TELEPHONE No.: CANBERRA 831. XM 5418
TELEGRAPHIC ADDRESS: "TERRITORIES" CANBERRA.

Law Revision Section,
**DEPARTMENT OF EXTERNAL TERRITORIES,**
Post Office, MOSMAN. N.S.W.
~~Canberra,~~

In reply quote No. TPF:MMM

17th. August 1949.

H.E. Maud Esq.,
South Pacific Research Council,
86 Milson Road,
CREMORNE. N.S.W.

Dear Mr. Maud,

I'm enclosing an amended screed about "The Government of South Pacific Dependencies". If you have any time to glance through it tomorrow (Thursday) morning I would appreciate it, as I would like to hear your views concerning this publication either during lunch at the Hotel Wentworth, or over coffee afterwards.

Kind regards,

Yours sincerely,

Thomas P. Fry

Note by H.E. Maude

(1) Length of each section of Introduction

(2) II (B) Dr Cumberland would be ideal.

(3) Could do (IV) (A), (B) and (C) if advised ~~at or~~ precisely the form and length required

(4) Who is doing (E) and (G)

(5) Do you want anyone to do (I) or (J). Could enquire of Bryan (on secondment from University of Hawaii) and Baas Becking.

(6) And (H) – who is to do?

# THE GOVERNMENT OF SOUTH PACIFIC DEPENDENCIES.

In view of the growing importance of the South Pacific area, evidenced by the establishment of the South Pacific Commission and by the debates and decisions of the U.N. Trusteeship Council, the Australian Institute of International Affairs requested Dr. Fry, who had edited the Annotated Laws of Papua and New Guinea, and had been an adviser to the Australian delegation at the 1947 South Seas Conference in Canberra which drew up the constitution of the South Pacific Commission, to edit a publication dealing with the Government of South Pacific Dependencies.

There is serious need for an expert, complete, but reasonably short account of the general operation of international, national and local machinery of government in relation to South Pacific Dependencies. It is also apparent that fiew of the basic constitutional documents are readily accessible except as a result of skilled and patient research, and that there is no publication in which any attempt has been made to gather them together.

Dr. Fry, with the assistance of Mr. Ewart Smith (Assistant Editor of the Annotated Laws of Papua and New Guinea), is collating the texts of the principal documents. He has also obtained the co-operation of scholars (including several who have achieved distinction in specialized fields) possessing expert knowledge about particular areas or about particuhar factors effecting the actual working of governmental machinery throughout the whole area. The publication is planned with an intention to present a complete outline picture concerning the manner in which South Pacific Depèndencies are governed.

The volume will commence with a readable introduction, consisting of about 275 pages, designed for general readers and students. Acknowledged authorities in specialized fields will discuss the problems of Government, Law and Politics in South Pacific Dependencies from the following aspects -

(i) The Legal Basis and Constitutional Structure of Government, and the manner in which Government actually operates, in relation to each Dependency in the South Pacific; and
(ii) The general geographical, economic, ahthropological, educational, historical, strategical, political, international, constitutional, and legal factors affecting Government and Politics throughout the South Pacific.

The second part of this volume will consist of the edited and annotated texts of treaties, statutes, orders in council, local regulations, and other institutional documents, relating to:

(i) agencies of international control and co-operation;
(ii) the constitutional and political relationship of each Controlling Power to its various Dependencies in the South Pacific; and
(iii) the internal structure of government in each of these Depèndencies -- the structure, functions and powers of each of the agencies of government (including subordinate agencies) in each, and the basic content and source of the law (including the extent of recognition of native law) in each.

The documents will possibly occupy about 325 pages. These will be selected so as to include all those of permanent importance, but will be edited to eliminate minutiae. By means of annotations, readers will be informed of the general nature of omitted sections, and, by means of systematically compiled lists, will aos be referred to such additional instruments and documents as may be required for further study by specialists.

That is, the book as planned will consist of -

(i) A symposium, that will be a systematic Survey of the Government of South Pacific Dependencies; and
(ii) Annotated Select Documents relating to the Government of South Pacific Dependencies.

## CONTENTS OF INTRODUCTORY SYMPOSIUM


(I) EDITORIAL GENERAL INTRODUCTION

(II) GENERAL PATTERN OF GOVERNMENT

(A) The General Pattern of Governmental Machinery and Law in the South Pacific.

(i) The relationship of Controlling Powers to their Dependencies.
(ii) The structure of Government within the Dependencies.
(iii) The general pattern of law and customs in the South Pacific.

(B) International Cooperation, and International Control and Supervision, in the South Pacific.

1. The Condominiums.
2. Special agreements e.g. The British-New Zealand Health Scheme.
3. The South Pacific Commission System.
4. The Trust Territories in the South Pacific, and the International Trusteeship System.

(C) The Relative Significance of the various Factors affecting the actual working of Governmental Machinery throughout the South Pacific.

1. The impact of civilized institutions and law upon indigenous types of organization and native customs.
2. The "Colonial Policies" of Controlling Powers in relation to South Pacific Dependencies.
3. The actual and potential effects upon South Pacific Dependencies of the International and National (including strategical) Political Policies of Controlling Powers.
4. Geographical, Economic, Educational and other local Factors affecting Government and politics in the South Pacific.

(III) THE LEGAL BASIS AND CONSTITUTIONAL STRUCTURE OF GOVERNMENT OF EACH TERRITORY AND GROUP OF TERRITORIES: A CONTEMPORARY SURVEY.

(A) Island Territories administered by the United Kingdom.

1. General Survey.
2. The Governor of Fiji, the British High Commissioner for the Western Pacific, and the British Consul-General for the Western Pacific.
3. The Colony of Fiji.
4. The Gilbert and Ellice Islands Colony.
5. The British Solomon Islands Protectorate.
6. The Pitcairn Islands District.

(B) The Kingdom of Tonga.

(C) The Condominium of Enderbury Island and Canton Island.

(D) Island Territories administered by the French Republic.

1. General Survey.
2. New Caledonia.
3. French Oceania.

(E) The Condominium of the New Hebrides.

(F) Island Territories under Australian Administration.

1. General Survey
2. The Territory of Papua and New Guinea.
3. The Territory of Norfolk Island.

(G) The Joint Trust Territory of Nauru Island.

(H) Island Territories under New Zealand Administration.

1. General Survey.
2. The Trust Territory of Western Samoa, and the Tokelau Islands.
3. The Cook Islands.

(I) Island Territories of the United States of America.

(J) Netherlands New Guinea.

(IV) GENERAL FACTORS AFFECTING THE ACTUAL WORKING OF GOVERNMENTAL MACHINERY THROUGHOUT THE SOUTH PACIFIC.


(See over)

## (IV) GENERAL FACTORS AFFECTING THE ACTUAL WORKING OF GOVERNMENTAL MACHINERY THROUGHOUT THE SOUTH PACIFIC.

(A) Geographical Factors affecting Government.
(B) Historical Factors affecting Government - A Century of Constitutional History and Politics.
(C) Strategical Factors, and Contemporary International and National Political Policies of Controlling Powers, affecting the South Pacific.
(D) Administrative Policies of Controlling Powers in South Pacific Dependencies.
(E) Anthropological Factors affecting Government.
(F) Economic and Demographic Factors affecting Government.

## MORE DETAILED CONTENTS OF PART IV OF THE INTRODUCTORY SYMPOSIUM.


(IV) GENERAL FACTORS AFFECTING THE ACTUAL WORKING OF GOVERNMENTAL MACHINERY THROUGHOUT THE SOUTH PACIFIC.

(A) Geographical Factors affecting Government.
1. The influence of geographical factors upon -
   (i) the form of local government in South Pacific Depéndencies; and
   (ii) the machinery of control by Controlling Powers over their South Pacific Dependencies.
2. Geographical features of South Pacific as a homogeneous political "region".

(B) Historical Factors affecting Government - A Century of Constitutional History and Politics in the South Pacific, considered as a factor in Contemporary Government and Politics.
1. France and the United Kingdom in the Changing Pacific, 1844-1876.
2. The Western Pacific High Commission, 1877-1893.
3. Germany as an Additional Factor in the South Pacific, 1894-1918.
4. Impact of Internationalism upon the South Pacific, 1919-1949.

(C) Strategical Factors, and Contemporary International and National Contemporary Political Policies of Controlling Powers (and others), affecting the South Pacific.
1. The South Pacific as a Political Region.
2. The War and Post-war Situation in the Area and its Effect upon the Politics of the Powers concerned.
3. The effects in International Politics of the Interplay of National Policies.
4. The Troubled Area to the North.
5. Strategical rêalities and potentialities.
6. Conclusions.

(D) Administrative Policies of Controlling Powers in South Pacific Dependencies.
(sub-headings not yet determined)

(E) Anthropological factors affecting Government and Politics.
1. General anthropological distributions of populations.
2. Effect of tribal organizations and customs, and of the agricultural, industrial, intellectual and cultural levels of knowledge and education, upon Government and Politics in the various Depéndencies of the South Pacific.

(F) Economic and Demographic Factors affecting Government and Politics.
1. Intêrnal economy -
   (i) Agriculture, horticulture and animâl husbandry.
   (ii) Mining.
   (iii) Industrial crafts, commerce and transportation.
2. Imports and exports, as factors in world tradê, and factors in internal stability and in the progress of local communities towards self-government.
3. Population.
4. Labour resources.
5. Government financial resources of local administrations and of Controlling Powers.
6. Oceanic and aerial communications.

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The second part of this volume -- the greater part of it -- will consist of reprints of treaties, statutes, orders in council, local regulations, and other constitutional documents, relating to:

(i) agencies of international control and co-operation:

(ii) the constitutional and political relationship of each Controlling Power to its various Depdndencies in the South Pacific; and

(iii) the internal structure of government in each of these Dependencies -- the structure functions and powers of each

of the agencies of government (including subordinate agencies) in each, and the basic content and source of the law (including the extent of recognition of native law) in each.

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(i) The general geographical, economic, anthropological, historical, strategical, political, international, constitutional and legal factors affecting Government and Politics in relation to South Pacific Dependencies.

(ii) The Legal Basis and Constitutional Structure of Government in relation to each Dependency in the South Pacific.

# THE GOVERNMENT OF SOUTH PACIFIC DEPENDENCIES.

## Interim List of Contributors to Introduction.

There will be a number of expert contributors to the Introduction. The following list is subject to alteration, as final assent has not yet been received from two of those whose names are listed below, and as the obtaining of additional contributors is a possibility -

I. Editorial General Introduction ............ Dr. T. P. Fry

II. General Factors affecting Government and Politics in the South Pacific

- (A) The Relative Significance and General Survey of the Various Factors .......... Dr. J.W.Davidson
- (B) Geograhpical Factors .................... Dr. J. Andrews
- (C) Economic Factors ..........................................
- (D) Anthropological Factors ................ Prof.R. Firth
- (E) Historical Factors - A Century of Constitutional History and Politics .. Prof. J.M.Ward
- (F) Strategical Factors ..,.,.,............. Tristan Buesst
- (G) Contemporary National Policies affecting the South Pacific .......... Prof.G.Greenwood

III. General Pattern of Government and Law in the South Pacific .................... Dr. T. P. Fry

- (A) General Survey of Constitutional Government of South Pacific Dependencies
- (B) International Cooperation, and International Control and Supervision, in the South Pacific

IV. The Legal Basis and Constitutional Structure of Government of each Territory and Group of Territories: A Contemporary Survey .................................. Drs. T.P.Fry and J.W. Davidson, Mrs. N. Robson, Messrs. H.E.Maud and E. Smith.

- (A) United Kingdom Depdndencies
- (B) Tonga (Protected Kingdom)
- (C) Enderbury and Canton Islands (Condominium)
- (D) French Depdndencies
- (E) The New Hebrides (Condominium)
- (F) Australian Dependencies
- (G) Nauru Island (Joint Trust Territory)
- (H) New Zealand Dependencies
- (I) U.S.A. Dependencies
- (J) Netherlands New Guinea

## CONTENTS OF "INTRODUCTION".


(I) EDITORIAL GENERAL INTRODUCTION

(II) GENERAL FACTORS AFFECTING GOVERNMENT AND POLITICS IN THE SOUTH PACIFIC.

(A) The Relative Significance of the Various Factors Affecting Government and Politics in the South Pacific - a General Survey of all Factors.

(B)
1. A Broad View of the Geography of the South Pacific as a whole, but taking some account of its relation to the whole of the Pacific, and also particularizing concerning any islands or groups of special significance.
2. The influence of geographical factors upon -
   (i) the form of local government in South Pacific Dependencies; and
   (ii) the machinery of control by Controlling Powers over their South Pacific Dependencies.
3. Geographical features of South Pacific as a homogeneous political "region".
4. Maps.

(C) Economic and Demographic Factors affecting Government and Politics.
1. Internal economy -
   (i) Agriculture, horticulture and animal husbandry.
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5. Government financial resources of local administrations and of Controlling Powers.
6. Oceanic and aerial communications.
7. Maps.

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1. General anthropological distributions of populations.
2. Effect of tribal organizations and customs, and of the agricultural, industrial, intellectual and cultural levels of knowledge and education, upon Government and Politics in the various Dependencies of the South Pacific.
3. Maps.

(E) A Century of History of Constitutional Government in the South Pacific, considered as a factor in Contemporary Government and Politics.
1. France and the United Kingdom in the Changing Pacific, 1844-1876.
2. The Western Pacific High Commission, 1877-1893.
3. Germany as an Additional Factor in the South Pacific, 1894-1918.
4. Impact of Internationalism upon the South Pacific, 1919-1949.

(F) Strategical Factors affecting Government and Politics.
1. Local.
2. External (including global).

(G) Contemporary Foreign Policies of Controlling Powers (and others).
1. The South Pacific as a Political Region.
2. International Realities in the South Pacific.
3. The War and Post-war Situation in the Area and its Effect upon the Politics of the Powers concerned.
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6. Conclusions.

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(IV) THE LEGAL BASIS CONSTITUTIONAL STRUCTURE OF GOVERNMENT OF EACH TERRITORY AND GROUP OF TERRITORIES: A CONTEMPORARY SURVEY.

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2. The Colony of Fiji.
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4. The British Solomon Islands Protectorate.
5. The Pitcairn Islands District.

(B) The Kingdom of Tonga.

(C) The Condominium of Enderbury Island and Canton Island.

(D) Island Territories administered by the French Republic.

1. General Principles of French Overseas Administration under the 1946 Constitution.
2. Representation of Overseas Territories in France.
3. Administration -
   (i) in Paris, and
   (ii) in Noumea and Papeete.
4. The Judicial system.
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6. Native Institutions and Asiatic Groups.

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# PRELIMINARY LIST OF DOCUMENTS.

1. International institutions.
   The U.N. Charter, Chs. XI-XIII.
   The South Pacific Commission Agreement.
2. Fiji.
   The Letters Patent and Orders in Council as to Fiji.
   Selected Fiji Ordinances.
3. The United Kingdom's Colonies, Protectorates, etc., under the High Commissioner for the Western Pacific.
   The Pacific Order in Council
   International Treaties between U.K. and Germany 1880-1900
   The Colonial Boundaries Act
   The Foreign Jurisdiction Acts
   The 1916 Order in Council annexing Ocean, Fanning and Washington Islands
   The Order in Council and Letters Patent as to the Gilbert and Ellice Islands Colony
   Gilbert & Ellice Islands' Native Laws Ordinance
   The Orders in Council proclaiming the British Solomon Islands a Protectorate, and, later, enlarging, its boundaries
   Selections of King's Regulations applicable to the British Solomon Islands Protectorate
   The Regulations as to the Pitcairn District
4. The Kingdom of Tonga
   Two Treaties between the United Kingdom and Tonga, and a British Proclamation concerning Tonga
   The Constitution, and selected laws, of Tonga
5. The Condominium of Canton and Enderbury Islands
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   The 1914 Condominium Agreement
   The 1922 Exchange of Notes
   The British Order in Council of 1922
7. French Dependant Territories
   The French Constitution - Provisions relating to Colonies
   The Decree re French Oceania
   The Decree re New Caledonia
8. The Island Territories of Australia
   The New Guinea Trusteeship Agreement
   The Letters Patent transferring BNG to Australia
   The Boundary agreements of U.K. and Australia with the Netherlands
   The Papua and New Guinea Act, 1949
   The Norfolk Island Act
   Selected Ordinances of Norfolk Island
   The Australian Antarctic Acceptance Act
9. The Trust Territory of Nauru Island
   The Trusteeship Agreement
   The Nauru Island Agreement Acts
10. New Zealand's External Territories
   The N.Z. Island Territories Act
   The Western Samoa Trusteeship Agreement
   The Order in Council as to Western Samoa
   The N.Z. Western Samoa Act
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11. Island Territories of the United States of America
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   Relevant documents (e.g. any new Constitution to be proclaimed establishing the United States of Indonesia)

(Draft 11.8.1949)

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The second part of this volume - - the greater part of it - - will consist of reprints of treaties, statutes, orders in council, local regulations and other constitutional documents relating to: (i) agencies of international control and co-operation: (ii) the constitutional and political relationship of each Controlling Power to its various Dependencies in the South Pacific; and (iii) the internal structure of government in each of these Dependencies -- the structure functions and powers of each of the agencies of government (including subordinate agencies), and the basic content and source of the law (including the extent of recognition of native law), in each. The documents will occupy about 325 pages.

The volume will commence with a short readable introduction to the matters with which the reprinted constitutional documents are concerned. This first part of the volume will consist of about 125 pages.

A synopsis of the Introduction, and a preliminary list of the Documents to be reprinted are given below:-

## CONTENTS OF "INTRODUCTION".


(I) GENERAL SURVEY.

(II) GENERAL FACTORS AFFECTING GOVERNMENT AND POLITICS IN THE SOUTH PACIFIC.

(A) Geographical Factors.
1. Geographical features of South Pacific as a homogeneous political "region".
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    Relevant documents as to Eastern Samoa
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    Relevant documents (e.g. any new Constitution to be proclaimed establishing the United States of Indonesia)

G. S.

1. Very brief historical note
2. Machinery at the centre.
3. Relations of C. Ps & the Ds.
4. Govt in the Ds.
   (i) Law — general content.
   (i) Legislative instrumentalities
   (ii) Judicial tribunals.
   (iii) Administrative agencies
   (iv) Native institutions
5. Special topics.

PACIFIC DOCUMENTS IN MADE UP FILE.

| Document | Territory |
|---|---|
| Western Samoa O - in - C 1920; " " Amendment) O - in - C 1920 | WEST SAMOA |
| Union Ids (No. 2) O - in - C 1925 | UNION ISLANDS |
| British Proclamation including Cook Islds in boundaries of N.Z. (1901); O - in - C providing for Govt. of Cook Islds | |
| Fiji Letters Patent 1937 (In Separate Files); Amendment of 1943 (two) 1944 — These can be incorporated in 1937 O in C | FIJI |
| British Solomon Ids (Temp. Provision) O in C 1942; Proclamation of 1900 declaring Protectorate over Choiseul etc. (to be part of British Solomon Ids). | BR. SOLOMONS |
| O in C annexing Birne, Canton etc. to Gilbert and Ellice Ids. Colony (1937); O in C annexing Ocean, Fanning and Washington Ids. to Gilbert & Ellice Ids. Colony.; O in C of 1916, annexing Union Ids to Gilbert & Ellice Ids.; Union Ids. (No. 1) O in C 1925, excluding Union Ids. from Gilbert and Ellice Ids. Colony | GILBERT & ELLICE IDS. COLONY. |
| Agreement amending 1900 Tongan Treaty - 1928; British Proclamation relative to revenue of British jurisdiction in Tonga | TONGA |
| Queens Regns. prohibiting supply of arms etc. to natives (1893); The Pacific O in C 1893, as amended to 1908 and 1910 | GENERAL |
| New Hebrides O in C 1923; New Hebrides O in C 1922 (Scheduling Protocol) | NEW HEBRIDES |

IN SEPARATE FILES

| | |
|---|---|
| FIJI: | Letters Patent of 1937 |
| | Supreme Court Ordinance 1875 (extracts) |
| | District Commissioners Ordinance 1876 (extract) |
| | Appeals Ordinance 1903 |
| GILBERT & ELLICE ID. COLONY: | Native Laws Ordinance 1917 |
| | Gilbert & Ellice Ids. O in C of 1915 |
| COOK IDS: | Cook Ids Act |
| WESTERN SAMOA: | Somoa Act |
| | Island Territories Act |
| TONGA: | Treaty of 1900 |
| | Treaty of 1879 (superseded in part) |
| | Supreme Court Act (extracts) |
| NEW HEBRIDES: | Delegation of Powers (French High Commissioner to Resident Commissioner) |
| | Joint Decision No. 2 (administrative districts) |
| | The 1914 Protocol |
| PITCAIRN ID: | Pitcairn Id Govt. Regs. 1940 |
| | Rules thereunder. |
| UNION IDS: | Tokelau Nomenclature Ordinance 1946 |
| | Union Ids ( No. 1 of New Zealand) Order 1926 |

AUSTRALIAN TERRITORIES:

1. NORFOLK ID.

Norfolk Id. Act 1913 - 1935

Proclamation as to commencement of Act

O in C re Norfolk Id.

