the Land Transfer Process**

2.48 It is apparent that the Federal Government has adopted a staged approach to the land transfer process. As noted above, the current land transfer process is limited to residential Crown leases. Crown

land comprising public reserves, KAVHA and the National Park is not included in the Land Transfer Initiative. The Committee understands that the Federal Government has yet to make any decision or binding commitment in respect of other types of licensed or leased Crown land (such as Crown land used for commercial purposes). The Committee also agrees that no such decision or commitment be made until after a suitable period has passed to enable an assessment of the effectiveness of the new land management and planning regime, especially in respect of residential Crown leases, once freeholded.

## Recommendation 2

- 2.49 That the Federal Government make no decision or commitment in respect of the transfer to freehold title of other types of Crown leasehold or licences until after a suitable period has passed to enable an assessment of the effectiveness of the new land management and planning regime, especially in respect of residential Crown leases that will have been transferred to freehold title.**

### Appropriate Resourcing of the new Norfolk Island Land Package

- 2.50 The effectiveness of the Territory's new planning, environmental and land management laws depend upon their implementation, operation and enforcement being appropriately resourced on an ongoing basis. However, the attention to date of both Governments in respect of the Land Initiative appears to have focussed largely on completion of the legislative prerequisites.<sup>63</sup> The Committee is concerned that little, if any, attention appears to have been given to the question of ongoing budgetary provision and administrative resourcing to support the new legislative regime once it is in place. At the same time, it is evident from the findings of the Committee's report on Norfolk Island governance and the other reports and inquiries listed in it that the Norfolk Island Government is grappling with financial difficulties and administrative shortcomings.<sup>64</sup> As such, before any land transfers

63 See paragraph 2.13.

64 See Joint Standing Committee on the National Capital and External Territories, December 2003, *Quis custodiet ipsos custodes?: Inquiry into Governance on Norfolk Island*, Canprint, Canberra. Other reports include: Butland, G. J. 1974, *Report to the Department of the Capital Territory of the Australian Government on a Long Term Population Study of Norfolk Island*;

take place, including transfer of residential Crown leasehold, both governments ought to be satisfied that it has been demonstrated that the new land package is appropriately resourced and will continue to be in the future.

- 2.51 The Federal Government has the option of extending federal financial and other assistance to the Territory Government in respect of planning, environmental and land management. There are an array of different mechanisms by which this may be done (such as an annual federal 'environmental' grant to the Norfolk Island Government, through specific grants to landholders or through the secondment of federal officials to the Territory Government or through the provision of expert advice to Territory officials and residents via on-island federal representatives). As stated in the Committee's report on Norfolk Island governance, there is a need for the Federal Government to reassess its current policies with respect to Norfolk Island and its exclusion from federal programmes and services on the basis that residents are exempted from federal income tax.<sup>65</sup> This need extends to planning and environmental management on Norfolk Island. If further justification were required, regard could also be had

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Nimmo, J. 1976, *Report of the Royal Commission into Matters relating to Norfolk Island*, Australian Government Publishing Service, Canberra; House of Representatives Standing Committee on Legal and Constitutional Affairs, 1991, *Islands in the Sun: The Legal Regimes of Australia's External Territories and the Jervis Bay Territory*, Australian Government Publishing Service, Canberra; Australian Law Reform Commission, 1994, Report No. 69, *Equality before the Law: Women's Equality* (Chapter 14: *Women in Remote Communities: Norfolk Island – a case study*); Joint Standing Committee on the National Capital and External Territories, 1995, *Delivering the Goods*, Australian Government Publishing Service, Canberra; Australian Law Reform Commission, 1995, Report No. 77, *Open Government: a review of the federal Freedom of Information Act 1982* (Chapter 11); Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra; Access Economics, 1997, *Norfolk Island: Recent Economic Performance, Present Situation, and Future Economic Viability. Is there a Case for Change?*; John Howard and Associates, 1998, *Norfolk Island Administration, Strategic Review*, Sydney; Human Rights and Equal Opportunity Commission, 1999, *Territorial Limits: Norfolk Island's Immigration Act and Human Rights*, J. S. McMillan Printing Group, Sydney; Joint Standing Committee on the National Capital and External Territories, 1999, *Island to Islands: Communications with Australia's External Territories*; 2001, *In the Pink or in the Red?: Health Services on Norfolk Island*; and 2002, *Norfolk Island Electoral Matters*, Canprint, Canberra; and *Focus 2002 – Sustainable Norfolk Island*, 10<sup>th</sup> Legislative Assembly, Norfolk Island.

