House of Representatives Standing Committee on Legal and Constitutional Affairs

Federal Implications of Statehood for the Northern Territory

Seminar in Darwin, NT, November 2006

Submission by Graham R Nicholson

Thank you to the Chairman the Hon Peter Slipper MP and Hon Members of the Committee for this opportunity to make this submission. My thanks also to the Secretary of the Committee.

I am a barrister at law, residing in Kuranda in North Queensland. Previously I was the Senior Crown Counsel for the Northern Territory. I am the legal adviser to the NT Statehood Steering Committee. Previously I was the legal adviser to the Standing Committee of the NT Legislative Assembly on Legal and Constitutional Affairs and the previous versions of that Committee back to its inception. I have been engaged in constitutional issues affecting the NT since 1974.

I was originally invited to address you on two aspects in this Submission:

a) the various legal facets of constituting a new state (in the Australian federation); and.

b) the Commonwealth constitutional ramifications of the changed legal status for the NT (upon a grant of statehood).

Both these aspects are obviously relevant to your enquiry. Since then I have been asked to address on Commonwealth constitutional matters and achieving statehood. This topic really encompasses both of these previous topics.

I have prepared these few comments after consultation with the NT Statehood Steering Committee. I seek your permission to include a copy of

this submission in the internet materials attaching to the Steering Committee's website.

Before dealing with these two matters may I just make a few general comments in relation to Statehood for the NT.

General Comments

The Northern Territory comprises one-sixth of the land mass of the Australian Continent. It is the third largest in distinct jurisdictional area after Western Australia and Queensland. It was formerly a participant in the Australian federation proper from 1901 to 1911 by being a part of the original State of South Australia. Since then it has not been a full participant in that federation and its citizens remain with a second-class constitutional status. The degree of that consequent disadvantage is to be measured by the difference constitutionally between a State in the federation and residents of such a State on the one hand, and a territory of the Commonwealth albeit with a grant of self-governing powers and residents of such a territory on the other hand.

Perhaps it was justifiable to remove the NT from the federation proper in 1911. It was at that time largely a forgotten backwater with a very small population, greatly under-developed and with few prospects for development, of little strategic or economic importance. The reason why it had been surrendered by South Australia to the Commonwealth was because it was a burden. It was not surprising that it was then reduced to a form of "feudal" dependency[1] of the Commonwealth by becoming a territory of the Commonwealth.

But times have radically changed since then. The NT is now a vital part of Australia, of considerable strategic, social and economic importance. It is located close to one of the most populated, fastest developing and most unstable parts of the world. It is at Australia's front door. And within its jurisdiction are resources of enormous value. For example it has some of the greatest reserves of uranium in the western world. And it now has a significant population, more than equivalent to some of the original States at the start of the federation. That population is among the most diverse in Australia. For example nearly one third of the residents claim descent from

[1] Of course the NT was never in a truly "feudal" position, except perhaps in the sense that for a long time after 1911, it was governed exclusively from Canberra either by national politicians or by the national bureaucracy.

the indigenous Aboriginal inhabitants. There are many cultures and ethnic groups represented. The NT is unique in Australia, and this gives rise to certain features that demand substantial local knowledge and input in terms of governance.

More than that, the NT has now had a long experience in self-government- nearly 30 years. That grant since 1978 has in general terms been very successful both constitutionally and (divorced from considerations of pure party politics) in terms of good governance. While there will always be controversial issues faced by any polity, that grant of self-government does not appear to be experiencing the same degree of questioning as is now faced in the ACT and in Norfolk Island[2]. As far as I am aware, there is no question of making any significant changes to the substance of NT self-government other than by way of a possible grant of statehood.

But there remains a number of features of these present NT constitutional arrangements that place the NT and its citizens in a second class constitutional status, even with self-government. Self-government is quite unlike the status of a State in the federation. I will deal with some of these differences later in this submission. The Australian constitutional system continues to be fundamentally based of the federal model comprised of only two types of political entities, the Commonwealth and the States. This continues to be the case notwithstanding the gradual increase in Commonwealth powers over those of the existing States[3]. Many informed people may still feel that the strength of the Australian constitutional model, its political stability and freedoms, have much to do with the fact that we are a federation under a national democratic constitution that can't easily be

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[2] These are the two Commonwealth territories that are closest to the NT model.

[3] The writer is not of the view that the federation has been so undermined by the emerging predominance of Commonwealth constitutional powers that the value of the federation has been substantially eroded as a result. It may be that the Commonwealth has taken a more expansive approach to the nature and extent of its constitutional powers viz a viz the States in recent times, supported by favourable interpretations from the High Court. But there remains a significant residue of State powers that are beyond potential Commonwealth intrusion. The States remain important actors in the federal scene. It may well be a mistake on the part of the Commonwealth to regard the pressures of globalization, international security and the perceived need for greater continental uniformity as a licence and mandate to seek a further significant expansion of Commonwealth powers and influence. Substantial diversity remains in the different regions of Australia that demand some degree of difference in approach, and the NT would add considerably to that diversity as a new State. In such a large country, considerations of decentralization are likely to increase in importance under regional, national and international pressures rather than decrease. Even if the States were to be abolished, there would almost certainly be a need to replace them with a system of regional government. In the longer term, the progress of globalization may be likely to put more pressure on governance at the national level rather than on the regional and local levels.

changed. Unitary systems may, on a simplistic view, seem more efficient and economical, but they do not necessarily contain all the protections, guarantees, innovativeness and responsiveness of federal models. And in any event, it is most unlikely that Australia will choose to change to a unitary system in the foreseeable future. So the future of the NT as a full constitutional participant must be within the context of the present Australian federal system.