Appeal Ordinance 1919 - 1936 (See Consol for amendments)

Executive Council Ordinance 1925 - 1934

Administration Ordinance 1936

2. ASHMORE and CARTIER IDS.

O in C placing Ids under authority of C'lth.

IN SEPARATE FILES (Cont'd)

Ashmore & Cartier Ids Acceptance Act 1933 - 38

3. ANTARCTICA

Australian Antartic Territory Acceptance Act

4. NAURU

Nauru Island Agreement Act 1919

Nauru Island Agreement Act 1932

5. PAPUA and NEW GUINEA

Papua and New Guinea Act 1949

# CONSTITUTIONAL STRUCTURE IN PAPUA-NEW GUINEA.

(i) General survey of the island territories under Australian administration.

(ii) The Provisional Territory of Papua-New Guinea.

(a) Historical development in recent years.

(b) Outline of the Provisional Administration.

Diagram I
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(c) The administrative and judicial agencies of government, other than those consisting of natives, operating within each District or Division.

(d) Native governmental officials in native villages.

(e) Native representatives of natives.

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(i) General survey of the island territories under Australian administration.

The Territories of Papua, Norfolk Island and Australian Antarctica are "Territories of the Australian Commonwealth" within the meaning of the Australian Commonwealth Constitution, and the Australian Commonwealth possesses plenary powers of control in respect of each of them. The powers of the Australian Commonwealth are also plenary in respect of the "trust" Territory of New Guinea, except to the extent that they are restricted by provisions of the "trusteeship agreement".

The "federal" system of government which is a distinctive feature of Australia proper (which comprises the Commonwealth and the six States), is not applicable to the Territories, and, on this point, the same rule applies to the "trust" Territory of New Guinea as to Papua, Norfolk Island and other Territories. The States of Australia have no constitutional powers or functions in respect of the Territories. Section 122 of the Australian Commonwealth Constitution confers upon the Commonwealth Parliament power to "make laws for the government of any Territory". Sir Robert Garran has pointed out that its power in respect of Territories is "plenary in scope, and extends to all subject matters; the Territories have nothing analogous to 'State-rights' as to their local affairs". This supremacy has been principally used (except in respect of Australian Antarctica) for the purposes of (a) establishing local legislative judicial and administrative agencies in each Territory, (b) extending to each Territory about 60 Australian Commonwealth statutes, most of which are therefore applicable uniformly throughout Australia and its Territories (The rule laid down by the Australian Commonwealth Parliament is,

nevertheless, that none of its statutes applies to any Territory unless it is expressly so applied, these 60 having been expressly applied), and (c) ensuring that there will be supervision and ultimate administrative control by the Australian Commonwealth Government, through the Administrator of each Territory, over the administrative work and legislative enactments of the Territory, but so as not to stifle the implementation of local policies evolved by officials in the Territory. (In this respect, the Australian system resembles that of the United Kingdom, although the comparatively greater closeness of Canberra to its Territories is an important factor which tends towards closer control by Canberra than by Whitehall).

Each Territory has its own constitutional statute. Since the enactment of the Papua-New Guinea Provisional Administration Act 1945, the Papua Act and the New Guinea Act have each been suspended, but they have not been repealed, and provisionally these two Territories are now being administered as a combined Territory. Norfolk Island and Australian Antarctica each has its own constitutional statute.

None of the Australian statutes which embody constitutions for the various Territories embodies a code of law or (with very few exceptions) any rules of law other than those which establish and determine the structure and powers of the principal legislative judicial and administrative agencies of the particular Territory. By means of local Ordinances, however, there has been introduced into each Territory, as its basic system of law, the law of England as modified by statutes of the State of Queensland. This basic law has, in turn, been modified to a considerable extent by local Ordinances in each Territory.

There has been no attempt in Papua-New Guinea to codify

native customs, but this does not mean that the courts can refuse to recognise native customs as legally binding. Indeed, disputes as to most civil matters (but not criminal offences) are determined in accordance with native custom whenever they happen to arise between natives in respect of native village life, if the rights of Europeans are not involved. As Norfolk Island does not have a native population, no similar problem arises there.

(ii) The Provisional Territory of Papua-New Guinea.

(a) Historical development in recent years.

Before 1942, the Territory of Papua and the mandated Territory of New Guinea each had a separate local system of civil government and a separate body of laws. Although there were differences in detail between the laws and the governmental agencies of each of these Territories, they were almost identical in their general characteristics. Their civil governments (but not their laws) were both suspended early in 1942 because of invasion by Japanese armed forces. For more than three years the two Territories were combined under a military administration known as the Australian New Guinea Administrative Unit.

Between 29th October 1945 and 30th June 1946 the military administration was withdrawn from the Territories in three successive phases. On 30th October 1945 there was established, under the Papua-New Guinea Provisional Administration Act 1945, a Provisional Administration of a new provisionally-combined Territory, the Territory of Papua-New Guinea, but at first it administered only one District of the Territory of New Guinea and the whole of the Territory of Papua. Since 30th June 1946 it has administered the whole of the Territory of New Guinea as well as the Territory of Papua. Just as, under ANGAU, there was an administrative amalgamation of Papua and New Guinea, so also there is at present a provisional amalgamation under the new civilian Provisional Administration.

(b) Outline of the Provisional Administration.

Nevertheless, there have been only a few fundamental changes from the pre-invasion pattern of government. Amongst them are: (i) Provisional amalgamation of the two former Territories, and the establishment of one Administrator and one Supreme Court, although the main body of laws of the two former Territories still remain distinct and the lower courts and the administrative services (other than the Administrator's central headquarters) continue to be differently constructed and to have different powers and functions according to whether they are in Papua or in New Guinea. (ii) There is no Legislative Council in Papua-New Guinea, whereas there was formerly a Legislative Council in Papua and another in New Guinea; legislative powers equivalent to those which previously vested in the Legislative Councils being now vested (temporarily) in the Australian Commonwealth Government. The following is an outline of the present system of government in Papua-New Guinea:

Within Papua, the laws of Papua continue to apply, and within New Guinea, the laws of New Guinea continue to apply. The Australian Commonwealth Government, however, has power to amend or repeal any law of Papua or of New Guinea and to enact uniform laws for Papua-New Guinea. To date the most important uniform law that has been enacted is a Native Labour Ordinance.

Papua-New Guinea has no Legislative Council. The Administrator however, possesses such subordinate powers of legislating by Regulations as may have been conferred upon him specifically by Ordinances.

In Papua-New Guinea there is one Administrator, and one central headquarters staff, for the whole Territory, instead of two (one for each of the two former Territories) as formerly. There has, however, not been a complete fusion of administrative machinery. Apart from the Administrator, officials must look to the laws of Papua in respect of Papua, and to the laws of New Guinea in respect

of New Guinea, in order to determine the name of the office or offices they hold and the powers and functions of each such office. The structure of the administrative machinery operating within Papua continues to be different from that operating in New Guinea; subject, however, to the important difference that one Administrator (assisted by a combined central headquarters) controls both sets of administrative machinery, and thus has some chance of co-ordinating them.

This system may soon prove unworkable, and it will then be necessary to draft unified laws to operate throughout Papua-New Guinea should it be decided that the two pre-existing Territories are to be amalgamated permanently. Meanwhile, all officials of both Papua and New Guinea continue to be suspended from office; and their offices are filled and their functions and powers are exercised by officers of the Provisional Public Service of the new Territory of Papua-New Guinea (who are, in very many instances, the same persons who, in their former capacities, are still "suspended").

A new Supreme Court of Papua-New Guinea has been established but there is as yet no uniformity in the lower courts. In Papua the Papuan system of lower courts has been continued, and in New Guinea, the system of lower courts of that Territory has been continued. The Supreme Courts of Papua and New Guinea, respectively, remain suspended.

Another change is the vesting in the Minister for External Territories, instead of in the Australian Commonwealth Government as a whole, of the power to issue instructions to the Administrator of Papua-New Guinea.

In order to give a clear outline of the general characteristics of the Administrative and judicial systems operating in Papua-New Guinea, three Diagrams are given below.

In two Tables which are also given below there are set out, in a very brief way, information as to the jurisdiction of the various courts of Papua-New Guinea.

DIAGRAM I.

ADMINISTRATIVE AGENCIES: RELATIONSHIP OF AUSTRALIAN COMMONWEALTH AGENCIES TO THOSE IN PAPUA-NEW GUINEA.

GOVERNOR-GENERAL IN COUNCIL OF THE AUSTRALIAN COMMONWEALTH

AUSTRALIAN COMMONWEALTH MINISTER FOR EXTERNAL TERRITORIES

ADMINISTRATOR

TERRITORY'S CENTRAL HEADQUARTERS STAFF

DISTRICT STAFFS

NATIVE VILLAGE OFFICIALS AND VILLAGE COUNCILLORS

DIAGRAM II: RELATIONSHIP OF JUDICIAL AND ADMINISTRATIVE AGENCIES WITHIN PAPUA- NEW GUINEA.

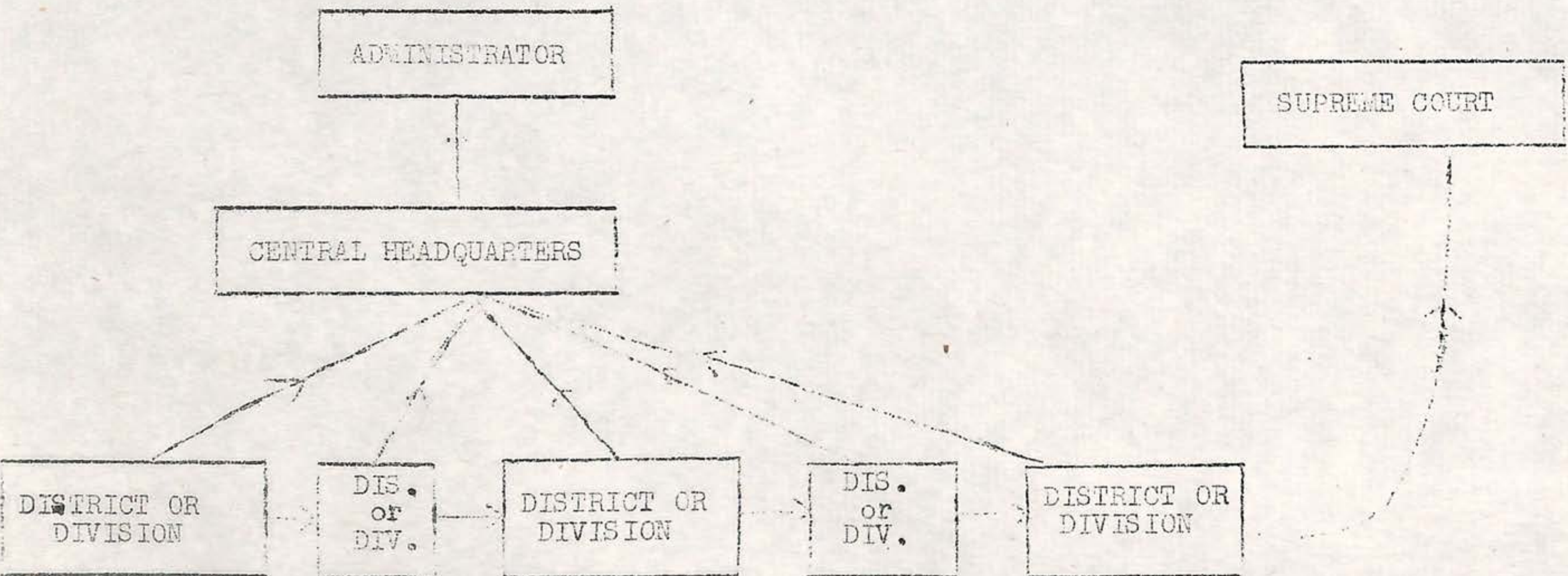
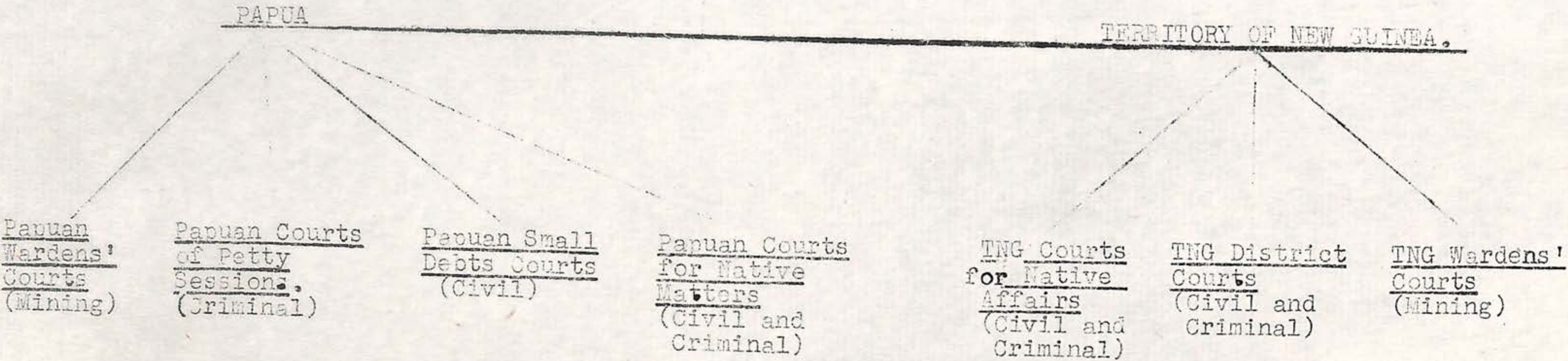


DIAGRAM III: JUDICIAL TRIBUNALS OF PAPUA-NEW GUINEA



## TABLE A: EXTENT OF CRIMINAL JURISDICTION OF JUDICIAL TRIBUNALS IN PAPUA-NEW GUINEA.

### SUPREME COURT OF PAPUA-NEW GUINEA

All indictable offences (e.g. treason, "crimes", misdeameanours) committed by natives or non-natives.

### TERRITORY OF NEW GUINEA

#### DISTRICT COURTS

Non-indictable offences (sometimes called "summary" or "simple" offences) committed by natives or non-natives, except offences by natives charged under the Native Administration Regulations.

#### COURTS OF NATIVE AFFAIRS

Offences by natives against the Native Administration Regulations

#### WARDENS' COURTS

Mining offences by natives or non-natives against the Mining Ordinance or against any regulation made thereunder.

### PAPUA

#### COURTS OF PETTY SESSIONS

Non-indictable offences (sometimes called "summary" or "simple" offences) committed by natives or non-natives, except offences by natives charged under the Native Regulations. (Offences which are offences against both the general criminal law and the Native Regulations may be charged before a Court of Petty Sessions or, in appropriate cases of indictable offences, in the Supreme Court of Papua-New Guinea).

#### COURTS OF NATIVE MATTERS

Offences by natives against the Native Regulations

#### WARDENS' COURTS

Mining offences by natives or non-natives against the Mining Ordinance or against any regulation made thereunder.

## TABLE B: EXTENT OF CIVIL JURISDICTION OF JUDICIAL TRIBUNALS IN PAPUA-NEW GUINEA.

### SUPREME COURT OF PAPUA-NEW GUINEA

Civil cases, whether governed by Common Law or Equity, and whether the parties are natives or non-natives. Its civil jurisdiction is as plenary as that of the Supreme Court of Queensland.

### TERRITORY OF NEW GUINEA.

**DISTRICT COURTS**

Any of the following types of civil cases, whether the parties are natives or non-natives, provided that the amount claimed, or the value of the goods or land claimed, does not exceed £100:

(i) Damages for assault.
(ii) Ownership or possession of goods.
(iii) Sale of goods.
(iv) Loans, and interest (if not more than 6%).
(v) Work and labour done, and materials provided.
(vi) Hire of goods and animals.
(vii) Use and occupation of land or buildings (including warehouses).
(viii) Board and lodging.
(ix) Feeding and care of cattle.
(x) Trespass of cattle.
(xi) Carriage of goods.
(xii) Money due under contract, negotiable instrument, etc.,
(xiii) Taxes, etc.

### PAPUA.

**SMALL DEBTS COURTS** (i.e. Courts of Petty Sessions sitting in their civil jurisdiction).

Any of the following types of civil cases:

(i) Any "debts, demands, or damages", however arising, but not exceeding £100.

(ii) Partnership disputes involving no more than £30.

N.B. Small Debts Courts have <u>no jurisdiction in any case in which the title to any land is bona fide in question.</u>

TABLE B: (Continued) EXTENT OF CIVIL JURISDICTION OF JUDICIAL TRIBUNALS IN PAPUA-NEW GUINEA

| TERRITORY OF NEW GUINEA | PAPUA |
| --- | --- |
| COURTS FOR NATIVE AFFAIRS<br>Any civil claim of any kind whatsoever, if all the parties are natives(including<br>(i) Claims to the ownership of land, and<br>(ii) Claims concerning bride payments). | COURTSFOR NATIVE MATTERS<br>Any civil claim of any kind whatsoever, if all the parties are natives, except<br>(i) Claims to the ownership of any land, water or reef, or<br>(ii) Claims concerning the bride payment arising out of a marriage contracted in accordance with native custom. |
| WARDENS' COURTS<br>All cases in relation to mining or to lands held under the Mining Ordinance. | WARDENS' COURTS<br>All cases in relation to mining or to lands held under the Mining Ordinance. |

(c) The administrative and judicial agencies of government other than those consisting of natives, operating within each District or Division.

Under the Administrator and his central headquarters there are the Field Staff in the various Districts (or Divisions) into which the Territory is sub-divided for administrative and judicial purposes. Papua is sub-divided into 9 Divisions and New Guinea into 8 Districts. In charge of each Division is a Resident Magistrate and of each District is a District Officer. Within each District (or Division) there are various Localities within each of which is situated a Government Sub-Station at which an Assistant District Officer or Assistant Resident Magistrate, as the case may be, has his headquarters. Such an Assistant has the judicial and other legal powers of a District Officer or Resident Magistrate, as the case may be, but the latter has supreme administrative control of his District or Division, and as such can control all the other officers on his staff, other than in their judicial decisions. In each District or Division there are Patrol Officers, who possess minor legal powers and perform subordinate administrative and, sometimes, judicial functions.

The lower courts, as well as the administrative work, of each District or Division, are a responsibility of the District Officers and Resident Magistrates, and their staffs. (See Tables A and B above). None of the courts has a native judge.

Resident Magistrates and District Officers are in effect the representatives in their respective Divisions and Districts of the Administrator and his central headquarters.

The powers of a Resident Magistrate in his Division in Papua are similar to those of a District Officer in his District in New Guinea. The 1925 District Standing Instructions of New Guinea made it clear that the District Officer controlled the administrative activities of all administrative officials in his District, except:

(i) The medical and hygiene staff of his District. (These come directly under the Chief Medical Officer).

(ii) Technical officers (e.g. engineers) on the staff of the central administration, whilst performing duty in his District .

(iii) Any senior officials from central headquarters (e.g. "permanent heads" of Departments, the Superintendent of Police, and the like) and District Officers from other Districts, whilst visiting his District.

In order to ensure that the District Officer's control within his District was maintained, it was prescribed by these Instructions that:

(i) All communications concerning matters in his District (except medical matters) passing to and from central headquarters had to go through the District Officer. (In police matters,also, the District Officer corresponded with the Superintendent of Police in his capacity as Police Inspector for his District). No direct communication was permitted between any junior officer permanently stationed in a District and central headquarters; except that medical officers and other medical personnel stationed in a District did communicate direct with the Director of Public Health, copies being forwarded to the District Officer for information.

(ii) All officials on the staff of central headquarters (other than senior officers, such as the "permanent heads" of Departments, the Superintendent of Police, and the like) had to confer with the District Officer before commencing duty in his District, and to furnish the District Officer with a copy of written instructions concerning such duties.

(iii) No officer, not even senior visiting officers from central headquarters, was permitted to give instructions to any natives in a District without the concurrence of the

District Officer; except that medical officers could give instructions concerning villages, etc., in any medical emergency.

The administrative powers and functions of a Resident Magistrate within his Division and of a District Officer within his District derived (a) from instructions issued to him from time to time by central headquarters, and (b) from Ordinances. These functions may be summarised under the following very general headings:

(i) Administrative direction and control of all subordinate officials in his Division or District.

(ii) The compilation of reports to the Administrator (an Annual Report and other reports) concerning the affairs of his Division or District.

(iii) Administration of native affairs. A Resident Magistrate or District Officer has the responsibility of supervising native life, especially in regard to sanitation and health in native villages, the extension of government influence and control, the purchase of native lands, the economic development (including agricultural) of native villages, supervision of the recruiting and treatment of indentured native labour, the taking of the native census, the collection of native taxes, and like duties.

(iv) Control or supervision of native authorities (e.g. Village Councillors, and Luluais and Tultuls, in New Guinea and Village Councillors and Village Constables in Papua).

(v) Control of the police forces and of the prisons in his District, in his capacities as Police Inspector and Head Gaoler in his District.

(vi) The issuing of licences or permits, and the making of registrations, under various Ordinances and Regulations.

(vii) Multifarious administrative functions conferred upon him either by instructions issued by central headquarters or by

particular Ordinances and Regulations or delegations thereunder.