<sup>65</sup> Recommendation Two, Joint Standing Committee on the National Capital and External Territories, December 2003, *Quis custodiet ipsos custodes?: Inquiry into Governance on Norfolk Island*, Canprint, Canberra, pp. 48-49.

to the local, national and international importance of the Island's environment described above.

### **Recommendation 3**

- 2.52 That, before any land transfers take place, the Federal Government ensure that the new land package is appropriately resourced and will continue to be in the future and that, prior to any transfer, the Federal Minister report to Parliament on steps taken to ensure the latter.**

### **Recommendation 4**

- 2.53 That the Federal Government extend its reassessment of its current policies with respect to Norfolk Island and the basis for the Territory's exclusion from Commonwealth programmes and services to include planning and environmental management on Norfolk Island.**

### **Implementation by the Federal Government of the Committee's recommended good governance reforms**

- 2.54** As mentioned earlier, the Committee's position and recommendations in this report are conditional on acceptance and implementation of the Committee's recommendations in the earlier good governance inquiry. As explained in Chapter One, the Committee has recommended a range of reforms designed to ensure accountability and transparency in decision-making within the Territory Government and to provide Island residents with the opportunities, rights and protections that other Australians enjoy in respect of government. In recommending these measures, it was intended that they would apply to the Territory's land management and planning regime.
- 2.55** The Committee is aware that an Administrative Review Tribunal has been established on Norfolk Island – with federal assistance and input – to allow for decisions made by Territory Ministers and officials,

including certain decisions on land and planning matters.<sup>66</sup> At present the laws enacted by the Norfolk Island Assembly confer a relatively limited jurisdiction on the Tribunal. The Committee is aware that consideration is being given to widening the jurisdiction of that Tribunal. However, it must be recognised that an administrative review tribunal is only one small part of the total reform package required. The current Tribunal is not an independent, investigatory body equipped with an appropriate statutory mandate and powers – and the resources required – to respond to and investigate residents’ concerns and complaints about government. Tribunal members can only address themselves to the merits of the impugned decision in question and only after the matter has been brought before them. The Tribunal relies on persons who may be adversely affected by a Norfolk Island Government decision having sufficient financial and other resources available to first obtain all the relevant information and evidence themselves and then to bring the case before the Tribunal and then to argue it. That is, assuming they can do so within the relevant timeframes and in accordance with the procedural and legal prerequisites governing who, when and how a matter can be brought before the Tribunal for review.

### **Federal Government Scrutiny in Development of Planning Laws**

- 2.56 The Land Initiative is premised on federal endorsement of the new laws and delegated legislation – especially the Norfolk Island Plan – before any land transfer will be contemplated. However, there appears no guarantee that the Norfolk Island Plan or any of the subordinate legislation that the Federal Government has insisted upon, helped develop and then endorsed, will remain in place once Crown land is freeholded. The ability to make or amend the subordinate legislation – such as the Norfolk Island Plan – rests with the Norfolk Island Legislative Assembly alone. Federal authorities appear to have no formal or legal role in this process.<sup>67</sup>

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66 An Administrative Review Tribunal (ART) for Norfolk Island was established in 1996, through the *Administrative Review Tribunal Act 1996* (NI). The Tribunal can review (on merits) decisions made under the following Norfolk Island laws: *Crown Lands Act 1996*; *Land Administration Fees Act 1996*; *Land Titles Act 1996*; *Planning Act 1996*, *Billboard Act 1996*, *Public Health Act 1996*, *Public Reserves Act 1997*, *Trees Act 1997* and *Norfolk Island Broadcasting Authority Act 2000*. The Chief Magistrate of the Australian Capital Territory is appointed as the President of the Tribunal.