In my opinion, not too much significance should be attached to the previous exercise seeking a grant of statehood for the NT, up to and including the failed indicative Territory referendum. There were special considerations that applied to that earlier exercise[4]. They do not necessarily detract from proposals for any future grant of statehood. Sufficient time has now passed to reconsider the matter anew. Lessons can be learnt from the previous experiment. The matter should be looked at afresh on its merits, and this Committee is doing that.

There are no insurmountable obstacles to the grant of statehood to the NT. Constitutionally this avenue is definitely open. There are some complex issues that will require co-ordinated political resolution[5], plus it seems essential that a there be adequate support for such a grant among at least a majority of Territorians, and of course certain actions by the Commonwealth Government and Parliament are necessary, but subject thereto such a grant is legally capable of being effected. It is a constitutional action requiring sufficient political will.

Commonwealth constitutional matters and achieving Statehood

A. Method of Grant

I have already expressed the view that it is constitutionally open to grant Statehood to the Northern Territory. This clears the way for such a grant to

[4] Some of these are identified in the Report into Appropriate Measures to Facilitate Statehood of the NT Standing Committee on Legal and Constitutional Affairs of April 1999.

[5] In my view it is not sufficient for the Commonwealth Government to indicate generally that it supports the proposed grant of statehood to the Northern Territory. Any such commitment must carry with it an understanding that there is an obligation on the relevant Commonwealth Ministers to actively pursue to a point of resolution the various complicated issues surrounding the proposed grant and the terms and conditions of that grant. Some of these issues are discussed below. It would be misleading for the Commonwealth to sit back and observe the unfolding of the Territory processes for such a grant if there is no genuine commitment by the Commonwealth to resolve these issues.

be made providing there is the political will to do so. Given the severance of residual constitutional links with the United Kingdom, it has been identified that there are two methods available for doing this:

> i) Successful national referendum to amend the Commonwealth Constitution under section 128 of that Constitution to insert the Territory in that document as a new State, and perhaps to set some of the terms and conditions of that grant, including as to the federal representation of the new State.
>
> ii) The admission[6] by the Commonwealth Parliament of the Northern Territory as a new State under section 121 of that Constitution along with the terms and conditions of that grant.

For a variety of reasons[7], the latter has generally been considered the preferred method. Section 121 is an express constitutional grant of power vesting in the Commonwealth Parliament specifically for this purpose, it clearly extends to territories[8], and legally only requires an Act of that Parliament for its implementation.

There may be added considerations that dictate some degree of prior consultation with the existing States over any proposal to use section 121 as it would no doubt affect them. For example, they will be interested in the degree of federal representation granted to the new State.

In addition, for an established self-governing community such as the Northern Territory is, it would seem unthinkable to proceed without detailed consultation and agreement with that Territory and its democratically elected representatives. A radically changed constitutional status is not something to be thrust on an unwilling electorate except perhaps in the most extreme circumstances. But these are not requirements spelt out in the constitutional text, section 121 being designed for the granting of statehood to polities and territories at different stages of political development.

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[6] Section 121 contains the words "*admit to the Commonwealth or establish new States*". In the case of a self-governing territory it seems more appropriate to describe the process as one of admission rather than establishment – there is already a separate body politic in existence that is seeking admission to the federation proper. But not a great deal may hang on the difference.

[7] These reasons can be expanded upon if required.

[8] See definition of the "States" in covering clause 6 to the Imperial ~~Commonwealth of Australia~~ Constitution Act 1900.

These requirements for consultation and agreement would also presumably apply to any proposed action under section 128.

There has been one constitutional issue arising from any use of the section 121 method that might require elucidation from the High Court. This is the issue whether the 2 for 1 nexus between the respective numbers of members in the two federal Houses of Parliament and the quota in section 24 of the Commonwealth Constitution would apply to the Senators and the Representatives in that Parliament of the new State as so admitted. It is necessary to know the legal position in this regard in finally fixing the representation of the new State. But this should not be a fatal impediment to the grant of statehood under this method.

I note that the question of the federal representation of the new State is to be dealt with under another heading before this Committee so I will not pursue this matter further at this time. Sufficient to note that section 121 itself expressly provides for the fixing by the Parliament of the terms and conditions of the grant of Statehood as to, inter alia, the extent of such representation in either House. The constitutional guarantees as to the minimal federal representation of an "original State"[9] in both Houses do not apply to a new State.