The list given above makes apparent the necessity for the following warning which Brigadier-General Wisdom, Administrator of New Guinea, gave to his District Officers on 30th June, 1925:

"The District Officer must not develop into an office man. While "he has, of course, his magisterial work to do on the station, "and must exercise supervision over his office staff, as much "of his time as possible must be spent in the villages, getting "into intimate touch with the natives, learning their customs, "studying their characters and appreciating their requirements. "Important tasks, such as action in the case of tribal fighting, "and serious trouble between villages should, except in "exceptional circumstances, be conducted by the District Officer "personally."

A similar point of view had been expressed to his Resident Magistrates by the former Lieutenant-Governor of Papua on 16th September, 1918:

"I have noticed a tendency among Resident Magistrates and "Assistant Resident Magistrates to regard patrolling as something "outside their ordinary work. This is a misconception, for "patrolling is a part, and a very important part, of their duty, "since is is obvious that they cannot have a personal knowledge "of what is going on in their Division or District unless they "keep in constant touch with the people living in it. In "cases where a Patrol Officer is attached to the station the "intention is not to relieve the Resident Magistrate or Assist-"ant Resident Magistrate of all patrol work, but to increase the "amount of patrolling done by putting two men to do it instead "of one. If, as must frequently happen ...... an officer is "alone on a station, he must by no means neglect his patrol work, "but should do as much as he can even at the risk of neglecting

"other duties of minor importance. It is not suggested that "in every case all other work should yield to the patrol, for "in some cases, of course, the other work should take precedence".

(d) Native Governmental Officials in Native Villages.

In addition to using its European officials, in both Territories, natives have been appointed to act as governmental officers in native villages. In Papua, these officials are known as Village Constables; in New Guinea as Paramount Luluais, Luluais (or Kukurais), ordinary Tultuls and Medical Tultuls.

All these native officials are appointed by the government and are representatives of the government. They are not appointed by the native village or tribe.

In New Guinea, none of the native officials, except Paramount Luluais (who received £3 per annum) is paid; but they are exempt from taxes. In Papua, Village Constables are paid for their services, and are also exempt from taxes.

Disobedience of the orders of a Tultul is not an offence; but disobedience of any lawful order of a Village Constable in Papua, or of a Luluai in the Mandated Territory, is an offence punishable by fine and/or imprisonment. Any unlawful exercise of authority by any of these native officials, is also an offence in each Territory, likewise punishable by fine and/or imprisonment.

In Papua, Village Constables are commanded to "deal justly and kindly with the people" and not oppress them, and to "obey the lawful orders" of the Government Secretary and Resident Magistrates.

In the Mandated Territory the Luluai (or Kukurai) is the senior native government official in a village, Tultuls being his assistants. The meanings of "Luluai" (or "Kukurai") and "Tultul" are, respectively, "chief" and "servant or messenger". A Paramount Luluai is a Luluai with jurisdiction over several villages situated in some specific part of a District. Tultuls of the following kinds

assist a Luluai (or Kukurai) in the performance of his duties:

(i) Tultuls

(ii) Medical Tultuls

(iii) Patrol Medical Tultuls

A medical Tultul must be selected, trained, and recommended by a medical officer or medical assistant before he becomes eligible for appointment. He is the medical orderly of the village and gives effect to all orders for the medical care and treatment of the natives. A Patrol Medical Tultul goes on patrol and gives medical care and treatment to the natives of villages visited by the patrol.

The 1921-22 Annual Report for the Territory of New Guinea summarised as follows the duties of a Luluai (or Kukurai):

"He acts as the representative of the Administration in his "village and sees that all orders and regulations are observed. "He is responsible for maintaining good order, and he reports "promptly to the Administration any breach of the peace or "irregularity that may occur".

A Luluai (or Kukurai) in New Guinea, and a Village Constable in Papua, has general responsibility for law-enforcement in his village. Amongst his particular powers are the following (the Territory or Territories being indicated in which each power is respectively conferred):

(i) He arrests offenders but must, without delay, take them for trial to the nearest Resident Magistrate (Papua) or District Officer (New Guinea).

(ii) He controls natives ordered by a Resident Magistrate (Papua) or a District Officer (New Guinea) to construct or repair certain roads or to burn noxious weeds

(iii) In New Guinea, he assists in taking the village census, for which he possesses all the necessary powers; and reports births and deaths.

(iv) In Papua he enforces orders given by a Resident Magistrate for the planting of useful trees, e.g. cocoanuts

(v) In New Guinea, he enforces orders of medical officers and medical assistants for drainage and filling, to eliminate mosquito-breeding water (Papua has a much more narrow provision)

(vi) In Papua he selects men as carriers for compulsory service with the government

(vii) Natives are required to make reports to him if they -

(a) are suffering from venereal disease (New Guinea)

(b) find lost property (both Territories), or

(c) kill trespassing pigs (New Guinea)

(viii) He can give orders to natives (disobedience of such orders consituting an offence) commanding them to:-

(a) keep the village, and their houses in it, clean and sanitary (New Guinea)

(b) remove inflammable material from the village (both Territories)

(c) segregate sick persons (both Territories)

(d) clear a space around the village (Papua)

(e) protect springs and wells of drinking water and render them accessible (Papua)(New Guinea had a more general provision re water-supply )

(f) assemble for medical examination, and, if necessary, order to hospital for treatment (New Guinea).

In neither Territory does any Ordinance confer on a Luluai or Village Constable any judicial functions.

(e) Native Representatives of Natives.

There has grown up in both Territories the beginnings of "indirect rule". This has taken the form of the selection by villagers of Native Councillors for their village. These Native Councillors are, in each Territory, selected by the villagers, not appointed by the Government. Their functions and status have not,

however, been laid down in any Ordinance in either Territory; and the actual working of Native Councils depends upon local conditions in each locality.

In circulars which the former Lieutenant-Governor of Papua issued on 21st July, 1926, 29th April and 11th July, 1929, he explained the manner of selection and the functions of Native Councillors in Papua. He pointed out that Native Councillors were not Assistant Village Constables. - "The Councillors are not officials, the Village Constables are". - He went on to say.

"Natives may choose their own method of appointing Councillors, "and if they elect to choose them by popular vote they should be "allowed to do so. But this method (which perhaps is quite "foreign to native ideas) should not be forced upon them or even "recommended. They should be allowed perfect freedom and, if "they prefer, for instance, to leave the selection to the older "men, they should be permitted to do so."

"Village Councillors will be found most useful (i) in enabling "officers to keep in touch with native opinion and (ii) as "serving as a channel by which officers may explain the policy "of the Government."

"The Councillors represent the village people, and as such "representatives it is their duty to bring before the Government "any matter that may occur to them which will be for the "advantage either of their village in particular or of the native "population in general. For instance the Port Moresby Council-"lors recently suggested that notices should be issued in the "Motu language explaining to natives the advantages of banking "their money, instead of wasting it in gambling or in useless "purchases, and such notices are now being issued. And there "are numerous matters connected with each particular village in "which suggestions may be invited, e.g., the improvement of "garden lands, the utilization of modern implements for gardening

"fishing, etc., water supply, and the ever-present question
"of pigs ...... One of the greatest difficulties of administrat-
"ion is that, while we really know but little about the natives,
"they know very much less about us. And the Councillors may be
"of assistance in removing or minimizing this difficulty, for
"the officer can explain to them, and they can pass on to the
"rest of the village, the salient principles of our adminis-
"tration."
"Thus he can explain to Councillors, and they can tell the others
"that the tax does not go into the pocket of the tax-collector
"but that it is used to build hospitals, to equip schools, to
"provide for the travelling medical assistants and so forth.
"And so with other Government activities. And in this way
"we hope to make them realise that we do not make them build
"roads and carry heavy burdens for our own amusement, but that
"there is really some reason for it all; and that, in nine
"cases out of ten, what we are doing is solely for their benefit.
"Administration will be much easier and will go much more
"smoothly if we can get the natives in general to see what the
"most intelligent of them see already, that we are really
"doing all we can to help them".

Captain W.R. Humphries in 1944 said of the Papuan system:
"Years ago Village Councillors were appointed more or less as
"an experiment, but the experiment succeeded and Councillors
"have come to stay. Their value depends very largely on the
"attitude of the Magistrate of the District. If he is sympath-
"etic the Councillors feel encouraged and can render good
"service; if he is not, they will lose heart and become simply
"a drag upon the progress of the village".

In New Guinea, Native Councillors have been appointed in certain areas. The 1926-27 Annual Report reported as follows concerning the functioning of Native Councils in the Morobe District:

"There are no hereditary chiefs or highly developed native "organisations in the Territory such as are found in many other "native countries. In a portion of the Morobe District, the "natives have evolved with the assistance of the missions a "system of village administration which is reported to be "operating fairly satisfactorily. In this area, each village "has appointed what might be termed a "village council", which "controls, or adjudicates in matters relating to the affairs of "the village. From these village councils a higher council "is elected which adjudicates in matters of importance in the "area ...... These areas constitute a very small portion of the "Territory."

In the Rabaul area in New Britain, there has been established a Kivung, or Council of Luluais which advises the government on local policy in native affairs. They even hear disputes between natives, but do not imprison; but their powers in such cases are not derived from any Ordinance. Their quasi-judicial work was assessed as follows by Major N. Penglase in 1944:

"As an experiment, a system of native courts was introduced in "the Sub-District of Rabaul, Administrative District of New "Britain, a few years ago. These courts had no jurisdiction "under the laws of the Territory; but under supervision they "dealt with minor civil complaints. There were no legal "provisions for the enforcement of decisions and where the "court could not agree on the matter under dispute it was "referred to the Court of Native Affairs. In cases where "supervision was not possible by a Field Staff Officer the "decisions of the court were registered in a book which was "presented for inspection to the next visiting officer".

The policy of the present Australian Commonwealth Government is to extend and strengthen the system of Village Councils., and to establish Village Courts with natives as judges wherever practicable.

CONFIDENTIAL

## THE STATUS AND FUNCTIONS OF ADMINISTRATOR IN AUSTRALIAN TERRITORIES; AND RELATED MATTERS.

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- VI. The Administrator's functions and authority in relation to institutions and officers in his Territory; and the calibre of the main officers of his Territory Administration.

E. The Title of the Office of Administrator, the Style of addressing its occupant, and other courtesies due to him.

- I. Title of the Office.
  1. Historical Introduction as to British and other practice.
  2. Administrator.
  3. Governor.
  4. Lieutenant-Governor.
  5. High Commissioner.
  6. Resident Commissioner.
- II. Style of Address.
- III. Salutes and other ceremonial marks of respect (together with an Appendix).

F. Precedence of the higher officers (including Administrators).

- I. Table of Precedence for use for official purposes in each Territory in respect of the legislators, senior administrative and judicial officials of that Territory, and officers of the Armed Services stationed therein.
- II. Precedence as between Officers holding appointments in different Territories.


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31.10.1951.

OPINION BY DR. T. P. FRY AS TO THE STATUS AND FUNCTIONS OF ADMINISTRATOR IN AUSTRALIAN TERRITORIES, AND RELATED MATTERS.

(A). QUESTIONS REFERRED FOR OPINION.

1. I have been requested by the Parliamentary Under-Secretary for Territories, Mr. J.B. Howse, to furnish for consideration by the Minister for Territories an Opinion concerning the following matters:-

(i) The status of the office of Administrator in the Territory of Papua and New Guinea, the Northern Territory of Australia, the Territory of Norfolk Island and the Territory of the Island of Nauru as that status is defined in statutes relating to those Territories (Mr. Howse suggested that some consideration might be given also to the British practice and other relevant considerations).

(ii) The functions of the Administrator in each of these Territories.

(iii) The title of the office, the style of addressing its occupant and other courtesies due to the Administrators of each of these Territories.

(iv) The question of precedence in respect of the principal Administration officers (including the Administrators) of these Territories, with special reference to the following matters :-

(a) The nature and contents of a Table to prescribe precedence as between the senior administrative and judicial officials in each of these four Territories separately, for use for official purposes within each; and

(b) The order of precedence, applicable outside their Territories, as between corresponding officers serving in different Territories (The need for determining precedence as between them having particular importance in view of the forthcoming Royal Visit).

2. When determining some of the above matters, significance — on some points almost decisive significance — should, I respectfully submit, be attributed to the constitutional international and political status of the Territories. I have included in my Opinion some discussion as to the status of these Territories; and as a consequence I have graded them into two classes as follows :-

Class I. -

The Northern Territory of Australia; and
The Territory of Papua and New Guinea.

Class II. -

The Territory of Norfolk Island; and
The Territory of Nauru Island.

(B). STATUS OF THE OFFICE OF ADMINISTRATOR.

3. The status of the Administrator of an Australian Territory is not expressly prescribed in, and cannot be deduced from, Commonwealth statutes relating to those Territories with the same certainty as the status of Governors, High Commissioners and the like can be deduced from the Colonial Regulations which govern His Majesty's British Colonial Service; and the Commonwealth Constitution gives no explicit assistance.

4. In due course there should be embodied in basic constitutional instruments relating to the Territories unequivocal rules to determine such matters as the status of the Australian Commonwealth Government's principal administrative representative in each, the courtesies appropriate to his office, the constitutional rules which determine his legal and ceremonial relationships to other officers and institutions in his Territory, and those other constitutional rules which determine his legal relationship with the Australian Commonwealth Government itself.

5. Commonwealth and Territorial legislation entrust to the Administrator in each Territory quite a number of detailed powers and functions, but most of these detailed powers and functions are not in themselves determinative of the precise status of the office of Administrator and do not prescribe the ceremonial honours and courtesies to be afforded to him.

6. The political decisions as to what the status of the Territory and of its Administrator is to be will eventually be decisive as to all important constitutional and legal factors, and your request for information concerning the questions referred to me indicates in itself a possibility

that there may be made by the Commonwealth at your instance those political decisions which in due course will result in legislation designed to embody those decisions.

7. I think it might even now be right to say that the status of the Office of Administrator is of a higher kind and more honorific in nature if -

(i) The Territory is intrinsically an important one constitutionally, internationally and politically;

(ii) The Australian Commonwealth Government in its laws and in all its actions treats the incumbent (and makes it plain to all that it does so treat him) as being an officer of high status and its main agent in the Territory, and as being within the Territory the single and supreme authority responsible to, and representative of, the Australian Commonwealth Government;

(iii) The Administrator is placed at the head of a Territorial Administration in which the principal departmental heads are expert and experienced officers who are willing to accept responsibility and capable of discharging it with credit, with the result that the Administrator is freed to devote himself to matters of policy and to details of real importance instead of becoming bogged down in details of routine administration which properly should devolve upon competent departmental officers.

8. Later on in this Opinion I discuss the constitutional, international and political status of these Territories; and also the constitutional relationships of Administrator to Commonwealth Government and of Administrator to the Territorial Administration.

9. In accordance with the British pattern the Territories can be classified into two classes, each containing two Territories -- the two larger and more important Territories being in Class I.

10. Inherent in the problem of the constitutional relationships of Administrator to the Commonwealth Government are *inter alia* the following factors :-

(i) The extent to which the Administrator -

(a) not only is the Commonwealth Government's main agent within the Territory and, as such, the supreme authority in it responsible for its good governance to, and representative therein of, the Commonwealth Government;

(b) but is also accorded by the Commonwealth Government a title, a style of address, rights, privileges and courtesies, fully appropriate to the functions he performs as its main agent and supreme representative in the Territory.

(ii) The nature and extent of the delegated and devolved powers which the Administrator is permitted to exercise in pursuance of rules stated in legislation, or in any instruments (such as a Charter of Delegated Powers) which the Governor-General may issue to him;

(iii) The consequential title, style, rights, privileges and courtesies which the Australian Commonwealth Government decides are to be accorded to the Administrator.

11. Inherent in the problem of the constitutional relationships of Administrator to his Territory, that is to say, the legal relations existing inside the Territory between the Administrator on the one hand and the officers and institutions of the Territory Administration on the other, are _inter alia_ the following factors :-

(i) The extent to which departmental heads within the Territory's Administration are because of their experience and basic qualifications fully competent to perform their several functions and leave the Administrator free to perform his own, higher, functions; and

(ii) The extent to which the Administrator is assisted in the work of government by mature institutions, such as a legislature which is either wholly or partly representative in nature, and possesses legislative power of considerable extent.

12. The various points suggested above (and in many instances discussed later on in this Opinion) are in my view, although not exhaustive or conclusive of the question, important ingredients in any legal or policy determination of what is or might appropriately be the status of the Office of Administrator in Australian Territories.

13. Apart from these matters, and legal details of a comparable kind, it is difficult in the absence of express Australian legal provisions as to the precise status to be accorded to the Administrator to say exactly what his _status_ is. From a policy point of view the most useful point at which to commence an investigation is the status, precedence and courtesies prescribed by law in respect of the Governors

and High Commissioners of British dependencies.

14. The British Colonial Regulations class all Governors and High Commissioners of its dependencies as equal in status, except to the extent that they are differentiated amongst themselves by reference to the class into which falls the dependency which each governs, and by the difference in precedence and the consequential slight differences in courtesies (Of course, there are certain differences in the prerogative powers of a constitutional kind, and also in the personal rights and liabilities of a legal nature, of British Governors who are Viceroys and those who are not; but these latter differences do not appear greatly significant for your purposes, certainly not at this stage of inquiry into the matters you referred for opinion).

15. It is difficult, as at present advised, to see why the principal officer whom the Australian Commonwealth has appointed to administer its two most important Territories, which I suggest could appropriately be grouped as Territories Class I, should not have the status and perhaps also the title but at any rate the style of address and the rights privileges and courtesies appertaining, in British dependencies of similar importance, to the British Governor or High Commissioner. Later on I also discuss briefly the two Territories I have grouped as Territories Class II, and suggest that in each of these two smaller and less important Territories the Administrator might be accorded a status, title, style of address, rights, privileges and courtesies appertaining to the Resident Commissioners in the British Solomon Islands Protectorate and the Gilbert and Ellice Islands Colony (each of whom are lower in status than, and are comprised within the Territorial jurisdiction of, the British High Commissioner for the Western Pacific).

16. The decision as to status is, I respectfully suggest, not a legal decision for lawyers (whether myself or any other), but a decision of high policy which it is the Minister's

privilege to make. When made, and endorsed by the Federal Executive Council, it will then be the responsibility of legislative draftsmen to embody in law (either by amendment of existing laws or by the enactment of new laws) the consequential rules necessary to give legal substance to the policy decisions as to status.

17. The real choice of policy is best revealed, I think, by a study of the history and legal structure of the British Colonial Empire and by the application to Australian conditions of the results of that study.

18. If at this initial stage of your tenure of office you decide to adhere in a general way to the British pattern in respect of Governors of Colonies (at least in respect of Australia's two main Territories), or, if on the other hand you decide to depart from that pattern and weave one of your own, you should, I suggest, arrange to have embodied in law the rules that will be consequential upon your main policy decision. You may possibly decide to pilot through the Parliament an Australian Territories Bill. At any rate, your policy decisions as to the status of Administrators and related matters should eventually prove to be determinative of all incidental legislation. Sooner or later existing law will need to be either amended or supplemented in order to embody, or conform to, those decisions.

19. Now that there is a Minister for Territories and a Department of Territories it would not be inappropriate were matters comparable to those embodied in the British Colonial Regulations (including matters you have referred to me for opinion) embodied in future in Australian Territorial Regulations. These might perhaps be made under a general Australian Territories Act if such a statute were to be passed by the Parliament. This statute might confer power on the Federal Executive Council to make regulations for the purpose I have suggested, and for other purposes to be named therein (as to which I would have some suggestions were

I asked). This statute might also include, if so desired, provisions designed to establish an Australian Territorial Service, perhaps one possessing "unified branches" similar to those of the British Colonial Service.

20. Decisions of high policy in respect of status and other, collateral, questions are a primary requisite, but new legislation of some kind or other is most desirable as soon as those decisions have been made.

## (C). THE CONSTITUTIONAL, INTERNATIONAL AND POLITICAL STATUS OF EACH TERRITORY.

### I. Their several relationships to the Australian Commonwealth and the United Nations.

21. I am asked for an Opinion concerning four Territories, and in this connexion I think it may be of value to classify them, firstly by reference to their respective relationships to the Australian Commonwealth (and, wherever appropriate, to the United Nations), and secondly by reference to the basic characteristics of the form of government enjoyed by each.

22. Their several relationships to the Commonwealth and the United Nations are shown in the following Table :-

| | | |
|---|---|---|
| (i) Territory of Papua and New Guinea. | The Territory of Papua (a Possession of the Commonwealth in the right of His Britannic Majesty) is jointly governed in Administrative Union with the Trust Territory of New Guinea, a Trust Territory responsibility for the administration of which has been granted to His Majesty's Australian Government by the United Nations. | Section 12A of the Papua and New Guinea Act 1949-1950 declares the combined Territory to be a Territory of the Commonwealth "which does not form part of the Commonwealth". |
| (ii) The Northern Territory of Australia. | A Possession of the Commonwealth in the right of His Britannic Majesty. | A Territory of the Commonwealth which forms part of "the Commonwealth". |
| (iii) The Territory of Norfolk Island. | A Possession of the Commonwealth in the right of His Britannic Majesty. | A Territory of the Commonwealth, sed quaere whether it forms part of "the Commonwealth". |
| (iv) The Trust Territory of Nauru Island. | A Trust Territory the administration of which is entrusted to His Britannic Majesty, on whose behalf it is jointly controlled as a condominium by the United Kingdom, Australia and New Zealand, and is administered by them subject to (a) the Trusteeship Agreement, and (b) a Joint Agreement by which the three Contracting Governments have prescribed the role of each in the actual administration of the Island. | Not a Territory of the Commonwealth in the sense of being a Possession, although at present it is possibly a Territory temporarily and partly under the control or authority of the Commonwealth. It is a Trust Territory in respect of which the Commonwealth exercises certain powers and functions, some of them jointly with Great Britain and New Zealand. |

23. In view of the analysis made above, the four Territories may be classified as follows with respect to their relationships to the Commonwealth and the United Nations :-

(1) Possessions of the Commonwealth of Australia -

<u>The Northern Territory of Australia</u>;
<u>The Territory of Papua</u> (now in Administrative Union with a Trusteeship Territory); and
<u>The Territory of Norfolk Island</u>.