67 The Committee understands that the only opportunity federal authorities have under the Territory planning laws to comment on the draft Plan is during the public consultation phase. In this sense, the Federal Government stands in the same position as the general public and its comments are free to be adopted or rejected by Territory authorities. In



- 2.57 The situation on Norfolk Island stands in stark contrast to that in other Australian States and the Northern Territory where amendments to statutory planning instruments are subject to the checks and balances of being proposed at one government level (that is, at the local government level) and then endorsed, amended or rejected by another (that is, at the state government level). However, in Norfolk Island's case, the Members of the Legislative Assembly are responsible both for proposing and endorsing the Plan and any amendments thereto. The Committee has some reservation with this situation given findings of earlier inquiries and reports concerning the governance of Norfolk Island.<sup>68</sup>
- 2.58 There appear good grounds to argue that the Federal Government should have a role in scrutinising the making and amendment of Territory subordinate planning and land use laws. As mentioned above, the ability to rely on Territory planning laws, particularly the Norfolk Island Plan, to protect the environment has been cited as one reason for the Federal Government to withdraw from ownership of Crown land and thereby relinquish any rights it may have to management of that land. Yet, it is apparent that the efficacy of these planning laws depends to a large extent on subordinate legislation. Consideration could be given to amending the *Norfolk Island Act 1979* (Cth) or the relevant Norfolk Island laws to provide for a formal federal role or input in the development and amendment of the statutory planning and land use regime.<sup>69</sup>

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contrast, provision has been made for a federal role and scrutiny in the making of Plans of Management for the Island's public reserves by the requirement that the Administrator make the Plans and through the application of section 7 of the *Norfolk Island Act 1979* (Cth).

68 See Joint Standing Committee on the National Capital and External Territories, December 2003, *Quis custodiet ipsos custodes?: Inquiry into Governance on Norfolk Island*, Canprint, Canberra. See also the reports listed at footnote 31 on page 16 of that report.

69 One approach would be to include 'land use and management' and 'environment protection and conservation (including parks, reserves and gardens, and preservation of historical objects and areas)' in Schedule 3 of the *Norfolk Island Act 1979* (Cth) and to then confer powers on the Administrator with respect to the development and amendment of the statutory planning and land use regime, including subordinate legislation. The Norfolk Island Act requires the Administrator, when exercising such powers to act in accordance with advice of the Norfolk Island Government or Executive Council in respect of Schedule 3 matters. The Federal Government – acting through the Federal Territories Minister – would therefore have the option of issuing instructions to the Administrator in respect of such matters (as happens with the current Crown Land Instructions).

- 2.59 Planning and land management are also matters in which the Federal Government has a legitimate interest given its role and responsibilities for the Norfolk Island. As highlighted by the 1994-1995 Joint Federal-Territory Land Working Group, if the Island has limited natural resources (for example, its environment, its fresh water supplies, visual amenity, character and even the Island's cultural identity) and if these are lost through natural disaster, mismanagement or overdevelopment, federal assistance and funding may be required. The Federal Government therefore retains an interest in ensuring the Territory remains as resilient as possible by ensuring the enactment, administration and enforcement of an effective planning and land use regime. Also relevant is the Federal Government's residual interest in and responsibility for 'good governance' in the Territory. Reciprocal obligations arise out of the fact that the Federal Parliament has devolved legislative and executive power to Norfolk Island, to elect its own government, to have its own Administration and be responsible for raising its own revenue. The Federal Government therefore retains residual responsibilities for the Territory's good governance and proper financial management. That is, to ensure that efficient and honest government is delivered locally and to facilitate economic and social development.<sup>70</sup>
- 2.60 Federal involvement and oversight would also reflect the fact that the heritage, flora and fauna of Norfolk Island is unique and of national and international significance. It would also reflect the longstanding federal interest, and relatively significant investment in financial and human terms by the Federal Government, in Norfolk Island land and environmental matters to date.<sup>71</sup> As was stated by the Commonwealth Grants Commission in 1997, federal oversight (and advice and assistance) would still allow the Norfolk Island Government to provide the government services in question, but would also provide a means of monitoring proposed legislative developments to ensure minimum standards are met and to provide any advice or assistance as may be required in that regard.<sup>72</sup>

