

## Constitutional matters and achieving statehood

### **States and territories in the Australian Constitution**

- 4.1 The *Commonwealth of Australia Constitution Act 1901* (the Constitution) makes numerous references to 'The States'. Chapter V of the Constitution specifically provides for the recognition of State Constitutions, state parliaments and state laws. The Constitution is guided by the general principle of equality in its treatment of states. For example,
- s. 51(ii) - no discrimination between Commonwealth taxation laws between states;
  - s. 51(xxxi) - Commonwealth laws for the acquisition of property on just terms;
  - s. 92 - Trade within the Commonwealth to be free;
  - s. 99 - Commonwealth not to give preference (to one state, in relation to any law or regulation of trade, commerce, or revenue);
  - s. 117 - Rights of residents in states;
  - s. 118 - Recognition of laws etc. of states;
  - s. 119 - Protection of States from invasion and violence; and
  - s. 123 - Alteration of limits of states.

4.2 Constitutional judicial guarantees also relate to states. Judicial guarantees include the right of appeal from state Supreme Courts to the High Court (s. 73) and the entrenched original jurisdiction of the High Court in all matters between states, between residents of different states, or between a state and a resident of another state (s. 75).

4.3 The Constitution provides for the different treatment of territories compared to states. Section 122 of the Constitution deals with the Government of Territories:

The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth ...

4.4 While in many respects the Northern Territory is treated as a state, Constitutional provisions relating to the states are not necessarily applicable to the Northern Territory. Constitutional guarantees to states may extend to the Northern Territory upon a grant of statehood.<sup>1</sup>

## Method of grant

4.5 Creating a new State under the Constitution is not a straightforward matter:

The whole Constitution is framed around the centrality of this notion of a federation of Commonwealth and states in an entrenched constitution with certain rights given to protect the smaller states against the larger. The whole question of territories and new states was quite an incidental issue.<sup>2</sup>

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1 J. Toohey, 'New States and the Constitution: An Overview', in P. Loveday and P. McNab (eds.) *Australia's Seventh State*, The Law Society of the Northern Territory and the North Australia Research Unit, Australian National University, 1988, p. 9.

2 Mr Nicholson, *Transcript of Evidence*, 15 November 2006, p. 42.

- 4.6 There are two constitutional mechanisms for granting statehood:
- To amend the Constitution via a referendum in accordance with S.128, inserting the Territory as a new state, and possibly including any terms and conditions of a grant (such as the level of representation of the new State and the Federal Parliament); or
  - To admit the new State via an Act of the Commonwealth Parliament in accordance with s. 121.<sup>3</sup>
- 4.7 The main advantage of using s. 121 to grant statehood is that it does not require a referendum, and that it would be easier to incorporate any terms and conditions related to the grant. On the other hand, an amendment to the Constitution could remove any potential legal doubt about the power of the new State in relation to original states.<sup>4</sup>
- 4.8 A number of participants at the Northern Territory Statehood seminar indicated a preference for the admission/establishment of the new State by means of Commonwealth legislation under s. 121 of the Constitution rather than by a referendum to amend the Constitution under s. 128.<sup>5</sup> The Prime Minister also indicated in 1998 the preference of the Commonwealth Government to use s. 121.<sup>6</sup> The Committee agrees that s. 121 is the preferred mechanism for granting statehood because it is a more straightforward and flexible path to statehood.
- 4.9 Part VI of the Constitution deals with new states. Section 121 of the Constitution provides for the admission or establishment of new states:

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

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3 The 1992 *Capital Duplicators* decision of the High Court confirmed that it is constitutionally possible for the Northern Territory to become a state. *Capital Duplicators Pty Limited and another v. Australian Capital Territory and another*, HCA 51, 177 CLR 248, FC 92/037.

4 Northern Territory Statehood Working Group, Final Report, 1996, pp. 12-15.

5 The Hon Justice Mildren, *Transcript of Evidence*, 15 November 2006, p. 35; Mr Nicholson, *Transcript of Evidence*, 15 November 2006, p. 39; Mr Pauling, *Transcript of Evidence*, 15 November 2006, p. 41.