(2) An Administrative Union of a Possession and a Trust Territory -

<u>The Territory of Papua and New Guinea</u>.

(3) Trust Territories -

<u>The Trust Territory of New Guinea</u>.
<u>The Trust Territory of Nauru Island</u>.

24. The two Trust Territories are New Guinea and Nauru.

25. Administration of the Trust Territory of New Guinea has been entrusted to the Australian Commonwealth, which governs it in Administrative Union with one of its own Possessions, the Territory of Papua.

26. Administration of the Trust Territory of Nauru Island has been entrusted to His Britannic Majesty, who has arranged for its administration as a Trusteeship Condominium under the United Kingdom, Australia and New Zealand in pursuance of an Agreement made between the three of them in that behalf, and subject to the terms of the relevant Trusteeship Agreement. Under this Agreement the Australian Commonwealth is at present entrusted with special administrative functions, but merely because the present Administrator was appointed by it. Australia temporarily enjoys, in respect of its laws and administration, a special position for so long as the three Contracting Governments continue to agree that Australia is to appoint its Administrator.

27. Nauru Island is a Trust Territory held by His Britannic Majesty under a Trusteeship Agreement; and is not a Territory of the Commonwealth, although it is one that is, at least partly, under the control of the Commonwealth. The manner

of its administration is determined by the Agreement between the Governments of Australia, New Zealand and the United Kingdom, each of which is called a Contracting Government. Although this Agreement dated 2 July 1919 (as amended by an Agreement dated 30 May 1923) is mainly a commercial agreement between the Contracting Governments, establishing a phosphate condominium between them in respect of the Island, it is also its constitution. As such it determines by whom its actual administration is to be carried out, its laws enacted, its public finances provided and its phosphate deposits worked. One of the three Contracting Governments, to be mutually agreed upon from time to time amongst themselves, is to appoint an Administrator in whom vests the administration of the Island. He is advised by an Advisory Council of Nauruans and also by a Representative of the Chinese residents. Australia is the Contracting Government which happens, by mutual consent, to have appointed the present Administrator as well as his predecessors. So long as this practice continues, Ordinances made by him will require confirmation by the Governor-General of the Commonwealth. Under the Agreement, however, "title" to the Island's phosphate products vests in a Board of three Commissioners, of whom each of the three Contracting Governments appoints one.

28. The ~~xxx~~ three Possessions are the Northern Territory, Papua and Norfolk Island.

29. The official opinion of the Attorney-General's Department is, I think, that Papua is "not part of the Commonwealth", a view expressed recently in Section 12A of the Papua and New Guinea Act 1949-1950; and its view is, I think, that the Northern Territory of Australia is "part of the Commonwealth". I am unaware of whether in that Department's view Norfolk Island is, or is not, "a part of the Commonwealth"; but its view would be that Nauru Island is not "a part" thereof.

30. Whether a Territory of the Commonwealth does or does

not form part of the Commonwealth within the meaning of that term as used in the Australian Commonwealth Constitution depends upon criteria which have not yet been finally determined by the High Court. Although I have not seen that Department's files, I believe the official view of the Commonwealth Attorney-General's Department, first formed in the days of Sir Robert Garran, is that for this purpose "Commonwealth" is to all intents and purposes coincident <u>either</u> with the "Australian mainland" <u>or</u> with territory within the boundaries, and in full ownership, of the six Colonies at the date of Federation. These views are not necessarily the views which the High Court will ultimately decide are legally correct, but they have been acted upon by the Parliament and thus embodied in Commonwealth legislation. As a constitutional question is involved the matter cannot be finally concluded by legislative provisions, as they may not succeed in surmounting a challenge on constitutional grounds when and if it comes. Although the consequences of the legal accuracy or inaccuracy of a legal theory as to the point may ultimately prove of significance in the law of the Territories, this is at present realised by few lawyers.

31. When Section 12A of the <u>Papua and New Guinea Act</u> 1949-1950 declared that the Territory of Papua and New Guinea, although a Territory of the Commonwealth, does not form part of the Commonwealth, the draftsman might also have intended to imply that part of it was not a Possession but was merely a Trust Territory, but, if so, it would seem to have added nothing to the meaning of other sections of that Act.

<u>II. Basic characteristics of internal government in each Territory</u>.

32. The four Territories may also be classified as follows with respect to the basic characteristics of the form of internal government enjoyed by each -

(A) Territories possessing a Legislative Council consisting partly of elected and nominated members and partly

of official members, of which the official members are in the majority -

(i) Those represented in the Australian Commonwealth Parliament -

The Northern Territory of Australia; and

(ii) Those not represented in the Australian Commonwealth Parliament -

The Territory of Papua and New Guinea.

(B) Territories without a Legislative Council, but possessing an Advisory Council -

The Territory of Norfolk Island; and

The Territory of Nauru Island (See as to the Advisory Council, Sir Robert Garran in 9. A.L.J. Supplement at p.40).

III. Suggested classification of Australian Territories into two Classes.

33. In view of the analysis set out in the foregoing paragraphs, I suggest, for your consideration, that the Territories themselves, and consequently the officers appointed to administer their respective governments, might reasonably be graded as follows :-

Class I. -

The Northern Territory of Australia; and
The Territory of Papua and New Guinea.

Class II. -

The Territory of Norfolk Island; and
The Trust Territory of Nauru Island.

(D). THE FUNCTIONS, POWERS AND DUTIES OF THE ADMINISTRATORS.

I. Introduction.

34. I have assumed that you do not desire, in response to your request for information as to the functions of the Administrator in these four Territories, a long detailed catalogue of their functions; and that you desire, rather, some account of those of their functions that are particularly relevant to their status.

35. In the Territories the Administrator must necessarily exercise his powers and perform his functions and duties to a considerable extent through his subordinates or on their

advice, or in consultation with and with the collaboration of groups of his own officers gathered together, either with or without non-official persons, in Legislative Councils, Executive Councils or Advisory Councils.

36. The more formal elements of control over the Administrator derive from: (a) the legal rules which are embodied in the bodies of law and because of their existence establish, maintain and curb the government of the Territory; and (b) the policies which the Australian Commonwealth Government directs that he shall implement in relation to the Territory.

37. Functions (which normally are linked with powers and duties) may with reason be differentiated into those that are legislative, and those that are executive, in nature. Your interest in the latter type of functions relate, I would think, to the higher policy aspects of the matter rather than to the minutiae of it, and I have tried to limit myself therefore to the higher policy aspects of the executive functions of the Administrator. A selective approach has also been adopted in respect of the Administrator's legislative functions.

II. Legislative functions.

38. The principal legislative functions in which, in the Territory of Papua and New Guinea and the Northern Territory, the Administrator will participate are those that it is proposed are to be vested, or that are now vested, in the local Legislative Council. He therefore has to make his most significant legislative contribution as chairman and leader of heterogeneous groups therein - official and non-official, elected and non-elected, and, in Papua and New Guinea, native and European; the official members being in a majority. The Administrator has in reserve the power of refusing assent to legislation passed by a majority of his Legislative Council, or of reserving it for the Governor-General's assent. Even if he assents, the Governor-General may disallow the legislation.

39. Many an Ordinance confers subordinate legislative

powers -- to make Regulations, Orders, Proclamations and the like -- upon either the Administrator in Council, or the Administrator only. If these subordinate legislative powers are conferred upon the Administrator in Council the Administrator must consult his Executive Council, but usually (e.g. in the Territory of Papua and New Guinea) the Administrator can enact subordinate legislation against their advice.

40. The best short study of the functions of a Governor (or Administrator) in a Legislative Council or Executive Council within a Dependency is to be found in Wight's Evolution of the Legislative Council, a small but enlightening monograph.

41. In relation to Norfolk Island, legislative power resides in the Governor-General in Council of the Australian Commonwealth, subject to a provision that an Ordinance which is proposed shall - unless for some special reason this procedure is dispensed with - lie for at least 30 days before the Island's Advisory Council, which may within that period make written suggestions to the Administrator concerning it; and the Administrator also may add his own observations, and then forward to the Minister his observations as well as its suggestions. The Governor-General in Council, after considering these observations and suggestions, may "make" the Ordinance either in its original form or in an amended form.

42. Various Ordinances of Norfolk Island have conferred upon the Minister, and less frequently on its Administrator, power to enact subordinate legislation, such as Regulations. Local Ordinances variously provide that these subordinate enactments if made by the Administrator are usually subject to disallowance by the Governor-General in Council, or by one or both Houses of the Australian Commonwealth Parliament, or either; and, if made by the Minister, by one or both Houses of the Australian Commonwealth Parliament.

43. In relation to Nauru Island legislative power is vested

in the Administrator. He presumably exercises it in consultation with the Board of Commissioners, the Nauruans' Advisory Council and the Chinese Representative, at his discretion. His legislation when made is subject to confirmation or disallowance by the Governor-General in Council of the Australian Commonwealth. It is important to notice also that he is under a duty (which necessarily must extend to matters of legislation) to conform to such instructions as he may receive from time to time from the Australian Commonwealth Government, and also to that control of government revenue and control of the phosphate deposits which vests in the Board of three Commissioners appointed by the three Contracting Governments. Legislative powers cannot long be exercised in any manner to which these financial and commercial controls are hostile.

44. Power to enact subordinate legislation such as Regulations has been conferred in various Ordinances of Nauru Island upon the Administrator, but the structure of the government on this Island makes differentiation between Ordinances and subordinate legislation to a considerable extent unsubstantial in nature.

III. The Administrator's duty to administer the Territory "on behalf of" the Commonwealth.

45. The first step in ascertaining the legal status of the Administrators in the Australian Territories in respect of their respective executive functions therein is to note the position in which they stand in relation to the Australian Commonwealth Government, and a brief conspectus of this matter follows :

(i) Section 3 of the Papua and New Guinea Act 1949-1950 prescribes that the Administrator of Papua and New Guinea "shall be charged on behalf of the Commonwealth with the duty of administrating the Government of the Territory of Papua and New Guinea." Section 5 prescribes that the Administrator's Commission and such Instructions as are given him by the Governor-General in Council are to be observed by him in the exercise and performance by him of the powers and functions that belong to his office.

(ii) The Northern Territory (Administration) Act 1910-1947 which provides for the administration of that Territory as a Territory of the Commonwealth indicates likewise that the Administrator, in the exercise of his powers and functions, must conform to his Commission and to such Instructions as may be given him by the Minister.

(iii) In pursuance of the Norfolk Island Act 1913-1935 Norfolk Island was accepted by the Commonwealth as a Territory of the Commonwealth. The Administration Ordinance 1936 provided for the appointment by the Governor-General in Council of an Administrator of the Territory and placed the Administrator under a duty to exercise a general supervision over the Territory's affairs, subject to a requirement that he is to "carry out any instructions given to him by the Governor-General in Council".

(iv) The Trust Territory of Nauru Island is at the present time administered by an Administrator appointed by the Australian Commonwealth, as a condominium controlled jointly by Great Britain, Australia and New Zealand in the terms of an Agreement made between their respective Governments. Commercial exploitation of the phosphate deposits is the principal concern of the Island's population, and all these commercial matters are determined jointly by the three Contracting Governments by means of a Board of Commissioners of three members, one being appointed by each Government and holding office during the pleasure of the Government by which he is appointed. There is an Administrator who, in his administration of the Island -

(a) is under a duty to conform to such instructions as he shall from time to time receive from the Contracting Government by which he is appointed (i.e., at present, the Australian Commonwealth Government), and to supply to the three Contracting Governments such information concerning Island administration as any one of them may require;

(b) is subject to that commercial control over the Island's wealth which is exercisable by the Board of Commissioners in pursuance of the Agreement;

(c) makes Ordinances for the Island subject, so long as he is appointed by the Australian Commonwealth, to confirmation or disallowance of them by the Australian Governor-General in Council.

The Australian Commonwealth Government's relation to the Trust Territory of Nauru Island is not entirely unlike the relation of the Colony of Queensland to the Crown Colony of British New Guinea before the latter became a Territory of the Australian Commonwealth under the name of Papua; except that in addition to the Commonwealth's duty under the Tripartite Agreement to administer Nauru Island in accordance with policies mutually acceptable to other Governments

of the British Commonwealth of Nations (just as Queensland previously had to do), the Commonwealth is under the additional duty, that of conforming to the Trusteeship Agreement.

IV. Instructions from the Commonwealth.

46. One feature common to these four Territories is that the Administrator of each of them has been placed under a duty, in the exercise and performance of the powers and functions that belong to his office, to conform to such instructions as are given to him by the Australian Commonwealth Government.

47. These instructions to the Administrator in either Papua and New Guinea or in Norfolk Island are to be issued by the Governor-General acting on the advice of the Federal Executive Council; whereas instructions to the Administrator of the Northern Territory are to be issued by the Minister, and need not be issued by the Governor-General in Council.

48. As it is sufficient that, in general, instructions to the Administrator of Nauru Island be issued by "the Government of the Commonwealth of Australia" it would probably meet legal requirements were those instructions, except those with respect to the confirmation or disallowance of Ordinances, issued by the Minister; but confirmation, or disallowance, of the Administrator's Ordinances requires action by the Federal Executive Council.

49. This analysis as to the formalities requisite in the issue of instructions would seem to indicate that some examination is appropriate as to the general, and also the particular, nature of the instructions which are envisaged in Australian legislation. Australian legislation would seem to require, probably unintentionally, greater formality in the issue of the greater proportion of these instructions than is required by British practice; whereas actual Australian practice seems for the most part not to be sanctioned by a strict application of the legal rules applicable.

50. The British practice is, and was, to issue not only a Royal Commission appointing the Governor but also Standing

Instructions of a general nature. These Instructions are, and were, issued under the Royal Sign Manual and Signet. These Royal Instructions embody many matters which, in respect of the various Australian Territories are embodied in Commonwealth legislation or in local Ordinances; but there are matters which either are not, or are not adequately, provided for in Commonwealth legislation (e.g. the channel of communication to the Crown, rules as to precedence, annual publication of enactments, exercise of the power of pardon). There is no adequate reason why the Commonwealth should much longer continue to avoid policy decisions on matters of the kind embodied by the United Kingdom Government in (1) Royal Instructions issued in relation to particular dependent territories, and (2) Colonial Regulations for general application to all dependent territories. As soon as those decisions are made they could, and probably should, be embodied in Standing Instructions addressed to the Administrator of each particular Territory, and in Territorial Regulations of a general nature for application to all Australian Territories, as may be appropriate in each case. The Standing Instructions would normally accompany the Commission appointing the Administrator to his office.

51. The existence of these formal Instructions would not absolve an Administrator from compliance with particular instructions, even if informal in nature, received from the Minister for Territories. However, it would be very desirable to make this point clear by inserting in due course in relevant Commonwealth legislation a formula, similar to that usually employed by Great Britain, enjoining the Administrator (by whatever name his office may be called) to exercise all things that belong to his office according to the tenor of his Commission of appointment, the laws which created his office, the Standing Instructions issued to him by the Governor-General (whether embodied in Orders made in the Federal Executive Council or in orders issued by the Minister for Terri-

tories) and such laws as may be in force in or in relation to the Territory from time to time.

52. Even when exercising powers and performing functions vested by local legislation in the Administrator of a dependent Territory, the Administrator is constitutionally not free to exercise and perform them in a way contrary to instructions received from the Australian Commonwealth Government. In Volume I of his 1929 edition of "Responsible Government in the Dominions", Sir Arthur Berriedale Keith (at p.81) points out that the Governor of a Crown Colony is merely an instrument to exercise powers which the Crown cannot, by reason of space, perform in person and he cannot claim to act against the express wishes of him whom he represents. The position of an Administrator in an Australian Territory is similar.

53. Of course, he may find himself in a minority in his Executive Council or Legislative Council on some particular matter, in which case the policy decided upon by the Australian Commonwealth Government may have to be safeguarded either by his exercising such reserve powers as the Administrator may have (e.g. by refusing assent to an Ordinance or reserving it for the Governor-General's pleasure); or by acting contrary to the advice of his Executive Council, as he may do under Section 23 of the Papua and New Guinea Act 1949-1950, in respect to the Territory of Papua and New Guinea, or under comparable provisions elsewhere.

54. It should of course be borne in mind in this connexion, as in others, that despite any instruction or other consideration an Administrator, if he keeps within the law in his administration, will not be free to carry out those instructions etc. in any respect which offends against the law of the Territory, unless and until that law is amended or repealed.

V. The desirability of delegations by Canberra to the Administrator of local discretionary authority.

55. There were administrative techniques having a central-

ising tendency which, in the governance of dependencies, have perhaps been more noticeable in Canberra than in London. These centralizing administrative procedures at the centre of Commonwealth government on the mainland have done more, and are more likely to do more, to diminish the status of a Territory, and of the Administrator thereof, than the obligation which his appointment places upon him to undertake actively the advancement of, and to comply without question with, the general policies and occasional particular decisions of the Australian Commonwealth Government whose high agent he is.

56. This centralization may manifest itself to some extent in Commonwealth legislation, but its operation is much more insidious in the day-to-day operation of Commonwealth administration. The establishment of Legislative Councils in the Territories is, to some extent, a corrective and is centrifugal in its nature; but there is also required in the Commonwealth an administrative change of heart. This may, perhaps, be best demonstrated and implemented by -

(1) replacing, to as great an extent as possible, ad hoc detailed policy decisions (now evolved by multitudinous correspondence, inevitably accompanied by much delay, misunderstanding and frustration) by general rules embodied in general legislative instruments or instructions, such as -

(i) Australian Territories Regulations applicable generally to Australian Territories;

(ii) Instruments of the following kinds issued by the Governor-General to the officer administering the government of each particular Australian Territory -

(a) Standing Instructions in their character similar to the Royal Instructions issued to British Colonial Governors; and

(b) A Charter of Delegated Powers in the exercise of which the Administrator could act on his own responsibility, without reference to Canberra, provided that he conformed to such express instructions as to policy that he might receive from the Governor-General or the Minister. These Charters of Delegated Powers might be either particular, or general, in their application. In the event of their being of general application, they could form

part of the Australian Territories Regulations. (During the second World War Charters of Delegated Powers were issued by the Governor-General to the G.O.C. of the A.I.F. (Middle East) and the A.I.F. (Malaya); and, at a later stage, by the Commander-in-Chief of the A.M.F. to the G.O.C.'s of his two armies and his three Army Corps. Provided that there were in office Administrators who, like those G.O.C.'s, were able, and willing, to accept responsibility to implement over-riding policies in the light of local circumstances, much might be accomplished by these devices, provided that other Commonwealth Departments (and not only the Department of Territories) were to respect the spirit in which these Delegations were given).

(2) creating, either under a separate Division of the Commonwealth Public Service Act or under a separate Commonwealth Territories Public Service Act, an Australian Territorial Service similar to the British Colonial Service and having, like the latter, "unified Branches" such as those for administrative, medical, forestry or legal officers, and the like.

## VI. The Administrator's functions and authority in relation to institutions and officers in his Territory; and the calibre of the main officers of his Territory Administration.

57. The authority which the Administrator in an Australian Territory exercises over his subordinate officers is not supported by the existence of any enactment such as Reg. 105 of the British Colonial Regulations, which specifies that in a British Colony "the Governor is the single and supreme authority responsible to, and representative of, His Majesty. He is by virtue of his Commission and the Letters Patent or Order in Council constituting his office, entitled to the obedience, aid, and assistance of all military, air force, and civil officers". If a subordinate officer keeps within the letter of the Public Service Ordinance and other laws of the Territory of Papua and New Guinea or other Australian Territory it might be difficult for an Administrator of that Territory to enforce policy directions issued by him to that subordinate.

58. Apart from some general legal rule similar to Reg. 105 mentioned above, and indeed even should it be enacted, it is,

I suggest, desirable that the Australian Commonwealth Government should in all its actions treat its Administrator in all matters arising between him and any other officer in his Territory, however important be the latter (and make it plain to all that it does so treat the Administrator) as being in the Territory "the single and supreme authority responsible to, and representative of," the Australian Commonwealth Government.

59. If you consider that this principle is sound and therefore to prevail, you may think it desirable to determine whether there may exist in the present legal relations to Canberra and to the Administrator, respectively, of (a) the Public Service Commissioner of any Territory, and of (b) officers in the Territory of Commonwealth Departments performing their duties in the Territory for the particular Department and not responsible to the Administrator as part of his Administration, anything which in the future may call for variation.