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70 See Joint Standing on the National Capital and External Territories, December 2003, *Quis custodiet ipsos custodes?: Inquiry into Governance on Norfolk Island*, Canprint, Canberra, pp. 39-40.

71 See, for example, Hoare M, *The Winds of Change. Norfolk Island 1950-1982*, Institute of Pacific Studies, Suva 1983, pp 71 – 79.

72 Commonwealth Grants Commission, 1997, *Report on Norfolk Island*, Australian Government Publishing Service, Canberra, p. 217.

## Recommendation 5

- 2.61 **That the *Norfolk Island Act 1979* (Cth), together with the relevant Norfolk Island laws, be amended to provide for an effective, ongoing role for the Federal Government in the making and amendment of the Territory's statutory planning and land use regime.**

### Application of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)

- 2.62 As explained above, the EPBC Act applies to Norfolk Island and seeks to protect specified matters of national environmental significance. In the event of any inconsistency between Territory laws and the EPBC Act, the Act prevails. The Act has been amended to now include the protection of national heritage. The Committee understands that, in light of the environmental and social importance of Crown land on Norfolk Island outlined above, the Department of Transport and Regional Services and the Federal Minister for Territories are to adopt a precautionary approach to Crown land transfers and will refer the matter to the Federal Minister for Environment and Heritage for a determination whether any or all freeholding or transfer of Crown land constitutes a 'controlled action' for the purposes of the EPBC Act.<sup>73</sup> As explained above, the EPBC Act requires that 'controlled actions' undergo an environmental impact assessment and obtain approval under the EPBC Act before they can take place. Regard would presumably be had to the findings and recommendations of this report in any such determination or subsequent assessment or when considering what conditions ought to be imposed. As such, notwithstanding that concerns have been raised with the Committee with respect to the Land Initiative, the Committee has no qualms in recommending that the land transfer process continue subject to the Committee's recommendations in this report.

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73 The EPBC Act provides that any person proposing to undertake an action that may be a controlled action must propose the matter to the Federal Environment Minister for assessment as to whether it is a controlled action. The Environment Minister may also require persons – including Commonwealth agencies – who he or she believes are proposing to take a controlled action to refer the proposal to the Minister for assessment as to whether it is a controlled action. See sections 67 to 71 of the EPBC Act. The EPBC Act provides for public notification and comment on such assessments. Notice of all referrals are placed on the internet.

- 2.63 Protection of Norfolk Island's environment will also be dependent on the Federal Government and landholders agreeing to enter into appropriate conservation agreements and covenants when required prior to any transfer or freeholding of Crown land. It is important that these agreements and covenants provide, among other things, an enduring right of access for both Federal and Norfolk Island officers and agents for the purpose of environmental monitoring. The Committee believes it is important that the Department of the Environment and Heritage is provided with adequate resources on an ongoing basis, both to administer the overarching EPBC Act on the Island and to monitor and enforce compliance with any agreements, covenants or undertakings given or entered into by Crown leaseholders prior to freeholding.