6 The Hon John Howard MP, Joint Press Conference with the Hon Shane Stone MLA, Chief Minister of the Northern Territory, Parliament House, Canberra, 11 August 1998.

- 4.10 The Committee heard that there has previously been some debate about whether the Northern Territory should be admitted or established as a new State under s. 121. As there appears to be no major difference between the admission and establishment of the new State, the Committee is in agreement with Justices Mildren and Asche that it is more appropriate to admit the new State, as the Territory is already a self-governing 'body politic under the Crown', with existing institutions of parliament, executive and judiciary.<sup>7</sup>
- 4.11 The Committee also heard that while the Commonwealth may grant statehood to the Northern Territory through legislation, it also has the power to amend that legislation, as with any other Act of Parliament. The Commonwealth has previously exercised its power to override self-government in the Territories by passing of the *Euthanasia Laws Act 1997*, which amended the *Northern Territory (Self-Government) Act 1978* and the *Australian Capital Territory (Self-Government) Act 1988*, to prevent the Legislative Assemblies from legalising the practice of euthanasia.<sup>8</sup>
- 4.12 The power of the Commonwealth to amend its legislation granting statehood to the Northern Territory may be limited by other provisions in the Commonwealth Constitution including those outlined in paragraph 4.2,<sup>9</sup> s. 106 to the extent that the proposed amendment relates to the Constitution of the new State, or by the particular terms and conditions associated with the grant of statehood.

## Terms and conditions of a grant of statehood

- 4.13 The Committee heard differing views on the constitutional power of the Commonwealth to create a new state that is unequal to the original states particularly with regard to the issue of representation.
- 4.14 There has been legal doubt on whether the Commonwealth can admit a new state with terms and conditions that differ from those of the original states. The admission of a new state that is constitutionally

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7 The Hon Justice Mildren, *Transcript of Evidence*, 15 November 2006, p. 35; The Hon Justice Asche, *Transcript of Evidence*, 15 November 2006, p. 62.

8 Mr Pauling, *Transcript of Evidence*, 15 November 2006, p. 41.

9 J. Toohey, 'New States and the Constitution: An Overview', in P. Loveday and P. McNab (eds.) *Australia's Seventh State*, The Law Society of the Northern Territory and the North Australia Research Unit, Australian National University, 1988, pp. 8-9.

weaker than existing states undermines a key principle of federation, that of equality between states.<sup>10</sup> The Hon Justice Dean Mildren of the Northern Territory Supreme Court put to the Committee that ‘the new state be admitted on the same terms and conditions as the original states’.<sup>11</sup>

- 4.15 The terms and conditions of a grant of statehood may be limited by other provisions in the Commonwealth Constitution including those outlined in paragraph 4.2.<sup>12</sup>
- 4.16 There also appears to be legal uncertainty over whether the nexus and quota provisions of s. 24 of the Constitution applies to new states. The legal advisor to the Statehood Steering Committee suggested that this question would be resolved by bringing the statehood legislation before the High Court prior to the proclamation of the new State. This would ensure that there is a valid basis for the negotiated representation arrangements of the new State, once statehood is proclaimed.<sup>13</sup> Otherwise, there would be a strong likelihood of a High Court challenge by the original states.<sup>14</sup>
- 4.17 Chapter 6 contains further discussion of the issues of the representation of the new State.

## Constitution of the new State

- 4.18 The Constitution of the new State will need to pass through the Commonwealth Parliament and cover the power of the Northern Territory Parliament, and its executive, the Governor of the new State and provisions for the continuation of senior legal and government appointments.<sup>15</sup>

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10 The principle of equality between states was supported by a number of participants in the seminar. For example, Mr Burke MLA, *Transcript of Evidence*, 15 November 2006, p. 65.

11 The Hon Justice Mildren, *Transcript of Evidence*, 15 November 2006, p. 35.

12 J. Toohey, ‘New States and the Constitution: An Overview’, in P. Loveday and P. McNab (eds.) *Australia’s Seventh State*, The Law Society of the Northern Territory and the North Australia Research Unit, Australian National University, 1988, pp. 8-9.