60. The structure of the higher branches of the Public Service of a Territory, and the personal qualifications and administrative , technical or professional qualifications of the more senior officers of its Public Service, are matters which would seem to be not only in themselves important matters that merit your attention on the grounds of high policy for their own intrinsic importance. They would also seem to have importance in regard to the status and functions of the Commonwealth's principal administrative representative and agent in the Territory.

61. By whatever name the Commonwealth's principal representative therein is to be known (be it Administrator or not), he should be provided in his Territorial Administration with an adequate number of capable administrative, professional and technical staff of sufficient calibre and experience to enable him to concentrate upon matters of high policy, general executive supervision of Territory affairs, determinative participation in and control of the policy aspects of

the work of his Executive and Legislative Councils, the more significant of those of his social duties as are of a public nature, and such special problems as he may think sufficiently important to engage his personal attention.

62. This in its turn raises the question whether he should have as his chief aide some officer of high rank and mature administrative experience who would, although responsible to him as Administrator and to him alone, be of the calibre which in British Colonies is possessed by the Colonial Secretary, whose responsibility, experience and capacity is usually of sufficiently high a degree to ensure that in normal circumstances he will himself be appointed in due course as a Governor, usually in some other British Colony (the geographical translation ensuring that loyalty to the Governor he serves will march hand-in-hand with the efficiency with which he serves as Colonial Secretary).

63. Without pretending to have sound knowledge as to the qualifications and capacities of all Government Secretaries in Australian Territories in the past, my reading of history has gone far enough to lead me to think that their office has not always been filled by persons who in the British Colonial Service would be considered suitable for appointment as Colonial Secretary with a view to possible future advancement to office as a Colonial Governor.

64. In the circumstances it might well prove advisable to create in Australian Territories a new office, free from any doubtful historical associations that the office of Government Secretary may possess, with a status and salary which would result in men of calibre being attracted to the office; at first in open competition between those inside and those outside the Territory's Service, and later if possible from an Australian Territorial Service whose ranks have been recruited from first-class young graduates and others whose administrative and technical skills and experience give promise of rich fruition.

65. Were this policy to be followed, it would be not unwise to find a new name for the old kind of office to which you may decide to attach a new kind of status. If the principal officer is to continue to be called "Administrator", a suitable name for his chief aide might be "Assistant Administrator"; but if the principal officer be called, instead, either "Governor", "Lieutenant-Governor", "High Commissioner", or the like, a suitable name for his chief aide might well be — according to the name chosen for the principal — either "Lieutenant-Governor", "Administrator", "Assistant High Commissioner" or the like.

66. As an Assistant Administrator of high calibre and mature experience has already been appointed to the Territory of Papua and New Guinea, an initial step has been taken which could lead to the implementation of a new policy of internal administration in each Territory — or in each of the two main Territories, at least — such as that discussed in paragraphs 62 to 65 above.

67. Analogous to the question of how to attract to high office in Australian Territories persons with high administrative qualifications, is the task of attracting persons with high professional and technical qualifications.

68. The unwillingness of previous Governments to give higher status, salaries and responsibilities to its Administrators in the Territories has a parallel in regard to the learned justices of the Supreme Courts of Australian Territories, who continue to have withheld by the Commonwealth's Attorney-General's Department the titles of Chief Justice and Justice. The latter titles and styles of address are in accordance with those in Supreme Courts of similar jurisdiction. The reason for their being withheld in the Territories seems to be, so far as I understand it, that all judges of Federal Courts are to be known as Chief Judge or Judge. However, in a number of decisions the High Court of Australia has ruled that the Supreme Court of a Territory is

not a Federal Court.

69. There is also a parallel in the failure to follow British practice in naming the chief legal officer of a Territory as "Attorney-General" and his chief assistant as "Solicitor-General". "Crown Law Officer" sounds in professional ears an office of inferior status; and in addition rather lacks complete verbal purity in a Trust Territory, because of the retention of the word "Crown". The Australasian Colonies had Attorney-Generals and Solicitor-Generals even before they had Legislative Councils of a representative nature, and while their populations were quite small; and the Attorneys-General and Solicitors-General in Australia today derived their titles, historically, from those early colonial origins which in turn derived from the United Kingdom.

## (E). THE TITLE OF THE OFFICE OF ADMINISTRATOR, THE STYLE OF ADDRESSING ITS OCCUPANT, AND OTHER COURTESIES DUE TO HIM.

### I. Title of the Office.

#### 1. Historical introduction as to British and other practice.

70. The British practice is, in general, to appoint a Governor to administer the government in each British Colony; but whether the officer appointed is called Governor, Captain-General, High Commissioner or Commissioner-General, he is classified as a Governor in the British Colonial Regulations (R.102), and included in the List of Governors etc. (See 1950 Colonial Office List at pp.412-415).

71. The normal practice is to appoint a Governor to administer each British Colony, and this title is regarded by the Crown as appropriate whether the Colony has attained self-government as a Dominion or is still a fully dependent or semi-dependent Colony.

72. It is true that alternative terms have been, and still are, used by Great Britain.

73. For example, there is a High Commissioner for the Federation of Malaya (as, formerly, for the Malay States), also a

High Commissioner for the Western Pacific (exclusive of the Colony of Fiji).

74. The term Administrator, however, is not found in modern times in the British Empire as an alternative to the term Governor or High Commissioner. Although each of them is now governed by a Governor instead, formerly there was, however, an Administrator in British Honduras (1786-1884), Cyprus (1878-1898), Gambia (1843-1900), Northern Rhodesia (1911-1923) and Seychelles (1889-1899). Today the situation in the Windward Islands is that there is a Governor-in-Chief and, under him, an Administrator in charge of the government of each individual island.

75. It is unusual, but not unknown, for a Lieutenant-Governor, under that title, to be charged with the administration of a Government in a British country. If a Governor is not in office, it is usual to provide by law that his functions and powers are to be performed and exercised by an "Administrator", the term ordinarily used to describe an Acting Governor or Acting Governor-General. Lieutenant-Governors have, however, in the twentieth century for a period of some years in two instances in Australian States performed the functions of a Governor in the absence of the latter, e.g. in Western Australia, and Queensland; and whilst acting as Governors they have been entitled to use the style of "Excellency".

76. Dr. W. Macgregor, who was Administrator of British New Guinea (now Papua) from 1888 until 1896, became its Lieutenant-Governor on 6 June 1896. Sir Hubert Murray who at first was its Acting-Administrator later became Lieutenant-Governor of Papua and remained in that office until the Second World War; but, on his death, the Australian Commonwealth Parliament amended the Papua Act to provide for an Administrator of Papua instead of a Lieutenant-Governor. I have seen correspondence from the Governor-General dated in the 1930's protesting against use of the style of Excellency by the Lieutenant-Governor of Papua, but no immediate action seems to have been taken by the Commonwealth Government, and I am unaware of the location of

that correspondence. Furthermore, I find myself not convinced that the Australian Commonwealth, especially since the date of its adoption of the Statute of Westminster, is without the necessary constitutional power to appoint, if it so desires, a Lieutenant-Governor of its Territories (just as the Governor-General of Canada has the constitutional power to appoint Lieutenant-Governors of the Canadian Provinces (i.e. States)) and, by arrangement with His Majesty, to accord him the style of "Excellency", just as His Majesty seems to have accorded that style to Sir William Macgregor when he was Lieutenant-Governor of British New Guinea. The Canadian pattern seems not an unreasonable pattern to be adopted for Australian Territories, were His Majesty to assent to representations from the Australian Commonwealth Government in that behalf; as I should think He probably would.

77. A modern trend seems to be to create the office of High Commissioner, instead of Governor, in and over Trust Territories in the Pacific. Thus, I am informed by Mr. Maude of the South Pacific Research Council that U.S.A. has a High Commissioner for the Trust Territory of the Pacific Islands, and by Professor Davidson that New Zealand has altered to High Commissioner the title of its former Administrator of the Trust Territory of Western Samoa.

78. There would consequently appear to be available for consideration, on historical grounds, the following as titles of the highest office in a Territory :-

(i) Administrator;
(ii) Governor;
(iii) Lieutenant-Governor; and
(iv) High Commissioner (or Commissioner-General).

In regard to the smaller and less populous Australian Territories which I have put into Class II, there might also be considered the following title, although a number of small British, American and New Zealand dependencies nevertheless are and have been governed by Governors and High Commissioners :-

(v) Resident Commissioner.

79. Apart from terms that are rather outdated (e.g. Captain-General) or are probably locally inapposite (e.g. Commissioner), realistic possible alternatives to "Administrator" would appear to be limited to those listed above.

One of the titles listed in the last preceding paragraph could, if it were decided to employ it, be validly embodied in Commonwealth legislation and used in a Territory, after advice had been tendered by the Prime Minister to that effect to His Majesty.

80. Legislation would, however, be necessary to alter the title of the office from "Administrator" to the chosen alternative, and to prescribe matters relevant to the new title and status.

81. There may be grounds for distinguishing the status, privileges and courtesies appertaining to the officer administering the government of one of the two Territories classified by me in Class II, from those of the officer administering one of those classified by me in Class I. However, the comparative status of the Territory cannot be too minutely examined, because it is a basic fallacy of government, which the British usually have carefully avoided, to entrust a person with the highest local office, but fail to give him: (a) the actual support he needs to perform the duties of his office, or (b) in relation to his office the status and the outward symbols of status (such as rights, courtesies and privileges), which strengthen his position in his Territory as the occupant of the highest office in it.

2. Administrator.

82. The title of "Administrator" would appear, apart from current Australian Territorial practice, to have signified that the Administrator either -

(i) is temporarily acting for and vested with the powers and functions of a Governor-General, Governor or Lieutenant-Governor (where a Lieutenant-Governor himself administers a government by legal right as formerly in British New Guinea, later Australian Papua) during his absence from whatever cause;

(ii) governs a particular territorial unit which constitutes only part of a wider geographical territorial unit, the wider unit being under a Governor-General or a Governor (e.g. the Administrator of St. Lucia under the Governor of the Windward Islands Colony; or

(iii) a senior administrative official in a dependency but junior to the Governor-General, Governor, or High Commissioner thereof. This is an unusual but possible use of the term, and may be the correct interpretation to be given to the use of "Administrator" in (ii) above, in relation to the Windward Islands Colony.

83. In the second of the above three senses "Administrator" seems to correspond to "Lieutenant-Governor" as used in (a) the Provinces of Canada, (b) in Victoria for a brief period while it was part of N.S.W. just before its separation, and (c) in British New Guinea when its Lieutenant-Governor was in certain respects under the Governor and Government of Queensland, and in Australian Papua when its Lieutenant-Governor was under the Governor-General of the Australian Commonwealth.

3. Governor.

84. If the title "Governor" were used instead of "Administrator", as may well be considered appropriate, it should be arranged that his appointment be made by His Majesty on the advice of His Government in the Commonwealth of Australia; and, in consequence, the Governor of an Australian Territory would on this, as on other points, be in a different constitutional position than the Governor of an Australian State.

4. Lieutenant-Governor.

85. If the title "Lieutenant-Governor" were used instead of "Administrator", as was formerly done in Australian Papua, the same method of appointment should be followed as if his office were entitled that of "Governor". In consequence, the Lieutenant-Governor of an Australian Territory would be in a different constitutional position than either a Governor, or a Lieutenant-Governor, of an Australian State. (As a result of fortuitous personal knowledge of royal prerogative practice in this particular, acquired by me as an honorary A.D.C. to His Excellency the Governor of Queensland before

World War II), I respectfully suggest, despite certain official pre-war Commonwealth correspondence (not now available to me) with respect to the use of "His Excellency" by the Lieutenant-Governor of Papua, that in an Australian State (a) if a Lieutenant-Governor is not administering the government as its "Administrator" in the absence of the Governor, he is not entitled to the style "His Excellency", but that, (b) if he is administering it in the Governor's absence he is entitled to that style; and that, if in a Territory the office is entitled not "Governor" but "Lieutenant-Governor" and in consequence a Lieutenant-Governor normally administers its government in pursuance of a constitutional provision to that effect, the Lieutenant-Governor is and should be entitled to the style of "Excellency".

5. High Commissioner.

86. As there are already District Commissioners in the Territory of Papua and New Guinea, it would not be illogical in that Territory were the chief executive of that Territory given the title "High Commissioner". If "High Commissioner" were to be used in Australian Territories (It is a growing practice in respect of dependent Territories administered by imperial Powers, including the United Kingdom, in various parts of the globe and especially in respect of dependent Territories under United Nations trusteeship) instead of "Administrator", the appropriate style of address would appear to be "His Excellency".

87. I am given to understand by Mr. Alan Watt that the term "High Commissioner" (which as I have just said is growing in popularity as the title of office of the Governor of dependencies that are not Possessions in the narrow sense of that term, e.g. The High Commissioners of the Federation of Malaya, the U.S. Trust Territory of the Pacific Islands, the N.Z. Trust Territory of Western Samoa, and others) is causing a problem for his Department because of the use of that term to designate also the representatives (who are really Ambassadors) between the different self-governing

units of the British Commonwealth, e.g. the High Commissioner in Australia of His Majesty's Government in the United Kingdom. In the circumstances, it is obvious that the Department of External Affairs should be consulted before "High Commissioner" can be put up to Cabinet as a title alternative to "Administrator" in respect of an Australian Territory. Nevertheless, it would seem that however confusing may be the different uses of the term "High Commissioner", those different uses are in actual existence at the present time. I suggest for your consideration that the appropriate course of action is for you to choose between "Administrator", "Governor", "Lieutenant-Governor", "High Commissioner" or other term for use in respect of Australian Territories and then arrange with the Prime Minister and the Minister for External Affairs that the relative precedence amongst themselves of, say, all persons called either Governors or High Commissioners be formally determined by Cabinet so that no confusion need exist xxxxxxxxxxxxxx in the future in the minds of the Department of External Affairs or any other person at any time. xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.

6. Resident Commissioner.

88. "Resident Commissioner" is a title which possesses no intrinsic pre-eminence as a possible choice for Nauru Island and Norfolk Island should it be decided to abandon "Administrator" in regard to all Australian Territories, and replace it by "Governor" or "High Commissioner" in respect of the two Territories Class I but not in respect of the two Territories Class II. However, it has behind it some British colonial practice, which differentiates it in the British Solomon Islands Protectorate and in the Gilbert and Ellice Islands Colony by (a) prescribing salutes of eleven (11) guns, as against seventeen (17) for Governors and High Commissioners, (b) according the style "His Honour" in place of that of "Excellency" for Governors and High

Commissioners, and (c) being the title of a high official who nevertheless administers a territorial unit which is of less importance than a Territory Class I and is himself responsible to the British High Commissioner for the Pacific.

II. Style of address.

89. Governors in British Colonies are entitled to the style of "Excellency"; and this is so, I am informed by Mr. Maude of the British Colonial Service and the South Pacific Research Council, even if the title of his office although equivalent to that of Governor is not "Governor", provided that it is one of the alternatives recognised by Regulation 102 of the British Colonial Regulations, such as High Commissioner or (in the case of Somaliland and Zanzibar, even Commissioner or British Resident).

90. The style of address at present granted by the Australian Commonwealth to the Administrators is that of His Honour, a title which in British Colonies is reserved for British Colonial Service officials holding comparatively minor posts such as Resident Advisers, or administering comparatively minor territorial units comprising part of the territorial jurisdiction of a Governor or High Commissioner; as in the case of the Resident Commissioner of the Gilbert and Ellice Islands Colony, who comes under the British High Commissioner for the Western Pacific.

91. Apart from the use of "His Honour" as the style of address of these few comparatively senior, but nevertheless subordinate, administrative officials in the British Colonial Empire, the style is usually found in common use in its application to judges of a Supreme Court; although in formal, but not in common usage, it would seem the appropriate style for members of the Executive Council, and probably for members of the Legislative Council also.

92. This failure to grant to the Australian Commonwealth's principal representative in its two main Territories a style which distinguishes him from others who in his Territory's

Table of Precedence are or should be lower than he, is I submit, a situation which deserves attention.

93. My recommendation for consideration by you is that the Administrators (whether renamed or not) of the two Class I Territories (namely, Northern Territory and Papua and New Guinea) be granted, after proper consultation with and action by the Prime Minister's Department, the style "His Excellency"; and that, if the style "His Honour" is retained at all for Administrators, it be retained only for those of the two Class II Territories (namely, Norfolk Island and Nauru Island).

94. It may be maintained by some that the Northern Territory's position as part of "the Commonwealth" (i.e. as being on the mainland, but nevertheless not a State) differentiates the situation in regard to its chief official; but, if any such differentiation is desired on constitutional rather than on political grounds, I would appreciate a further opportunity to examine and give an opinion as to the constitutional basis of the differentiation.

III. Salutes and other ceremonial marks of respect.

95. Governors (including High Commissioners) of British Colonies are entitled to certain salutes from His Majesty's ships of war, and the ceremonial aspect of naval visits is carefully regulated and observed. They are also entitled to salutes from certain forts and batteries. I forward herewith as Appendix "A" the salutes prescribed under Regulation 120 of the British Colonial Regulations.

96. Part IX of the Australian Military Regulations, made under the Australian Commonwealth *Defence Act*, deals with military ceremonial, but its provisions deal almost exclusively with the Governor-General and the State Governors (and officers administering the Government in their stead). Although there are a few exceptions, such as those in Regs. 679(iv) and 696(i) which indicate that honours and salutes are to be given by troops on parade and by guards of honour to, *inter alia*, an officer administering the government of

"a colony or territory under British rule by mandate (sic)...... within his sphere of jurisdiction", those in Reg. 708 listing Flag Stations and those in Reg. 709 listing forts and batteries at which salutes are authorised to be fired, the whole of Part IX of the Australian Military Regulations badly requires revision in order to extend its provisions to cover officers administering the governments of Australian Territories as well as those of the Australian Commonwealth and States.

97. I have not quickly available to me the comparable Regulations which doubtless have been made under the Australian Commonwealth's Naval Defence Act and the Air Force Act, and therefore cannot without further time being available to me advise you in detail concerning Regulations made under them to govern naval and air force ceremonial; but I would be very surprised indeed were they less in need of revision than are the Australian Military Regulations mentioned above.

98. I suggest that, if and when you request each of the three Service Departments to make provision in their respective bodies of legislation on these points concerning officers administering the governments of Australian Territories, you could not do better than use the enclosed Appendix "A" as a guide in coming to a decision as to what to request.

99. My recommendation for consideration by you is that the Administrators (whether renamed or not) of the suggested two Class I Territories (namely, Northern Territory and Papua and New Guinea) be graded with Colonial Governors, and given, for instance, a salute of 17 guns; and that those of the two Class II Territories (namely, Norfolk Island and Nauru Island) be graded with the Resident Commissioners in the British Solomon Islands Protectorate and the Gilbert and Ellice Islands Colony and given, for instance, a salute of 11 guns.

# APPENDIX "A".

## SALUTES PRESCRIBED UNDER REGULATION 120 OF THE BRITISH COLONIAL REGULATIONS.

| Colonial Officers entitled to Salutes when in their Official Capacities. | No. of Guns. | By His Majesty's Ships. | | | By the Fort or Battery from which Salutes are usually fired. | | |
|---|---|---|---|---|---|---|---|
| | | Within what Limits. | Occasions. | How often by the same Flag, Broad Pendant or Ship. | Within what Limits. | Occasions. | How often. |
| Governor or High Commissioners of any of His Majesty's Colonies, Protectorates, Territories, Dependencies, Castles, or Fortresses. | 17 | Those of his Government. | On landing on first appointment, or on return from leave of absence, at his destination from the United Kingdom, by the ship in which he arrives.<br>When visiting a ship either on going on board or on leaving.<br>On finally quitting his Government or on proceeding on leave of absence, by the ship in which he embarks. | As the occasion arises.<br>Once a year and by only one ship on the same day.<br>As the occasion arises. | Those of his Government. | On first landing, on reading of Royal Commission and taking Oaths of Office, or on return from leave of absence exceeding three months.<br>On proceeding on leave of absence or finally quitting his Government.<br>When officially visiting other Forts or Dependencies of his Government. | As the occasion arises.<br>As the occasion arises.<br>Once a year only in any one place. |
| Lieutenant-Governor or Commissioner if administering the Government of a Colony, Protectorate, Territory, or Dependency, and if holding a commission direct from the King, or acting temporarily for an Officer so Commissioned, Administrators or Commissioners of Colonies, Protectorates, Territories, or Dependencies acting in subordination to a Governor or High Commissioner. | 15 | | | | | | |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Lieutenant-Governor not administering a Government if holding a Commission direct from the King. | 15 | At the seat of Government only. | On disembarking for the first time from the ship in which he may have arrived and on embarking for his final departure, by the ship in which he arrives or departs. | As the occasion arises. | At the seat of Government only. | On first arrival and on final departure. | As the occasion arises. |

* The High Commissioner for the Western Pacific will be entitled to the same number of guns when visiting in, embarking in, or disembarking from, a ship outside the precincts of his Government, but within the limits embraced by his Commission.

The Commissioner, Somaliland Protectorate, The British Resident, Zanzibar, } will be entitled to a salute of seventeen guns.

The British Resident Commissioner in the New Hebrides, the Resident Commissioners, British Solomon Islands Protectorate and Gilbert and Ellice Islands Colony, the British Agent and Consul, Tonga, and the Resident Advisers at Mukalla will be entitled to a salute of eleven guns.