#### **Recommendation 6**

- 2.64 **That the appropriate financial and human resources be provided to the Commonwealth Department of the Environment and Heritage to monitor and enforce compliance with Crown lease covenants and conservation and related agreements on Norfolk Island.**

#### **Federal Assistance for Norfolk Island Landholders**

- 2.65 Due regard and recognition must be given to the efforts and desire of many landholders on Norfolk Island to preserve the Island's natural environment. The Committee is aware of the strong and abiding connections that Island residents have to their family land, including leasehold land that has been held within one family for many years. It is also aware that there are Island leaseholders who, out of a commendable sense of stewardship for the land, have sought to preserve native species and habitat on their leases. It is appreciated that, in so doing, some would have relinquished the use of part of their leases and, therefore, part of their income as many would rely on their leases to supplement their incomes or pensions. Preservation of native species and habitat would not have always been and may not be an easy task for individual landholders. Natural areas will not always be self-maintaining on an island plagued with aggressive introduced weeds and feral cats and other pests. Personal, family and

community pressures to develop land on the Island for residential or commercial purposes do exist and must also be faced and resolved.<sup>74</sup>

- 2.66 The Committee notes that a relatively large sum of money will be generated by the land transfer process. It is the Committee's view that these funds should be reinvested into Norfolk Island. In particular, these funds could be used by the Federal Government to establish a Trust Fund to assist those landholders with covenants placed over their land as a result of the land transfer process. For example, assistance could extend to weed control, cat trapping to protect seabird rookeries and fencing to exclude grazing animals, and preservation of structures or sites of historical significance. Historical values also often need outside intervention to maintain the integrity of the fabric of structures, based upon advice from professional conservators. An ongoing programme of inspections by on-island federal officials could be introduced to monitor all freeholded properties once each year and to identify and agree on ways to assist landholders as appropriate.

### Recommendation 7

- 2.67 **That the Federal Government act immediately to ensure that Island residents and community organisations, as well as the Norfolk Island Government, be made aware of and eligible to apply for financial and other assistance provided under federal programmes, services and grant schemes that may be relevant to planning, environmental, heritage and land management.**

### Recommendation 8

- 2.68 **That net revenue received by the Federal Government in respect of any freeholding of Crown land on Norfolk Island be set aside to assist leasehold and freehold landholders on Norfolk Island who enter into conservation agreements, covenants or access agreements or similar undertakings with the Federal Government concerning the protection**

74 The Committee is aware that the Territory Government recently initiated an inquiry into land speculation on Norfolk Island. See *The Norfolk Islander*, 1 November 2003. It is understood that the Territory Government also had to reverse its earlier decision to remove restrictions on tourist accommodation on the Island due to rapid growth in tourist accommodation and associated development on the Island's limited freehold land. See *The Norfolk Islander*, 3 March 2003.

**and conservation of the environment or heritage on their land or the Island more generally.**

### **Recommendation 9**

- 2.69 That Recommendation Eight be implemented by the Federal Government establishing a Norfolk Island Trust Fund administered by the Federal Minister for the Environment and Heritage.**

### **Ongoing Federal Parliamentary Monitoring**

- 2.70** As already stated, the Committee's support of the Land Transfer Initiative is conditional on those concerns raised throughout this chapter being adequately addressed. Given fears raised during the inquiry that the initiative threatens to compromise significant environmental features on the Island, the Committee believes that an appropriate system of checks and balances must be in place for the transfer to proceed. The Committee wishes to reinforce its view that there is a need for ongoing budgetary provision and administrative resourcing to support Norfolk Island's new planning, environmental and land management regime. The Committee will continue to monitor the situation regarding the land transfer, to ensure effective application of the EPBC Act is taking place and to satisfy the Committee that the considerations and measures outlined throughout this chapter have been implemented appropriately. The Committee intends to report to the Parliament on this matter in future inquiries concerning Norfolk Island.