13 Mr Nicholson, *Transcript of Evidence*, 15 November 2006, p. 45.

14 Mr Pauling, *Transcript of Evidence*, 15 November 2006, p. 49.

15 The Hon Justice Mildren, *Transcript of Evidence*, 15 November 2006, p. 38.

- 4.19 The new Constitution should also have the support of the existing states:

... the new constitution should not be radically different from the constitutions of the other states if agreement is to be reached on its terms – bearing in mind that not only must the agreement be reached as between Territorians but it must be reached with the parliament, and therefore it must be in a form which will be acceptable to the states as well.<sup>16</sup>

- 4.20 However, the Statehood Steering Committee is of the view that the Constitution of the new State is a matter for Territorians alone:

In accordance with democratic principles, Territorians should have the say on the formation and content of this document. It is for Territorians to determine this process. It should not be a matter for Commonwealth intrusion or dictation. Once the new State Constitution is adopted by Territorians in accordance with their own processes, it is then for the Commonwealth Government and Parliament to decide whether to accept it or reject it.<sup>17</sup>

- 4.21 As an Act of the Commonwealth Parliament, the Constitution of the new State may also be subject to amendment by the Commonwealth. This may create a situation where the state Constitution can be amended by the Commonwealth without reference to the people. However, according to s. 106 of the Constitution, subject to other provisions of that Constitution, a state may alter its Constitution in accordance with its own procedures as defined by the state Constitution:

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

- 4.22 The Committee heard that there is some uncertainty about the potential use of s. 106 as the issue has not been settled by the High Court. The Statehood Steering Committee is continuing to investigate this matter.<sup>18</sup>

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16 The Hon Justice Mildren, *Transcript of Evidence*, 15 November 2006, p. 36.

17 Statehood Steering Committee, *Submission No. 1*, p. 4.

18 Mr Nicholson, *Transcript of Evidence*, 15 November 2006, p. 52.

4.23 Members of the public who participated in open discussions at the seminar also raised the issue of including a Bill of Rights in the Constitution of the new State.<sup>19</sup> The former Northern Territory Sessional Committee on Constitutional Development previously examined this issue of a Bill of Rights for the Territory. The Statehood Steering Committee is also exploring the views of Territorians on this issue.<sup>20</sup>

4.24 The Committee heard that entrenching a Bill of Rights in the new Constitution may risk the support of original States:

I would not attempt to provide for the protection of fundamental rights or freedoms in such a document, especially as provisions of this kind might give Territorians rights *vide* section 106 of the Constitution even as against the Commonwealth not enjoyed by citizens of other states and are likely to be divisive.<sup>21</sup>

### Future referenda

4.25 Section 128 of the Constitution requires that Constitution alteration bills be put to referendum, which then must be approved by a majority of electors and a majority of electors in a majority of states (or four out of six states) to enable an amendment to the Constitution. Following a 1977 referendum, Territorians were able to have their votes counted towards the overall tally in referenda, however their votes are still not included in the state tally, the second requirement for a successful referendum.

4.26 With the inclusion of a new state, the second majority required for a successful referendum would be a majority of electors in four out of seven states rather than four out of six states, thus reducing one of the impediments to Constitutional change.<sup>22</sup>

4.27 Since Federation there have been a total of 44 referenda held of which only eight have been successful. Had the Northern Territory been included in the state count it could be argued that there would have been little difference in referenda outcomes. Of the 36 rejected

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19 Mr Turner, *Transcript of Evidence*, 14 November 2006, p. 46; Mr Wu, *Transcript of Evidence*, 15 November 2006, p. 75.

20 Legislative Assembly Sessional Committee on Constitutional Development, *A Northern Territory Bill of Rights?*, 1995, Northern Territory Statehood Steering Committee, 'What is a Bill of Rights?' Fact Sheet No. 29.

21 The Hon Justice Mildren, *Transcript of Evidence*, 15 November 2006, p. 36.

22 Mr Faulkner, *Transcript of Evidence*, 15 November 2006, pp. 53-54.

referenda, only five have gained a majority of national support but lacked the support of four states.<sup>23</sup>

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23 Tasmania did not support each of the five state-rejected referenda. Tasmania also holds the record of most rejections out of all the states (34 out of 44).