The Provincial Commissioner, Coast Province, Kenya, will be entitled to a salute of seven guns.

(F). PRECEDENCE OF HIGHER OFFICERS (INCLUDING ADMINISTRATORS).

I. Table of Precedence for use for official purposes in each Territory in respect of the legislators, senior administrative and judicial officials of that Territory, and officers of the Armed Services stationed therein.

100. The precedence of officers in each British Colony is determined by local enactments. Owing to lack of time for search I have been unable as yet to provide you with a precedent of a particular British Colony.

101. However, the Colonial Regulations regulating the British Colonial Service provide (Rs. 115-118) *inter alia* that "in the absence of any special authority Governors will guide themselves by the following general Table of Colonial Precedence" :-

(i) The Governor or other officer administering the Government;

(ii) The Lieutenant-Governor;

(iii) The Service Officers in command of the "station", if not under the ranks of Rear-Admiral, Major-General or Air Vice-Marshal;

(iv) The Chief Justice of the Supreme Court;

(v) The Service Officers in command of the "station", if not under the ranks of Commodore, Brigadier or Air Commodore;

(vi) The Colonial Secretary;

(vii) The Members of the Executive Council;

(viii) The Service Officers in command of the "station", if not under the ranks of Commander, Lieutenant-Colonel or Wing-Commander;

(ix) The Puisne Judges of the Supreme Court;

(x) The President of the Legislative Council;

(xi) Members of the Legislative Council;

(xii-xiii) The Speaker and members of the House of Assembly;

(xiv) The Chief Commissioners, Government Agents or Residents of Provinces;

(xv) The Solicitor-General (That is, where there is also an Attorney-General, the latter being a senior official with a seat in the Executive and Legislative Councils);

(xvi) The Service Officers in command of the "station", if below the ranks listed in (viii) above.

102. It would appear obviously desirable that -

(i) in respect of each Australian Territory, a Table be decided upon by the Federal Executive Council, and either embodied in Instructions approved therein or enacted by the Territorial legislature on instructions from the Commonwealth;

(ii) each Table follow the order set out in the British Colonial Regulations referred to above, as adapted to the particular circumstances of each Territory;

(iii) inter pares within each category, precedence be accorded amongst -

(a) Service commanders, according to the rules laid down in that behalf under the Defence Act;

(b) Puisne Judges of the Supreme Court, according to their respective dates of appointment, unless one happens to have been appointed as Senior Puisne Judge, in which event the latter will take precedence over the others; and

(c) Official members of the Executive Council, according to their respective salaries (the British practice) or, if salaries are equal, in accordance with their respective dates of appointment; and

(d) Unofficial members of the Legislative Council, according to some principle to be decided upon and prescribed in law or in instructions issued in that behalf.

II. Precedence as between Officers holding appointments in different Territories.

103. Governors of British Colonies (and the term "Governor" covers every officer administering the government, whether his office be so entitled or entitled instead as High Commissioner, etc.) have precedence amongst themselves according to the class in which their respective colonies are graded. Governors of colonies of the same class, rank amongst themselves in accordance with the salary each respectively receives.

104. If Australian Territories were classified, as I have suggested be done, the British rules of precedence as between Governors could appropriately be applied as between Administrators (whether known by that, or some other name) of Australian Territories.

105. If Australia creates in the future specialised branch-

es of an Australian Territorial Service similar to the various specialised "unified Branches" of the British Colonial Service, such as an Administrative Service, a Legal Service, a Medical Service, an Agricultural Service, an Education Service, a Police Service and so on, each of these Services will have its own seniority list.

106. At the present time it would seem that, as between officers (other than Administrators, whether known by that or some other name) of corresponding kinds but from different Territories, the rules as to their respective precedence whenever each happens to be outside his own Territory might reasonably be based upon the following principles :-

(i) That officers of the same kind take precedence amongst themselves according to the classification of their respective Territories; or, if the Territories are of the same classification, according to either the salaries or the dates of appointment of the respective officers, whichever the Minister thinks preferable;

(ii) That officers be deemed to be of the same kind if they each happen to be an administrative, agricultural, legal, educational, medical, police, forestry or other kind of officer, as the case may be. (N.B. The "kinds" might be specified as the same categories as exist in the British Colonial Service; as to which see p.431 of the 1950 British Colonial Office List).

107. The question as to inter-Territorial precedence of Territorial officers, other than that of the Administrators, is one on which, in the absence of special "unified branches" of a new Australian Territorial Service, differences of opinion may exist as to matters both of principle or of detail. Consequently alternative solutions are possible to this question.

108. One possible alternative would be to use the same Table of Precedence as is suggested for determining internal precedence; and supplement it with a rule such as I have suggested in paragraph 106 might be adopted for the purpose also of determining the inter-Territorial precedence of the Administrators. However, other possible but laborious alternatives, taking very much time to implement, would, of course, be to -

(a) review all salaries in all four Australian Territories, with the question of inter-Territorial precedence in view; or

(b) draw up a unified seniority list of all officers in all Australian Territories.

109. The last two alternatives mentioned in the last preceding paragraph would involve a tremendous amount of work and take quite a substantial period of time to implement. They would have the virtue, however, that ultimately they would provide a secure permanent basis for an Australian Territorial Service (including its specialised "unified Branches").

31.10.1951.

OPINION BY DR. T. P. FRY AS TO THE STATUS AND FUNCTIONS OF ADMINISTRATOR IN AUSTRALIAN TERRITORIES, AND RELATED MATTERS.

(A). QUESTIONS REFERRED FOR OPINION.

1. I have been requested by the Parliamentary Under-Secretary for Territories, Mr. J.D. Howse, to furnish for consideration by the Minister for Territories an Opinion concerning the following matters:-

(i) The status of the office of Administrator in the Territory of Papua and New Guinea, the Northern Territory of Australia, the Territory of Norfolk Island and the Territory of the Island of Nauru as that status is defined in statutes relating to those Territories (Mr. Howse suggested that some consideration might be given also to the British practice and other relevant considerations).

(ii) The functions of the Administrator in each of these Territories.

(iii) The title of the office, the style of addressing its occupant and other courtesies due to the Administrators of each of these Territories.

(iv) The question of precedence in respect of the principal Administration officers (including the Administrators) of these Territories, with special reference to the following matters :-

(a) The nature and contents of a Table to prescribe precedence as between the senior administrative and judicial officials in each of these four Territories separately, for use for official purposes within each; and

(b) The order of precedence, applicable outside their Territories, as between corresponding officers serving in different Territories (The need for determining precedence as between them having particular importance in view of the forthcoming Royal Visit).

2. When determining some of the above matters, significance — on some points almost decisive significance — should, I respectfully submit, be attributed to the constitutional international and political status of the Territories. I have included in my Opinion some discussion as to the status of these Territories; and as a consequence I have graded them into two classes as follows :-

Class I. -

The Northern Territory of Australia; and
The Territory of Papua and New Guinea.

Class II. -

The Territory of Norfolk Island; and
The Territory of Nauru Island.

(B). STATUS OF THE OFFICE OF ADMINISTRATOR.

3. The status of the Administrator of an Australian Territory is not expressly prescribed in, and cannot be deduced from, Commonwealth statutes relating to those Territories with the same certainty as the status of Governors, High Commissioners and the like can be deduced from the Colonial Regulations which govern His Majesty's British Colonial Service; and the Commonwealth Constitution gives no explicit assistance.

4. In due course there should be embodied in basic constitutional instruments relating to the Territories unequivocal rules to determine such matters as the status of the Australian Commonwealth Government's principal administrative representative in each, the courtesies appropriate to his office, the constitutional rules which determine his legal and ceremonial relationships to other officers and institutions in his Territory, and those other constitutional rules which determine his legal relationship with the Australian Commonwealth Government itself.

5. Commonwealth and Territorial legislation entrust to the Administrator in each Territory quite a number of detailed powers and functions, but most of these detailed powers and functions are not in themselves determinative of the precise status of the office of Administrator and do not prescribe the ceremonial honours and courtesies to be afforded to him.

6. The political decisions as to what the status of the Territory and of its Administrator is to be will eventually be decisive as to all important constitutional and legal factors, and your request for information concerning the questions referred to me indicates in itself a possibility

that there may be made by the Commonwealth at your instance those political decisions which in due course will result in legislation designed to embody those decisions.

7. I think it might even now be right to say that the status of the Office of Administrator is of a higher kind and more honorific in nature if -

(i) The Territory is intrinsically an important one constitutionally, internationally and politically;

(ii) The Australian Commonwealth Government in its laws and in all its actions treats the incumbent (and makes it plain to all that it does so treat him) as being an officer of high status and its main agent in the Territory, and as being within the Territory the single and supreme authority responsible to, and representative of, the Australian Commonwealth Government;

(iii) The Administrator is placed at the head of a Territorial Administration in which the principal departmental heads are expert and experienced officers who are willing to accept responsibility and capable of discharging it with credit, with the result that the Administrator is freed to devote himself to matters of policy and to details of real importance instead of becoming bogged down in details of routine administration which properly should devolve upon competent departmental officers.

8. Later on in this Opinion I discuss the constitutional, international and political status of these Territories; and also the constitutional relationships of Administrator to Commonwealth Government and of Administrator to the Territorial Administration.

9. In accordance with the British pattern the Territories can be classified into two classes, each containing two Territories — the two larger and more important Territories being in Class I.

10. Inherent in the problem of the constitutional relationships of Administrator to the Commonwealth Government are _inter alia_ the following factors :-

(1) The extent to which the Administrator -

(a) not only is the Commonwealth Government's main agent within the Territory and, as such, the supreme authority in it responsible for its good governance to, and representative therein of, the Commonwealth Government;

(b) but is also accorded by the Commonwealth Government a title, a style of address, rights, privileges and courtesies, fully appropriate to the functions he performs as its main agent and supreme representative in the Territory.

(ii) The nature and extent of the delegated and devolved powers which the Administrator is permitted to exercise in pursuance of rules stated in legislation, or in any instruments (such as a Charter of Delegated Powers) which the Governor-General may issue to him;

(iii) The consequential title, style, rights, privileges and courtesies which the Australian Commonwealth Government decides are to be accorded to the Administrator.

11. Inherent in the problem of the constitutional relationships of Administrator to his Territory, that is to say, the legal relations existing inside the Territory between the Administrator on the one hand and the officers and institutions of the Territory Administration on the other, are inter alia the following factors :-

(i) The extent to which departmental heads within the Territory's Administration are because of their experience and basic qualifications fully competent to perform their several functions and leave the Administrator free to perform his own, higher, functions; and

(ii) The extent to which the Administrator is assisted in the work of government by mature institutions, such as a legislature which is either wholly or partly representative in nature, and possesses legislative power of considerable extent.

12. The various points suggested above (and in many instances discussed later on in this Opinion) are in my view, although not exhaustive or conclusive of the question, important ingredients in any legal or policy determination of what is or might appropriately be the status of the Office of Administrator in Australian Territories.

13. Apart from these matters, and legal details of a comparable kind, it is difficult in the absence of express Australian legal provisions as to the precise status to be accorded to the Administrator to say exactly what his status is. From a policy point of view the most useful point at which to commence an investigation is the status, precedence and courtesies prescribed by law in respect of the Governors

and High Commissioners of British dependencies.

14. The British Colonial Regulations class all Governors and High Commissioners of its dependencies as equal in status, except to the extent that they are differentiated amongst themselves by reference to the class into which falls the dependency which each governs, and by the difference in precedence and the consequential slight differences in courtesies (Of course there are certain differences in the prerogative powers of a constitutional kind, and also in the personal rights and liabilities of a legal nature, of British Governors who are Viceroys and those who are not; but these latter differences do not appear greatly significant for your purposes, certainly not at this stage of inquiry into the matters you referred for opinion).

15. It is difficult, as at present advised, to see why the principal officer whom the Australian Commonwealth has appointed to administer its two most important Territories, which I suggest could appropriately be grouped as Territories Class I, should not have the status and perhaps also the title but at any rate the style of address and the rights privileges and courtesies appertaining, in British dependencies of similar importance, to the British Governor or High Commissioner. Later on I also discuss briefly the two Territories I have grouped as Territories Class II, and suggest that in each of these two smaller and less important Territories the Administrator might be accorded a status, title, style of address, rights, privileges and courtesies appertaining to the Resident Commissioners in the British Solomon Islands Protectorate and the Gilbert and Ellice Islands Colony (each of whom are lower in status than, and are comprised within the Territorial jurisdiction of, the British High Commissioner for the Western Pacific).

16. The decision as to status is, I respectfully suggest, not a legal decision for lawyers (whether myself or any other), but a decision of high policy which it is the Minister's

privilege to make. When made, and endorsed by the Federal Executive Council, it will then be the responsibility of legislative draftsmen to embody in law (either by amendment of existing laws or by the enactment of new laws) the consequential rules necessary to give legal substance to the policy decisions as to status.

17. The real choice of policy is best revealed, I think, by a study of the history and legal structure of the British Colonial Empire and by the application to Australian conditions of the results of that study.

18. If at this initial stage of your tenure of office you decide to adhere in a general way to the British pattern in respect of Governors of Colonies (at least in respect of Australia's two main Territories), or, if on the other hand you decide to depart from that pattern and weave one of your own, you should, I suggest, arrange to have embodied in law the rules that will be consequential upon your main policy decision. You may possibly decide to pilot through the Parliament an Australian Territories Bill. At any rate, your policy decisions as to the status of Administrators and related matters should eventually prove to be determinative of all incidental legislation. Sooner or later existing law will need to be either amended or supplemented in order to embody, or conform to, those decisions.

19. Now that there is a Minister for Territories and a Department of Territories it would not be inappropriate were matters comparable to those embodied in the British Colonial Regulations (including matters you have referred to me for opinion) embodied in future in Australian Territorial Regulations. These might perhaps be made under a general Australian Territories Act if such a statute were to be passed by the Parliament. This statute might confer power on the Federal Executive Council to make regulations for the purpose I have suggested, and for other purposes to be named therein as to which I would have some suggestions were

I asked). This statute might also include, if so desired, provisions designed to establish an Australian Territorial Service, perhaps one possessing "unified branches" similar to those of the British Colonial Service.

20. Decisions of high policy in respect of status and other, collateral, questions are a primary requisite, but new legislation of some kind or other is most desirable as soon as those decisions have been made.

## (C). THE CONSTITUTIONAL, INTERNATIONAL AND POLITICAL STATUS OF EACH TERRITORY.

### I. Their several relationships to the Australian Commonwealth and the United Nations.

21. I am asked for an Opinion concerning four Territories, and in this connexion I think it may be of value to classify them, firstly by reference to their respective relationships to the Australian Commonwealth (and, wherever appropriate, to the United Nations), and secondly by reference to the basic characteristics of the form of government enjoyed by each.

22. Their several relationships to the Commonwealth and the United Nations are shown in the following Table :-

| | Territory | Status | Position under Commonwealth law |
|---|---|---|---|
| (i) | Territory of Papua and New Guinea. | The Territory of Papua (a Possession of the Commonwealth in the right of His Britannic Majesty) is jointly governed in Administrative Union with the Trust Territory of New Guinea, a Trust Territory responsibility for the administration of which has been granted to His Majesty's Australian Government by the United Nations. | Section 12A of the <u>Papua and New Guinea Act</u> 1949-1950 declares the combined Territory to be a Territory of the Commonwealth "which does not form part of the Commonwealth". |
| (ii) | The Northern Territory of Australia. | A Possession of the Commonwealth in the right of His Britannic Majesty. | A Territory of the Commonwealth which forms part of "the Commonwealth". |
| (iii) | The Territory of Norfolk Island. | A Possession of the Commonwealth in the right of His Britannic Majesty. | A Territory of the Commonwealth, <u>sed quaere</u> whether it forms part of "the Commonwealth". |
| (iv) | The Trust Territory of Nauru Island. | A Trust Territory the administration of which is entrusted to His Britannic Majesty, on whose behalf it is jointly controlled as a condominium by the United Kingdom, Australia and New Zealand, and is administered by them subject to (a) the Trusteeship Agreement, and (b) a Joint Agreement by which the three Contracting Governments have prescribed the role of each in the actual administration of the Island. | Not a Territory of the Commonwealth in the sense of being a Possession, although at present it is possibly a Territory temporarily and partly under the control or authority of the Commonwealth. It is a Trust Territory in respect of which the Commonwealth exercises certain powers and functions, some of them jointly with Great Britain and New Zealand. |

23. In view of the analysis made above, the four Territories may be classified as follows with respect to their relationships to the Commonwealth and the United Nations :-

(1) Possessions of the Commonwealth of Australia -

<u>The Northern Territory of Australia</u>;
<u>The Territory of Papua</u> (now in Administrative Union with a Trusteeship Territory); and
<u>The Territory of Norfolk Island</u>.

(2) An Administrative Union of a Possession and a Trust Territory -

<u>The Territory of Papua and New Guinea</u>.

(3) Trust Territories -

<u>The Trust Territory of New Guinea</u>.
<u>The Trust Territory of Nauru Island</u>.

24. The two Trust Territories are New Guinea and Nauru.

25. Administration of the Trust Territory of New Guinea has been entrusted to the Australian Commonwealth, which governs it in Administrative Union with one of its own Possessions, the Territory of Papua.

26. Administration of the Trust Territory of Nauru Island has been entrusted to His Britannic Majesty, who has arranged for its administration as a Trusteeship Condominium under the United Kingdom, Australia and New Zealand in pursuance of an Agreement made between the three of them in that behalf, and subject to the terms of the relevant Trusteeship Agreement. Under this Agreement the Australian Commonwealth is at present entrusted with special administrative functions, but merely because the present Administrator was appointed by it. Australia temporarily enjoys, in respect of its laws and administration, a special position for so long as the three Contracting Governments continue to agree that Australia is to appoint its Administrator.

27. Nauru Island is a Trust Territory held by His Britannic Majesty under a Trusteeship Agreement; and is not a Territory of the Commonwealth, although it is one that is, at least partly, under the control of the Commonwealth. The manner

of its administration is determined by the Agreement between the Governments of Australia, New Zealand and the United Kingdom, each of which is called a Contracting Government. Although this Agreement dated 2 July 1919 (as amended by an Agreement dated 30 May 1923) is mainly a commercial agreement between the Contracting Governments, establishing a phosphate condominium between them in respect of the Island, it is also its constitution. As such it determines by whom its actual administration is to be carried out, its laws enacted, its public finance provided and its phosphate deposits worked. One of the three Contracting Governments, to be mutually agreed upon from time to time amongst themselves, is to appoint an Administrator in whom vests the administration of the Island. He is advised by an Advisory Council of Nauruans and also by a Representative of the Chinese residents. Australia is the Contracting Government which happens, by mutual consent, to have appointed the present Administrator as well as his predecessors. So long as this practice continues, Ordinances made by him will require confirmation by the Governor-General of the Commonwealth. Under the Agreement, however, "title" to the Island's phosphate products vests in a Board of three Commissioners, of whom each of the three Contracting Governments appoints one.

28. The three Possessions are the Northern Territory, Papua and Norfolk Island.

29. The official opinion of the Attorney-General's Department is, I think, that Papua is "not part of the Commonwealth", a view expressed recently in Section 12A of the <u>Papua and New Guinea Act</u> 1949-1950; and its view is, I think, that the Northern Territory of Australia is "part of the Commonwealth". I am unaware of whether in that Department's view Norfolk Island is, or is not, "a part of the Commonwealth"; but its view would be that Nauru Island is not "a part" thereof.

30. Whether a Territory of the Commonwealth does or does

not form part of the Commonwealth within the meaning of that term as used in the Australian Commonwealth Constitution depends upon criteria which have not yet been finally determined by the High Court. Although I have not seen that Department's files, I believe the official view of the Commonwealth Attorney-General's Department, first formed in the days of Sir Robert Garran, is that for this purpose "Commonwealth" is to all intents and purposes coincident either with the "Australian mainland" or with territory within the boundaries, and in full ownership, of the six Colonies at the date of Federation. These views are not necessarily the views which the High Court will ultimately decide are legally correct, but they have been acted upon by the Parliament and thus embodied in Commonwealth legislation. As a constitutional question is involved the matter cannot be finally concluded by legislative provisions, as they may not succeed in surmounting a challenge on constitutional grounds when and if it comes. Although the consequences of the legal accuracy or inaccuracy of a legal theory as to the point may ultimately prove of significance in the law of the Territories, this is at present realised by few lawyers.

31. When Section 12A of the Papua and New Guinea Act 1949-1950 declared that the Territory of Papua and New Guinea, although a Territory of the Commonwealth, does not form part of the Commonwealth, the draftsman might also have intended to imply that part of it was not a Possession but was merely a Trust Territory, but, if so, it would seem to have added nothing to the meaning of other sections of that Act.

## II. Basic characteristics of internal government in each Territory.

32. The four Territories may also be classified as follows with respect to the basic characteristics of the form of internal government enjoyed by each -

(A) Territories possessing a Legislative Council consisting partly of elected and nominated members and partly

of official members, of which the official members are in the majority -

(i) Those represented in the Australian Commonwealth Parliament -

The Northern Territory of Australia; and

(ii) Those not represented in the Australian Commonwealth Parliament -

The Territory of Papua and New Guinea.