### **Recommendation 10**

- 2.71 That the Department of Transport and Regional Services and the Department of the Environment and Heritage, as the responsible Commonwealth agencies, specifically detail in future annual reports the human, financial and other resources allocated by each Department to administer the Federal Government's statutory and other responsibilities with respect to the environment and heritage of Norfolk Island.**

## The Committee's View

- 2.72 The Committee believes it is still too early to assess the operation of the new land management and planning legislation on Norfolk Island. However, the Committee is satisfied that, if the Federal and Norfolk Island Governments accede to the implementation of both the recommendations in this report and those from the Committee's first report on Norfolk Island governance, there can be no reasonable justification for the current Land Initiative not proceeding.

## National Park

- 2.73 As mentioned earlier, the Department of the Environment and Heritage, through Parks Australia is responsible for Norfolk Island's National Park and Botanic Gardens. Both are of national and international significance for their conservation values and are also significant locally as tourist attractions and places of recreation and relaxation.
- 2.74 The National Park covers 650 ha in two sections. The Mt Pitt section on Norfolk Island covers 450 ha and includes a Forestry Zone, which is managed in part for forestry. The other section comprises 190 ha on neighbouring Phillip Island. The Norfolk Island Botanic Garden comprises 5.5 ha of remnant rainforest.<sup>75</sup> Land comprising the Park is currently owned by the Commonwealth.
- 2.75 The EPBC Act imposes a range of controls and restrictions on activities in Commonwealth reserves such as the Norfolk Island National Park. Management of the National Park and Botanic Garden by the Director of Parks is guided by the Norfolk Island National Park Advisory Committee. The Committee is comprised of representatives from Parks Australia and the Norfolk Island Legislative Assembly.<sup>76</sup> The EPBC Act provides a range of regulatory mechanisms for controlling activities in Commonwealth reserves, in particular through the making and implementation of management plans.
- 2.76 Parks Australia's six staff on Norfolk Island perform several key functions including:

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75 Department of the Environment and Heritage, Submissions, p. 220.

76 Department of the Environment and Heritage, Submissions, p. 221.

- preparing and implementing the Norfolk Island National Park and the Norfolk Island Botanic Garden management plans;
- community liaison and education on environmental protection and conservation;
- provision of environmental advice to the Norfolk Island Administrator;
- liaison with the Norfolk Island Government and private landholders on conservation issues in the Territory; and
- undertaking various rehabilitation, maintenance and threatened species management programmes.

2.77 Each year the Federal Government provides funding of approximately \$100,000 for capital works for improving the facilities associated with the National Park and its recovery programmes. The Department of the Environment and Heritage reported that “since 1998 this has focussed on the repair of Mt Pitt Road, which collapsed in several sections after severe storms”.<sup>77</sup> However, the Committee understands that the Federal Government provided \$3 million in additional funding to repair the road over and above normal annual funding. Some might also argue that the reconstruction of a much wider and improved road has more importance from a tourism perspective than purely an environmental one. It is evident that such annual and special funding has had important spin offs for the Island economy and community. It is clear from the evidence gathered during this inquiry and the Committee’s inquiry into governance on Norfolk Island that the Territory Government and community would not have been able to raise this money itself were the Territory Government responsible for the National Park.

2.78 In its submission to the 1999 Senate Environment, Recreation, Communication and the Arts Legislation Committee’s Inquiry into the Environment Protection and Biodiversity Conservation Bill 1998, the Norfolk Island Government suggested that “the Norfolk Island National Park is managed by Parks Australia on behalf of the Norfolk Island Government” and that in the future “ownership of the park and primary management responsibility for the park will be vested in

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77 Department of the Environment and Heritage, Submissions, p. 222. On 6 August 2003, the Federal Minister for the Environment and Heritage, the Hon. Dr David Kemp MP, officially declared the successful reconstruction of the Mt Pitt Road. See *The Norfolk Islander*, 6 August 2003.



the Administration of Norfolk Island”.<sup>78</sup> The Committee does not share this view. The Park is of local, national and international significance and is managed by the Federal Government for and on behalf of all Australians, including the Norfolk Island community. Nor have any valid reasons been put forward to date to justify any change in the Park’s current ownership or management arrangements. In light of the findings of a range of inquiries which have identified among other things the “general lack of administrative and financial capacity of the Norfolk Island Government to manage the broad range of responsibilities it has been given”, the Committee would also have serious reservations at any proposal whereby the Norfolk Island Government assume management responsibility for or control over the National Park.<sup>79</sup>