(B) Territories without a Legislative Council, but possessing an Advisory Council -

The Territory of Norfolk Island; and

The Territory of Nauru Island (See as to the Advisory Council, Sir Robert Garran in 9. A.L.J. Supplement at p.40).

III. Suggested classification of Australian Territories into two Classes.

33. In view of the analysis set out in the foregoing paragraphs, I suggest, for your consideration, that the Territories themselves, and consequently the officers appointed to administer their respective governments, might reasonably be graded as follows :-

Class I. -

The Northern Territory of Australia; and
The Territory of Papua and New Guinea.

Class II. -

The Territory of Norfolk Island; and
The Trust Territory of Nauru Island.

(D). THE FUNCTIONS, POWERS AND DUTIES OF THE ADMINISTRATORS.

I. Introduction.

34. I have assumed that you do not desire, in response to your request for information as to the functions of the Administrator in these four Territories, a long detailed catalogue of their functions; and that you desire, rather, some account of those of their functions that are particularly relevant to their status.

35. In the Territories the Administrator must necessarily exercise his powers and perform his functions and duties to a considerable extent through his subordinates or on their

advice, or in consultation with and with the collaboration of groups of his own officers gathered together, either with or without non-official persons, in Legislative Councils, Executive Councils or Advisory Councils.

36. The more formal elements of control over the Administrator derive from: (a) the legal rules which are embodied in the bodies of law and because of their existence establish, maintain and curb the government of the Territory; and (b) the policies which the Australian Commonwealth Government directs that he shall implement in relation to the Territory.

37. Functions (which normally are linked with powers and duties) may with reason be differentiated into those that are legislative, and those that are executive, in nature. Your interest in the latter type of functions relate, I would think, to the higher policy aspects of the matter rather than to the minutiae of it, and I have tried to limit myself therefore to the higher policy aspects of the executive functions of the Administrator. A selective approach has also been adopted in respect of the Administrator's legislative functions.

II. Legislative functions.

38. The principal legislative functions in which, in the Territory of Papua and New Guinea and the Northern Territory, the Administrator will participate are those that it is proposed are to be vested, or that are now vested, in the local Legislative Council. He therefore has to make his most significant legislative contribution as chairman and leader of heterogeneous groups therein - official and non-official, elected and non-elected, and, in Papua and New Guinea, native and European; the official members being in a majority. The Administrator has in reserve the power of refusing assent to legislation passed by a majority of his Legislative Council, or of reserving it for the Governor-General's assent. Even if he assents, the Governor-General may disallow the legislation.

39. Many an Ordinance confers subordinate legislative

powers —— to make Regulations, Orders, Proclamations and the like —— upon either the Administrator in Council, or the Administrator only. If these subordinate legislative powers are conferred upon the Administrator in Council the Administrator must consult his Executive Council, but usually (e.g. in the Territory of Papua and New Guinea) the Administrator can enact subordinate legislation _against_ their advice.

40. The best short study of the functions of a Governor (or Administrator) in a Legislative Council or Executive Council within a Dependency is to be found in Wight's _Evolution of the Legislative Council_, a small but enlightening monograph.

41. In relation to Norfolk Island, legislative power resides in the Governor-General in Council of the Australian Commonwealth, subject to a provision that an Ordinance which is proposed shall - unless for some special reason this procedure is dispensed with - lie for at least 30 days before the Island's Advisory Council, which may within that period make written suggestions to the Administrator concerning it; and the Administrator also may add his own observations, and then forward to the Minister his observations as well as its suggestions. The Governor-General in Council, after considering these observations and suggestions, may "make" the Ordinance either in its original form or in an amended form.

42. Various Ordinances of Norfolk Island have conferred upon the Minister, and less frequently on its Administrator, power to enact subordinate legislation, such as Regulations. Local Ordinances variously provide that these subordinate enactments if made by the Administrator are usually subject to disallowance by the Governor-General in Council, or by one or both Houses of the Australian Commonwealth Parliament, or either; and, if made by the Minister, by one or both Houses of the Australian Commonwealth Parliament.

43. In relation to Nauru Island legislative power is vested

in the Administrator. He presumably exercises it in consultation with the Board of Commissioners, the Nauruans' Advisory Council and the Chinese Representative, at his discretion. His legislation when made is subject to confirmation or disallowance by the Governor-General in Council of the Australian Commonwealth. It is important to notice also that he is under a duty (which necessarily must extend to matters of legislation) to conform to such instructions as he may receive from time to time from the Australian Commonwealth Government, and also to that control of government revenue and control of the phosphate deposits which vests in the Board of three Commissioners appointed by the three Contracting Governments. Legislative powers cannot long be exercised in any manner to which these financial and commercial controls are hostile.

44. Power to enact subordinate legislation such as Regulations has been conferred in various Ordinances of Nauru Island upon the Administrator, but the structure of the government on this Island makes differentiation between Ordinances and subordinate legislation to a considerable extent unsubstantial in nature.

## III. The Administrator's duty to administer the Territory "on behalf of" the Commonwealth.

45. The first step in ascertaining the legal status of the Administrators in the Australian Territories in respect of their respective executive functions therein is to note the position in which they stand in relation to the Australian Commonwealth Government, and a brief conspectus of this matter follows :

(i) Section 3 of the Papua and New Guinea Act 1949-1950 prescribes that the Administrator of Papua and New Guinea "shall be charged on behalf of the Commonwealth with the duty of administrating the Government of the Territory of Papua and New Guinea." Section 5 prescribes that the Administrator's Commission and such Instructions as are given him by the Governor-General in Council are to be observed by him in the exercise and performance by him of the powers and functions that belong to his office.

(ii) The Northern Territory (Administration) Act 1910-1947 which provides for the administration of that Territory as a Territory of the Commonwealth indicates likewise that the Administrator, in the exercise of his powers and functions, must conform to his Commission and to such Instructions as may be given him by the Minister.

(iii) In pursuance of the Norfolk Island Act 1913-1935 Norfolk Island was accepted by the Commonwealth as a Territory of the Commonwealth. The Administration Ordinance 1936 provided for the appointment by the Governor-General in Council of an Administrator of the Territory and placed the Administrator under a duty to exercise a general supervision over the Territory's affairs, subject to a requirement that he is to "carry out any instructions given to him by the Governor-General in Council".

(iv) The Trust Territory of Nauru Island is at the present time administered by an Administrator appointed by the Australian Commonwealth, as a condominium controlled jointly by Great Britain, Australia and New Zealand in the terms of an Agreement made between their respective Governments. Commercial exploitation of the phosphate deposits is the principal concern of the Island's population, and all these commercial matters are determined jointly by the three Contracting Governments by means of a Board of Commissioners of three members, one being appointed by each Government and holding office during the pleasure of the Government by which he is appointed. There is an Administrator who, in his administration of the Island -

(a) is under a duty to conform to such instructions as he shall from time to time receive from the Contracting Government by which he is appointed (i.e., at present, the Australian Commonwealth Government), and to supply to the three Contracting Governments such information concerning Island administration as any one of them may require;

(b) is subject to that commercial control over the Island's wealth which is exercisable by the Board of Commissioners in pursuance of the Agreement;

(c) makes Ordinances for the Island subject, so long as he is appointed by the Australian Commonwealth, to confirmation or disallowance of them by the Australian Governor-General in Council.

The Australian Commonwealth Government's relation to the Trust Territory of Nauru Island is not entirely unlike the relation of the Colony of Queensland to the Crown Colony of British New Guinea before the latter became a Territory of the Australian Commonwealth under the name of Papua; except that in addition to the Commonwealth's duty under the Tripartite Agreement to administer Nauru Island in accordance with policies mutually acceptable to other Governments

of the British Commonwealth of Nations (just as Queensland previously had to do), the Commonwealth is under the additional duty, that of conforming to the Trusteeship Agreement.

IV. Instructions from the Commonwealth.

46. One feature common to these four Territories is that the Administrator of each of them has been placed under a duty, in the exercise and performance of the powers and functions that belong to his office, to conform to such instructions as are given to him by the Australian Commonwealth Government.

47. These instructions to the Administrator in either Papua and New Guinea or in Norfolk Island are to be issued by the Governor-General acting on the advice of the Federal Executive Council; whereas instructions to the Administrator of the Northern Territory are to be issued by the Minister, and need not be issued by the Governor-General in Council.

48. As it is sufficient that, in general, instructions to the Administrator of Nauru Island be issued by "the Government of the Commonwealth of Australia" it would probably meet legal requirements were those instructions, except those with respect to the confirmation or disallowance of Ordinances, issued by the Minister; but confirmation, or disallowance, of the Administrator's Ordinances requires action by the Federal Executive Council.

49. This analysis as to the formalities requisite in the issue of instructions would seem to indicate that some examination is appropriate as to the general, and also the particular, nature of the instructions which are envisaged in Australian legislation. Australian legislation would seem to require, probably unintentionally, greater formality in the issue of the greater proportion of these instructions than is required by British practice; whereas actual Australian practice seems for the most part not to be sanctioned by a strict application of the legal rules applicable.

50. The British practice is, and was, to issue not only a Royal Commission appointing the Governor but also Standing

Instructions of a general nature. These Instructions are, and were, issued under the Royal Sign Manual and Signet. These Royal Instructions embody many matters which, in respect of the various Australian Territories are embodied in Commonwealth legislation or in local Ordinances; but there are matters which either are not, or are not adequately, provided for in Commonwealth legislation (e.g. the channel of communication to the Crown, rules as to precedence, annual publication of enactments, exercise of the power of pardon). There is no adequate reason why the Commonwealth should much longer continue to avoid policy decisions on matters of the kind embodied by the United Kingdom Government in (1) Royal Instructions issued in relation to particular dependent territories, and (2) Colonial Regulations for general application to all dependent territories. As soon as those decisions are made they could, and probably should, be embodied in Standing Instructions addressed to the Administrator of each particular Territory, and in Territorial Regulations of a general nature for application to all Australian Territories, as may be appropriate in each case. The Standing Instructions would normally accompany the Commission appointing the Administrator to his office.

51. The existence of these formal Instructions would not absolve an Administrator from compliance with particular instructions, even if informal in nature, received from the Minister for Territories. However, it would be very desirable to make this point clear by inserting in due course in relevant Commonwealth legislation a formula, similar to that usually employed by Great Britain, enjoining the Administrator (by whatever name his office may be called) to exercise all things that belong to his office according to the tenor of his Commission of appointment, the laws which created his office, the Standing Instructions issued to him by the Governor-General (whether embodied in Orders made in the Federal Executive Council or in orders issued by the Minister for Terri-

tories) and such laws as may be in force in or in relation to the Territory from time to time.

52. Even when exercising powers and performing functions vested by local legislation in the Administrator of a dependent Territory, the Administrator is constitutionally not free to exercise and perform them in a way contrary to instructions received from the Australian Commonwealth Government. In Volume I of his 1929 edition of "Responsible Government in the Dominions", Sir Arthur Berriedale Keith (at p.81) points out that the Governor of a Crown Colony is merely an instrument to exercise powers which the Crown cannot, by reason of space, perform in person and he cannot claim to act against the express wishes of him whom he represents. The position of an Administrator in an Australian Territory is similar.

53. Of course, he may find himself in a minority in his Executive Council or Legislative Council on some particular matter, in which case the policy decided upon by the Australian Commonwealth Government may have to be safeguarded either by his exercising such reserve powers as the Administrator may have (e.g. by refusing assent to an Ordinance or reserving it for the Governor-General's pleasure); or by acting contrary to the advice of his Executive Council, as he may do under Section 23 of the Papua and New Guinea Act 1949-1950, in respect to the Territory of Papua and New Guinea, or under comparable provisions elsewhere.

54. It should of course be borne in mind in this connexion, as in others, that despite any instruction or other consideration an Administrator, if he keeps within the law in his administration, will not be free to carry out those instructions etc. in any respect which offends against the law of the Territory, unless and until that law is amended or repealed.

## V. The desirability of delegations by Canberra to the Administrator of local discretionary authority.

55. There were administrative techniques having a central-

izing tendency which, in the governance of dependencies, have perhaps been more noticeable in Canberra than in London. These centralizing administrative procedures at the centre of Commonwealth government on the mainland have done more, and are more likely to do more, to diminish the status of a Territory, and of the Administrator thereof, than the obligation which his appointment places upon him to undertake actively the advancement of, and to comply without question with, the general policies and occasional particular decisions of the Australian Commonwealth Government whose high agent he is.

56. This centralization may manifest itself to some extent in Commonwealth legislation, but its operation is much more insidious in the day-to-day operation of Commonwealth administration. The establishment of Legislative Councils in the Territories is, to some extent, a corrective and is centrifugal in its nature; but there is also required in the Commonwealth an administrative change of heart. This may, perhaps, be best demonstrated and implemented by -

(1) replacing, to as great an extent as possible, ad hoc detailed policy decisions (now evolved by multitudinous correspondence, inevitably accompanied by much delay, misunderstanding and frustration) by general rules embodied in general legislative instruments or instructions, such as -

(i) Australian Territories Regulations applicable generally to Australian Territories;

(ii) Instruments of the following kinds issued by the Governor-General to the officer administering the government of each particular Australian Territory -

(a) Standing Instructions in their character similar to the Royal Instructions issued to British Colonial Governors; and

(b) A Charter of Delegated Powers in the exercise of which the Administrator could act on his own responsibility, without reference to Canberra, provided that he conformed to such express instructions as to policy that he might receive from the Governor-General or the Minister. These Charters of Delegated Powers might be either particular, or general, in their application. In the event of their being of general application, they could form

part of the Australian Territories Regulations. (During the second World War Charters of Delegated Powers were issued by the Governor-General to the G.O.C. of the A.I.F. (Middle East) and the A.I.F. (Malaya); and, at a later stage, by the Commander-in-Chief of the A.M.F. to the G.O.C.'s of his two armies and his three Army Corps. Provided that there were in office Administrators who, like those G.O.C.'s, were able, and willing, to accept responsibility to implement over-riding policies in the light of local circumstances, much might be accomplished by these devices, provided that other Commonwealth Departments (and not only the Department of Territories) were to respect the spirit in which these Delegations were given).

(2) creating, either under a separate Division of the Commonwealth Public Service Act or under a separate Commonwealth Territories Public Service Act, an Australian Territorial Service similar to the British Colonial Service and having, like the latter, "unified Branches" such as those for administrative, medical, forestry or legal officers, and the like.

## VI. The Administrator's functions and authority in relation to institutions and officers in his Territory; and the calibre of the main officers of his Territory Administration.

57. The authority which the Administrator in an Australian Territory exercises over his subordinate officers is not supported by the existence of any enactment such as Reg. 105 of the British Colonial Regulations, which specifies that in a British Colony "the Governor is the single and supreme authority responsible to, and representative of, His Majesty. He is by virtue of his Commission and the Letters Patent or Order in Council constituting his office, entitled to the obedience, aid, and assistance of all military, air force, and civil officers". If a subordinate officer keeps within the letter of the Public Service Ordinance and other laws of the Territory of Papua and New Guinea or other Australian Territory it might be difficult for an Administrator of that Territory to enforce policy directions issued by him to that subordinate.

58. Apart from some general legal rule similar to Reg. 105 mentioned above, and indeed even should it be enacted, it is,

I suggest, desirable that the Australian Commonwealth Government should in all its actions treat its Administrator in all matters arising between him and any other officer in his Territory, however important be the latter (and make it plain to all that it does so treat the Administrator) as being in the Territory "the single and supreme authority responsible to, and representative of," the Australian Commonwealth Government.

59. If you consider that this principle is sound and therefore to prevail, you may think it desirable to determine whether there may exist in the present legal relations to Canberra and to the Administrator, respectively, of (a) the Public Service Commissioner of any Territory, and of (b) officers in the Territory of Commonwealth Departments performing their duties in the Territory for the particular Department and not responsible to the Administrator as part of his Administration, anything which in the future may call for variation.

60. The structure of the higher branches of the Public Service of a Territory, and the personal qualifications and administrative , technical or professional qualifications of the more senior officers of its Public Service, are matters which would seem to be not only in themselves important matters that merit your attention on the grounds of high policy for their own intrinsic importance. They would also seem to have importance in regard to the status and functions of the Commonwealth's principal administrative representative and agent in the Territory.

61. By whatever name the Commonwealth's principal representative therein is to be known (be it Administrator or not), he should be provided in his Territorial Administration with an adequate number of capable administrative, professional and technical staff ~~xxxxxxxxx~~ of sufficient calibre and experience to enable him to concentrate upon matters of high policy, general executive supervision of Territory affairs, determinative participation in and control of the policy aspects of

the work of his Executive and Legislative Councils, the more significant of those of his social duties as are of a public nature, and such special problems as he may think sufficiently important to engage his personal attention.

62. This in its turn raises the question whether he should have as his chief aide some officer of high rank and mature administrative experience who would, although responsible to him as Administrator and to him alone, be of the calibre which in British Colonies is possessed by the Colonial Secretary, whose responsibility, experience and capacity is usually of sufficiently high a degree to ensure that in normal circumstances he will himself be appointed in due course as a Governor, usually in some other British Colony (the geographical translation ensuring that loyalty to the Governor he serves will march hand-in-hand with the efficiency with which he serves as Colonial Secretary).

63. Without pretending to have sound knowledge as to the qualifications and capacities of the Government Secretaries in Australian Territories in the past, my reading of history has gone far enough to lead me to think that their office has not always been filled by persons who in the British Colonial Service would be considered suitable for appointment as a Colonial Secretary with a view to possible future advancement to office as a Colonial Governor.

64. In the circumstances it might well prove advisable to create in Australian Territories a new office, free from any doubtful historical associations that the office of Government Secretary may possess, with a status and salary which would result in men of calibre being attracted to the office; at first in open competition between those inside and those outside the Territory's Service, and later if possible from an Australian Territorial Service whose ranks have been recruited from first-class young graduates and others whose administrative and technical skills and experience give promise of rich fruition.

65. Were this policy to be followed, it would be not unwise to find a new name for the old kind of office to which you may decide to attach a new kind of status. If the principal officer is to continue to be called "Administrator", a suitable name for his chief aide might be "Assistant Administrator"; but if the principal officer be called, instead, either "Governor", "Lieutenant-Governor", "High Commissioner", or the like, a suitable name for his chief aide might well be — according to the name chosen for the principal — either "Lieutenant-Governor", "Administrator", "Assistant High Commissioner" or the like.

66. As an Assistant Administrator of high calibre and mature experience has already been appointed to the Territory of Papua and New Guinea, an initial step has been taken which could lead to the implementation of a new policy of internal administration in each Territory — or in each of the two main Territories, at least — such as that discussed in paragraphs 62 to 65 above.

67. Analogous to the question of how to attract to high office in Australian Territories persons with high administrative qualifications, is the task of attracting persons with high professional and technical qualifications.

68. The unwillingness of previous Governments to give higher status, salaries and responsibilities to its Administrators in the Territories has a parallel in regard to the learned justices of the Supreme Courts of xx Australian Territories, who continue to have withheld by the Commonwealth's Attorney-General's Department the titles of Chief Justice and Justice. The latter titles and styles of address are in accordance with those in Supreme Courts of similar jurisdiction. The reason for their being withheld in the Territories seems to be, so far as I understand it, that all judges of Federal Courts are to be known as Chief Judge or Judge. However, in a number of decisions the High Court of Australia has ruled that the Supreme Court of a Territory is

not a Federal Court.

69. There is also a parallel in the failure to follow British practice in naming the chief legal officer of a Territory as "Attorney-General" and his chief assistant as "Solicitor-General". "Crown Law Officer" sounds in professional ears an office of inferior status; and in addition rather lacks complete verbal purity in a Trust Territory, because of the retention of the word "Crown". The Australasian Colonies had Attorney-Generals and Solicitor-Generals even before they had Legislative Councils of a representative nature, and while their populations were quite small; and the Attorneys-General and Solicitors-General in Australia today derived their titles, historically, from those early colonial origins which in turn derived from the United Kingdom.

## (E). THE TITLE OF THE OFFICE OF ADMINISTRATOR, THE STYLE OF ADDRESSING ITS OCCUPANT, AND OTHER COURTESIES DUE TO HIM.

### I. Title of the Office.

#### 1. Historical introduction as to British and other practice.

70. The British practice is, in general, to appoint a Governor to administer the government in each British Colony; but whether the officer appointed is called Governor, Captain-General, High Commissioner or Commissioner-General, he is classified as a Governor in the British Colonial Regulations (R.102), and included in the List of Governors etc. (See 1950 Colonial Office List at pp.412-415).

71. The normal practice is to appoint a Governor to administer each British Colony, and this title is regarded by the Crown as appropriate whether the Colony has attained self-government as a Dominion or is still a fully dependent or semi-dependent Colony.

72. It is true that alternative terms have been, and still are, used by Great Britain.

73. For example, there is a High Commissioner for the Federation of Malaya (as, formerly, for the Malay States), also a

High Commissioner for the Western Pacific (exclusive of the Colony of Fiji).

74. The term Administrator, however, is not found in modern times in the British Empire as an alternative to the term Governor or High Commissioner. Although each of them is now governed by a Governor instead, formerly there was, however, an Administrator in British Honduras (1786-1884), Cyprus (1878-1898), Gambia (1843-1900), Northern Rhodesia (1911-1923) and Seychelles (1889-1899). Today the situation in the Windward Islands is that there is a Governor-in-Chief and, under him, an Administrator in charge of the government of each individual island.