### Recommendation 11

- 2.79 **That the Commonwealth retain both ownership and responsibility for the management of the Norfolk Island National Park.**

## Waste and refuse management

- 2.80 As could be expected on a small island with a tourist based economy and over 40,000 visitors a year, waste management is a major issue. On Norfolk Island the problem is exacerbated by a fragile aquifer, so that disposal in land fill is not an option. The great majority of waste is therefore dumped in the sea. The treatment of sewage and the removal of asbestos were also raised in evidence.
- 2.81 There are two tips at Headstone Point that are administered by the Norfolk Island Government. The Committee inspected the site on 17 February 2003 and observed a good deal of rubbish floating in the sea and a dark brown stain in the water, extending for several hectares. According to the Department of the Environment and Heritage, the current incinerator does not burn waste effectively and partially

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78 Norfolk Island Government, Submission to the 1999 Senate Environment, Recreation, Communication and the Arts Legislation Committee’s Inquiry into the Environment Protection and Biodiversity Conservation Bill 1998, p. 6.

79 For a full list of reports see Joint Standing on the National Capital and External Territories, December 2003, *Quis custodiet ipsos custodes?: Inquiry into Governance on Norfolk Island*, Canprint, Canberra.

unburnt material and other waste is deposited into the sea, threatening marine life, human health and the coastline.<sup>80</sup>

- 2.82 The Committee also observed that the construction of a new waste management facility had commenced. At the time of the visit, concrete foundations had been laid and a shed wall had been erected. The new facility was subsequently opened on 1 October 2003.<sup>81</sup> The Waste Management Centre was funded by both the Norfolk Island Government, which to June 2003 had contributed more than \$240,000,<sup>82</sup> and the Federal Government, which contributed a total of \$250,000 under the Coast and Clean Seas component of the Natural Heritage Trust to assist the Norfolk Island Government implement an Island wide waste management strategy.<sup>83</sup>

### Treatment of Sewage

- 2.83 Primary treated sewage is also deposited at sea. The Conservator of Public Reserves, and Land Use and Environment Manager in the Norfolk Island Administration, Mr Peter Davidson, stated that the Administration was not aware of any major problems with sewage disposal.<sup>84</sup> He observed, however, that it was important to determine what effects the system is having on the inshore marine environment.<sup>85</sup> If it were found that there were significant adverse effects, he suggested that it might be necessary to extend the pipeline further out. However, the Administration was not currently in a position to know whether this is necessary.
- 2.84 The Committee welcomes the implementation of the Norfolk Island Waste Management and Disposal Strategy and fully supports the

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80 National Heritage Trust Website, *Implementation of the Norfolk Island Waste Management and Disposal Strategy*. Available:

<http://www.nht.gov.au/nht1/programs/ccs/index.html>

81 See *The Norfolk Islander*, 4 October 2003. In *The Norfolk Islander*, 9 August 2003, Island residents were advised that with the opening of the centre, public access to the Headstone tip would cease. Residents were informed that the relevant Territory Government minister and the Legislative Assembly were considering options for funding the Island's waste management operations, but that "at this stage it is not intended to charge 'gate fees' for sorted domestic wastes". The Government would, however, "monitor the need to charge fees for unsorted waste and intractable or hazardous wastes". See also Mr Peter Davidson, Transcript, 18 February 2003, p. 4.