75. It is unusual, but not unknown, for a Lieutenant-Governor, under that title, to be charged with the administration of a Government in a British country. If a Governor is not in office, it is usual to provide by law that his functions and powers are to be performed and exercised by an "Administrator", the term ordinarily used to describe an Acting Governor or Acting Governor-General. Lieutenant-Governors have, however, in the twentieth century for a period of some years in two instances in Australian States performed the functions of a Governor in the absence of the latter, e.g. in Western Australia, and Queensland; and whilst acting as Governors they have been entitled to use the style of "Excellency".

76. Dr. W. Macgregor, who was Administrator of British New Guinea (now Papua) from 1888 until 1896, became its Lieutenant-Governor on 6 June 1896. Sir Hubert Murray who at first was its Acting-Administrator later became Lieutenant-Governor of Papua and remained in that office until the Second World War; but, on his death, the Australian Commonwealth Parliament amended the <u>Papua Act</u> to provide for an Administrator of Papua instead of a Lieutenant-Governor. I have seen correspondence from the Governor-General dated in the 1930's protesting against use of the style of Excellency by the Lieutenant-Governor of Papua, but no immediate action seems to have been taken by the Commonwealth Government, and I am unaware of the location of

that correspondence. Furthermore, I find myself not convinced that the Australian Commonwealth, especially since the date of its adoption of the Statute of Westminster, is without the necessary constitutional power to appoint, if it so desires, a Lieutenant-Governor of its Territories (just as the Governor-General of Canada has the constitutional power to appoint Lieutenant-Governors of the Canadian Provinces (i.e. States)) and, by arrangement with His Majesty, to accord him the style of "Excellency", just as His Majesty seems to have accorded that style to Sir William Macgregor when he was Lieutenant-Governor of British New Guinea. The Canadian pattern seems not an unreasonable pattern to be adopted for Australian Territories, were His Majesty to assent to representations from the Australian Commonwealth Government in that behalf; as I should think He probably would.

77. A modern trend seems to be to create the office of High Commissioner, instead of Governor, in and over Trust Territories in the Pacific. Thus, I am informed by Mr. Maude of the South Pacific Research Council that U.S.A. has a High Commissioner for the Trust Territory of the Pacific Islands, and by Professor Davidson that New Zealand has altered to High Commissioner the title of its former Administrator of the Trust Territory of Western Samoa.

78. There would consequently appear to be available for consideration, on historical grounds, the following as titles of the highest office in a Territory :-

(i) Administrator;
(ii) Governor;
(iii) Lieutenant-Governor; and
(iv) High Commissioner (or Commissioner-General).

In regard to the smaller and less populous Australian Territories which I have put into Class II, there might also be considered the following title, although a number of small British, American and New Zealand dependencies nevertheless are and have been governed by Governors and High Commissioners :-

(v) Resident Commissioner.

79. Apart from terms that are rather outdated (e.g. Captain-General) or are probably locally inappposite (e.g. Commissioner), realistic possible alternatives to "Administrator" would appear to be limited to those listed above.

One of the titles listed in the last preceding paragraph could, if it were decided to employ it, be validly embodied in Commonwealth legislation and used in a Territory, after advice had been tendered by the Prime Minister to that effect to His Majesty.

80. Legislation would, however, be necessary to alter the title of the office from "Administrator" to the chosen alternative, and to prescribe matters relevant to the new title and status.

81. There may be grounds for distinguishing the status, privileges and courtesies appertaining to the officer administering the government of one of the two Territories classified by me in Class II, from those of the officer administering one of those classified by me in Class I. However, the comparative status of the Territory cannot be too minutely examined, because it is a basic fallacy of government, which the British usually have carefully avoided, to entrust a person with the highest local office, but fail to give him: (a) the actual support he needs to perform the duties of his office, or (b) in relation to his office the status and the outward symbols of status (such as rights, courtesies and privileges), which strengthen his position in his Territory as the occupant of the highest office in it.

## 2. Administrator.

82. The title of "Administrator" would appear, apart from current Australian Territorial practice, to have signified that the Administrator either -

(i) is temporarily acting for and vested with the powers and functions of a Governor-General, Governor or Lieutenant-Governor (where a Lieutenant-Governor himself administers a government by legal right as formerly in British New Guinea, later Australian Papua) during his absence from whatever cause;

(ii) governs a particular territorial unit which constitutes only part of a wider geographical territorial unit, the wider unit being under a Governor-General or a Governor (e.g. the Administrator of St. Lucia under the Governor of the Windward Islands Colony; or

(iii) a senior administrative official in a dependency but junior to the Governor-General, Governor, or High Commissioner thereof. This is an unusual but possible use of the term, and may be the correct interpretation to be given to the use of "Administrator" in (ii) above, in relation to the Windward Islands Colony.

83. In the second of the above three senses "Administrator" seems to correspond to "Lieutenant-Governor" as used in (a) the Provinces of Canada, (b) in Victoria for a brief period while it was part of N.S.W. just before its separation, and (c) in British New Guinea when its Lieutenant-Governor was in certain respects under the Governor and Government of Queensland, and in Australian Papua when its Lieutenant-Governor was under the Governor-General of the Australian Commonwealth.

<u>3. Governor</u>.

84. If the title "Governor" were used instead of "Administrator", as may well be considered appropriate, it should be arranged that his appointment be made by His Majesty on the advice of His Government in the Commonwealth of Australia; and, in consequence, the Governor of an Australian Territory would on this, as on other points, be in a different constitutional position than the Governor of an Australian State.

<u>4. Lieutenant-Governor</u>.

85. If the title "Lieutenant-Governor" were used instead of "Administrator", as was formerly done in Australian Papua, the same method of appointment should be followed as if his office were entitled that of "Governor". In consequence, the Lieutenant-Governor of an Australian Territory would be in a different constitutional position than either a Governor, or a Lieutenant-Governor, of an Australian State. (As a result of fortuitous personal knowledge of royal prerogative practice in this particular, acquired by me as an honorary A.D.C. to His Excellency the Governor of Queensland before

World War II), I respectfully suggest, despite certain official pre-war Commonwealth correspondence (not now available to me) with respect to the use of "His Excellency" by the Lieutenant-Governor of Papua, that in an Australian State (a) if a Lieutenant-Governor is <u>not</u> administering the government as its "Administrator" in the absence of the Governor, he is not entitled to the style "His Excellency", but that, (b) if he is administering it in the Governor's absence he is entitled to that style; and that, if in a Territory the office is entitled not "Governor" but "Lieutenant-Governor" and in consequence a Lieutenant-Governor normally administers its government in pursuance of a constitutional provision to that effect, the Lieutenant-Governor is and should be entitled to the style of "Excellency".

<u>5. High Commissioner</u>.

86. As there are already District Commissioners in the Territory of Papua and New Guinea, it would not be illogical in that Territory were the chief executive of that Territory given the title "High Commissioner". If "High Commissioner" were to be used in Australian Territories (It is a growing practice in respect of dependent Territories administered by imperial Powers, including the United Kingdom, in various parts of the globe and especially in respect of dependent Territories under United Nations trusteeship) instead of "Administrator", the appropriate style of address would appear to be "His Excellency".

87. I am given to understand by Mr. Alan Watt that the term "High Commissioner" (which as I have just said is growing in popularity as the title of office of the Governor of dependencies that are not Possessions in the narrow sense of that term, e.g. The High Commissioners of the Federation of Malaya, the U.S. Trust Territory of the Pacific Islands, the N.Z. Trust Territory of Western Samoa, and others) is causing a problem for his Department because of the use of that term to designate also the representatives (who are really Ambassadors) between the different self-governing

units of the British Commonwealth, e.g. the High Commissioner in Australia of His Majesty's Government in the United Kingdom. In the circumstances, it is obvious that the Department of External Affairs should be consulted before "High Commissioner" can be put up to Cabinet as a title alternative to "Administrator" in respect of an Australian Territory. Nevertheless, it would seem that however confusing may be the different uses of the term "High Commissioner", those different uses are in actual existence at the present time. I suggest for your consideration that the appropriate course of action is for you to choose between "Administrator", "Governor", "Lieutenant-Governor", "High Commissioner" or other term for use in respect of Australian Territories and then arrange with the Prime Minister and the Minister for External Affairs that the relative precedence amongst themselves of, say, all persons called either Governors or High Commissioners be formally determined by Cabinet so that no confusion need exist in the future in the minds of the Department of External Affairs or any other person at any time.

6. Resident Commissioner.

88. "Resident Commissioner" is a title which possesses no intrinsic pre-eminence as a possible choice for Nauru Island and Norfolk Island should it be decided to abandon "Administrator" in regard to all Australian Territories, and replace it by "Governor" or "High Commissioner" in respect of the two Territories Class I but not in respect of the two Territories Class II. However, it has behind it some British colonial practice, which differentiates it in the British Solomon Islands Protectorate and in the Gilbert and Ellice Islands Colony by (a) prescribing salutes of eleven (11) guns as against seventeen (17) for Governors and High Commissioners, (b) according the style "His Honour" in place of that of "Excellency" for Governors and High

Commissioners, and (c) being the title of a high official who nevertheless administers a territorial unit which is of less importance than a Territory Class I and is himself responsible to the British High Commissioner for the Pacific.

II. Style of address.

89. Governors in British Colonies are entitled to the style of "Excellency"; and this is so, I am informed by Mr. Maude of the British Colonial Service and the South Pacific Research Council, even if the title of his office although equivalent to that of Governor is not "Governor", provided that it is one of the alternatives recognized by Regulation 102 of the British Colonial Regulations, such as High Commissioner or (in the case of Somaliland and Zanzibar, even Commissioner or British Resident).

90. The style of address at present granted by the Australian Commonwealth to the Administrators is that of His Honour, a title which in British Colonies is reserved for British Colonial Service officials holding comparatively minor posts such as Resident Advisers, or administering comparatively minor territorial units comprising part of the territorial jurisdiction of a Governor or High Commissioner; as is the case of the Resident Commissioner of the Gilbert and Ellice Islands Colony, who comes under the British High Commissioner for the Western Pacific.

91. Apart from the use of "His Honour" as the style of address of these few comparatively senior, but nevertheless subordinate, administrative officials in the British Colonial Empire, the style is usually found in common use in its application to judges of a Supreme Court; although in formal, but not in common usage, it would seem the appropriate style for members of the Executive Council, and probably for members of the Legislative Council also.

92. This failure to grant to the Australian Commonwealth's principal representative in its two main Territories a style which distinguishes him from others who in his Territory's

Table of Precedence are or should be lower than he, is I submit, a situation which deserves attention.

93. My recommendation for consideration by you is that the Administrators (whether renamed or not) of the two Class I Territories (namely, Northern Territory and Papua and New Guinea) be granted, after proper consultation with and action by the Prime Minister's Department, the style "His Excellency"; and that, if the style "His Honour" is retained at all for Administrators, it be retained only for those of the two Class II Territories (namely, Norfolk Island and Nauru Island).

94. It may be maintained by some that the Northern Territory's position as part of "the Commonwealth" (i.e. as being on the mainland, but nevertheless not a State) differentiates the situation in regard to its chief official; but, if any such differentiation is desired on constitutional rather than on political grounds, I would appreciate a further opportunity to examine and give an opinion as to the constitutional basis of the differentiation.

III. <u>Salutes and other ceremonial marks of respect</u>.

95. Governors (including High Commissioners) of British Colonies are entitled to certain salutes from His Majesty's ships of war, and the ceremonial aspect of naval visits is carefully regulated and observed. They are also entitled to salutes from certain forts and batteries. I forward herewith as Appendix "A" the salutes prescribed under Regulation 120 of the British Colonial Regulations.

96. Part IX of the Australian Military Regulations, made under the Australian Commonwealth *Defence Act*, deals with military ceremonial, but its provisions deal almost exclusively with the Governor-General and the State Governors (and officers administering the Government in their stead). Although there are a few exceptions, such as those in Regs. 679(iv) and 696(i)(ii) which indicate that honours and salutes are to be given by troops on parade and by guards of honour to, *inter alia*, an officer administering the government of

"a colony or territory under British rule by mandate (sic)...... within his sphere of jurisdiction", those in Reg. 708 listing Flag Stations and those in Reg. 709 listing forts and batteries at which salutes are authorized to be fired, the whole of Part IX of the Australian Military Regulations badly requires revision in order to extend its provisions to cover officers administering the governments of Australian Territories as well as those of the Australian Commonwealth and States.

97. I have not quickly available to me the comparable Regulations which doubtless have been made under the Australian Commonwealth's Naval Defence Act and the Air Force Act, and therefore cannot without further time being available to me advise you in detail concerning Regulations made under them to govern naval and air force ceremonial; but I would be very surprised indeed were they less in need of revision than are the Australian Military Regulations mentioned above.

98. I suggest that, if and when you request each of the three Service Departments to make provision in their respective bodies of legislation on these points concerning officers administering the governments of Australian Territories, you could not do better than use the enclosed Appendix "A" as a guide in coming to a decision as to what to request.

99. My recommendation for consideration by you is that the Administrators (whether renamed or not) of the suggested two Class I Territories (namely, Northern Territory and Papua and New Guinea) be graded with Colonial Governors, and given, for instance, a salute of 17 guns; and that those of the two Class II Territories (namely, Norfolk Island and Nauru Island) be graded with the Resident Commissioners in the British Solomon Islands Protectorate and the Gilbert and Ellice Islands Colony and given, for instance, a salute of 11 guns.

# A P P E N D I X "A".

## SALUTES PRESCRIBED UNDER REGULATION 120 OF THE BRITISH COLONIAL REGULATIONS.

| Colonial Officers entitled to Salutes when in their Official Capacities. | No. of Guns. | By His Majesty's Ships. | | | By the Fort or Battery from which Salutes are usually fired. | | |
|---|---|---|---|---|---|---|---|
| | | Within what Limits. | Occasions. | How often by the same Flag, Broad Pendant or Ship. | Within what Limits. | Occasions. | How often. |
| Governor or High Commissioners of any of His Majesty's Colonies, Protectorates, Territories, Dependencies, Castles, or Fortresses. | 17 | Those of his Government. | On landing on first appointment, or on return from leave of absence, at his destination from the United Kingdom, by the ship in which he arrives. | As the occasion arises. | Those of his Government. | On first landing, on reading of Royal Commission and taking Oaths of Office, or on return from leave of absence exceeding three months. | As the occasion arises. |
| | | | When visiting a ship either on going on board or on leaving, ~~by such ship.~~ | Once a year and by only one ship on the same day. | | On proceeding on leave of absence or finally quitting his Government. | As the occasion arises. |
| | | | On finally quitting his Government or on proceeding on leave of absence, by the ship in which he embarks. | As the occasion arises. | | When officially visiting other Ports or Dependencies of his Government. | Once a year only in any one place. |
| Lieutenant-Governor or Commissioner if administering the Government of a Colony, Protectorate, Territory, or Dependency, and if holding a commission direct from the King, or acting temporarily for an Officer so Commissioned, Administrators or Commissioners of Colonies, Protectorates, Territories, or Dependencies acting in subordination to a Governor or High Commissioner. | 15 | | | | | | |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Lieutenant-Governor not administering a Government if holding a Commission direct from the King. | 15 | )At the )seat of )Government )only. | (On disembarking (for the first (time from the (ship in which (he may have (arrived and on (embarking for (his final de-(parture, by (the ship in (which he ar-(rives or de-(parts. | As the occasion arises. | At the seat of Government only. | On first arrival and on final departure. | As the occasion arises. |

* The High Commissioner for the Western Pacific will be entitled to the same number of guns when visiting in, embarking in, or disembarking from, a ship outside the precincts of his Government, but within the limits embraced by his Commission.

The Commissioner, Somaliland Protectorate, } will be entitled to a salute of seventeen guns.
The British Resident, Zanzibar, }

The British Resident Commissioner in the New Hebrides, the Resident Commissioners, British Solomon Islands Protectorate and Gilbert and Ellice Islands Colony, the British Agent and Consul, Tonga, and the Resident Advisers at Mukalla will be entitled to a salute of eleven guns.

The Provincial Commissioner, Coast Province, Kenya, will be entitled to a salute of seven guns.

## (F). PRECEDENCE OF HIGHER OFFICERS (INCLUDING ADMINISTRATORS).

### I. Table of Precedence for use for official purposes in each Territory in respect of the legislators, senior administrative and judicial officials of that Territory, and officers of the Armed Services stationed therein.

100. The precedence of officers in each British Colony is determined by local enactments. Owing to lack of time for search I have been unable as yet to provide you with a precedent of a particular British Colony.

101. However, the Colonial Regulations regulating the British Colonial Service provide (Rs. 115-118) inter alia that "in the absence of any special authority Governors will guide themselves by the following general Table of Colonial Precedence" :-

(i) The Governor or other officer administering the Government;

(ii) The Lieutenant-Governor;

(iii) The Service Officers in command of the "station", if not under the ranks of Rear-Admiral, Major-General or Air Vice-Marshal;

(iv) The Chief Justice of the Supreme Court;

(v) The Service Officers in command of the "station", if not under the ranks of Commodore, Brigadier or Air Commodore;

(vi) The Colonial Secretary;

(vii) The Members of the Executive Council;

(viii) The Service Officers in command of the "station", if not under the ranks of Commander, Lieutenant-Colonel or Wing-Commander;

(ix) The Puisne Judges of the Supreme Court;

(x) The President of the Legislative Council;

(xi) Members of the Legislative Council;

(xii-xiii) The Speaker and members of the House of Assembly;

(xiv) The Chief Commissioners, Government Agents or Residents of Provinces;

(xv) The Solicitor-General (That is, where there is also an Attorney-General, the latter being a senior official with a seat in the Executive and Legislative Councils);

(xvi) The Service Officers in command of the "station", if below the ranks listed in (viii) above.

102. It would appear obviously desirable that -

(i) in respect of each Australian Territory, a Table be decided upon by the Federal Executive Council, and either embodied in Instructions approved therein or enacted by the Territorial legislature on instructions from the Commonwealth;

(ii) each Table follow the order set out in the British Colonial Regulations referred to above, as adapted to the particular circumstances of each Territory;

(iii) inter pares within each category, precedence be accorded amongst -

(a) Service commanders, according to the rules laid down in that behalf under the Defence Act;

(b) Puisne Judges of the Supreme Court, according to their respective dates of appointment, unless one happens to have been appointed as Senior Puisne Judge, in which event the latter will take precedence over the others; and

(c) Official members of the Executive Council, according to their respective salaries (the British practice) or, if salaries are equal, in accordance with their respective dates of appointment; and

(d) Unofficial members of the Legislative Council, according to some principle to be decided upon and prescribed in law or in instructions issued in that behalf.

## II. Precedence as between Officers holding appointments in different Territories.

103. Governors of British Colonies (and the term "Governor" covers every officer administering the government, whether his office be so entitled or entitled instead as High Commissioner, etc.) have precedence amongst themselves according to the class in which their respective colonies are graded. Governors of colonies of the same class, rank amongst themselves in accordance with the salary each respectively receives.

104. If Australian Territories were classified, as I have suggested be done, the British rules of precedence as between Governors could appropriately be applied as between Administrators (whether known by that, or some other name) of Australian Territories.

105. If Australia creates in the future specialised branch

as of an Australian Territorial Service similar to the various specialised "unified Branches" of the British Colonial Service, such as an Administrative Service, a Legal Service, a Medical Service, an Agricultural Service, an Education Service, a Police Service and so on, each of these Services will have its own seniority list.

106. At the present time it would seem that, as between officers (other than Administrators, whether known by that or some other name) of corresponding kinds but from different Territories, the rules as to their respective precedence whenever each happens to be outside his own Territory might reasonably be based upon the following principles :-

(i) That officers of the same kind take precedence amongst themselves according to the classification of their respective Territories; or, if the Territories are of the same classification, according to either the salaries or the dates of appointment of the respective officers, whichever the Minister thinks preferable;

(ii) That officers be deemed to be of the same kind if they each happen to be an administrative, agricultural, legal, educational, medical, police, forestry or other kind of officer, as the case may be. (N.B. The "kinds" might be specified as the same categories as exist in the British Colonial Service; as to which see p.431 of the 1950 British Colonial Office List).

107. The question as to inter-Territorial precedence of Territorial officers, other than that of the Administrators, is one on which, in the absence of special "unified branches" of a new Australian Territorial Service, differences of opinion may exist as to matters both of principle or of detail. Consequently alternative solutions are possible to this question.

108. One possible alternative would be to use the same Table of Precedence as is suggested for determining internal precedence; and supplement it with a rule such as I have suggested in paragraph 106 might be adopted for the purpose also of determining the inter-Territorial precedence of the Administrators. However, other possible but laborious alternatives, taking very much time to implement, would, of course, be to -

(a) review all salaries in all four Australian Territories, with the question of inter-Territorial precedence in view; or

(b) draw up a unified seniority list of all officers in all Australian Territories.

109. The last two alternatives mentioned in the last preceding paragraph would involve a tremendous amount of work and take quite a substantial period of time to implement. They would have the virtue, however, that ultimately they would provide a secure permanent basis for an Australian Territorial Service (including its specialised "unified Branches").