82 Information provided by the Norfolk Island Government.

83 Department of Transport and Regional Services, *Federal Assistance Provided to Norfolk Island*. Available: [http://www.dotars.gov.au/terr/norfolk/fed\\_assistance.htm](http://www.dotars.gov.au/terr/norfolk/fed_assistance.htm)

84 Mr Peter Davidson, Transcript, 18 February 2003, p. 9.

85 Mr Peter Davidson, Transcript, 18 February 2003, p. 9.

Federal Government's grant to the Norfolk Island Government under the Clean Seas Program.<sup>86</sup> It remains concerned, however, with the possible environmental damage that might be caused by in-shore sewage disposal. As the EPBC Act applies to the marine areas around Norfolk Island, the Federal Government arguably has a management and regulatory role to play in this.

- 2.85 The Committee is also concerned that Norfolk Island's current, inadequate, wastewater disposal system could, potentially, have an adverse impact on the health and well-being of Island residents and visitors. The Federal Government should, therefore, assist the Norfolk Island Government in providing a reliable and safe sewage disposal system that protects the Island community, visitors and the environment.<sup>87</sup> The Committee, therefore, recommends:

## Recommendation 12

- 2.86 **That the Federal Government assist the Norfolk Island Government in upgrading existing sewage services and, where necessary, developing new sewage disposal facilities that protect the health of the community, visitors, the environment and adjacent coastal areas of Norfolk Island.**

## Asbestos removal

- 2.87 Allegations were made in confidential evidence that asbestos was not being removed according to the proper practices.<sup>88</sup> It was claimed that this had led to the dissemination of asbestos dust, workers wearing contaminated clothing and insufficient knowledge as to where the collected asbestos is deposited (with the assumption that it is buried).
- 2.88 Asbestos removal, including asbestos removal in KAVHA, is a matter for the Norfolk Island Government. Under the intergovernmental agreement establishing the KAVHA Management Board, the Territory

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86 Department of the Environment and Heritage, Submission, p. 225. See <http://www.nht.gov.au/nht1/programs/csp/external/index.html#implementation>

87 The Queensland Government's *Smaller Communities Assistance Program*, an initiative designed to assist local governments in Queensland "to provide reliable water supply and sewerage services of an acceptable standard and cost in smaller communities" is a useful model. See <http://www.dlqp.qld.gov.au/Default.aspx?ID=106>

88 See also *The Norfolk Islander*, Saturday 10 January 2004, in which the supervisor at the new Waste Management Centre warns against the unsafe removal and disposal of asbestos material and the danger to the community of this practice.

Administration is entirely responsible for the maintenance of the government buildings within KAVHA.

- 2.89 The Department of Transport and Regional Services noted that the Territory Administration is progressively replacing roof tiles containing asbestos on some buildings within KAVHA and that the work will continue over a 6-7 year period at an annual cost of \$50,000.<sup>89</sup> The Department has been assured by the Territory Administration that it will comply with mainland standards when removing asbestos. The KAVHA project manager has also advised the KAVHA Board that the works will be carried out by the Territory Administration in accordance with all relevant guidelines.<sup>90</sup>
- 2.90 No evidence was presented to the Committee as to whether buildings on land outside KAVHA also contain asbestos. Removal and disposal of asbestos from any such buildings is subject to Norfolk Island building, planning, employment and other laws administered and enforced by the Norfolk Island Administration. At the same time, the Committee is aware of concerns recently raised by Territory officials over the removal, handling and disposal of asbestos by residents and builders on the Island and the implications for public health and safety.<sup>91</sup> However, the Committee is unaware of any request to date by the Norfolk Island Government for federal financial or technical assistance in respect of the removal and disposal of asbestos on Norfolk Island. The Committee therefore recommends:

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### **Recommendation 13**

- 2.91 **That the Federal Government ensure that the Norfolk Island Government take immediate and appropriate measures, in accordance with national standards, for the removal and disposal of asbestos on Norfolk Island.**

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89 Department of Transport and Regional Services, Submissions, p. 550.

90 Department of Transport and Regional Services, Submissions, p. 550.

91 See *The Norfolk Islander*, Saturday 10 January 2004 - warnings in relation to the unsafe removal and disposal of asbestos material from the supervisor at the new Waste Management Centre.