B. Terms and Conditions of the Grant

On the face of section 121 of the Commonwealth Constitution, there appears to be a very broad discretion in the Commonwealth Parliament to prescribe terms and conditions on a grant under that section. But clearly there are some limitations. The section has to be read in its broader constitutional context.

Thus there is High Court dicta to suggest that at least some minimal representation of the new State is required in both Houses of the federal Parliament[10].

Under section 106 of that Constitution, any pre-existing constitution of the political entity that is to become a new State is to be continued as at the admission or establishment of that new State until altered in accordance with that constitution[11].

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[9] Commonwealth Constitution, sections 7 and 24.

[10] Queensland v Commonwealth (1978) 139 CLR 585, High Court per Aickin J at 617.

[11] This is relevant to the position of the proposed new Constitution for the NT, discussed below.

It seems from a number of references in the Commonwealth Constitution that the new State must have a representative Parliament of some kind[12] with power to make laws for the new State[13]. It presumably must also have an Executive State Government of some kind, headed by a Governor or other chief executive officer or administrator[14], although not necessarily on the Westminster pattern of responsible government. And it should have a Supreme Court of the new State[15]. All these provisions would presumably be included in the constitution of the new State.

There is a question whether the new State and its constitution should be constituted under the Crown whilst Australia remains formally a constitutional monarchy, with the head of the new State appointed and dismissed by the Queen. The Constitution Act in the first preamble establishes "*one indissoluble Federal Commonwealth under the Crown...*". All existing States are established within the monarchical framework. Section 7 (1) of the Australia Acts 1986, read with the relevant definitions in section 16 of that Act, provides that Her Majesty's representative in each State, including in a new State, shall be the Governor or other person for the time being administering the government of that State. Section 7 goes on to provide that the Queen is not precluded, when personally present in the State, from exercising Her powers and functions in respect of the new State on the advice tendered by the Premier of the new State. Otherwise Her powers and functions, apart from appointment and termination of the Governor, are exercisable only by the Governor of the State. Presumably if statehood was to be granted by way of a national referendum under section 128 of the Commonwealth Constitution, then the new State could be created outside of this monarchical structure by express provision inserted in that Constitution.[16] But there is some doubt that this could be done if the section 121 method was to be used to grant Statehood[17]. The correct position could be that the new State must be established within the framework of the

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[12] That is, a democratically elected Parliament, but there is wide discretion as to the nature of the franchise.
[13] See Tappere, "*New States in Australia: The Nature and Extent of Commonwealth Power under Section 121 of the Constitution*", (1987) 17 Fed Law Rev, 223. Laws made by that new Parliament would be subject to the operation of section 109 of that Constitution. That law-making power extends to laws for the peace, order and good government of the new State, including those laws having extra-territorial effect – Australia Acts 1986, section 2 (1), although this provision is expressed in section 5 to be subject to the Commonwealth Constitution.
[14] Commonwealth Constitution, section 110.
[15] No doubt this could be a continuation of the existing Supreme Court of a territory.
[16] And see section 15 (3) of the Australia Acts 1986.
[17] Tappere, op. cit.

Crown, with a Governor or other person to administer the government of the new State as the representative of the Crown, but that it is not essential to confer any specific powers and functions on the Queen, including as to the appointment and termination of the Governor. This would leave the new State constitution free to prescribe another method of appointment and termination.

This does not mean that the new State Governor should be appointed and terminated by the Governor-General in the manner of the present Administrator of the Territory. Whether or not that would be constitutionally valid, such a method would clearly be opposed by the Territory as being inconsistent with the very notion of a separate State in the federation.

Questions arise as to whether the new State can be created on terms and conditions designed to avoid the application of certain guarantees in the Commonwealth Constitution to that new State. Thus, for example, could the new State be made not subject to the guarantee of absolute freedom of trade, commerce and intercourse among the States in section 92? The definition of "The States" in section 6 of the Covering Clauses to the ~~Constitution~~ expressly includes new States. The better view is that such constitutional guarantees cannot be avoided by this means.

Similar questions arise in relation to the operation of the federal division of legislative powers between the Commonwealth Parliament and the State Parliaments, as contained in section 51 and 52 of the ~~Commonwealth~~ Constitution. That is, can the Commonwealth Parliament use the terms and conditions power in section 121 to alter this federal division of legislative powers in respect of a new State, either by conferring additional legislative power on itself or by restricting the legislative power of the new State Parliament? This can be of great importance, for example, to the matter of euthanasia legislation in the Northern Territory.

This issue goes very much to the heart of the question whether it is constitutionally open for the Commonwealth Parliament to grant a form of "second-class" statehood. The federal division of legislative powers lies at the heart of the federal system as encapsulated in the Commonwealth Constitution. It is a single, common division that marks the respective boundaries of constitutional responsibility between all the States on the one hand and the Commonwealth on the other. To alter this in any significant

and permanent way other than by national referendum applicable to all States would be to make major inroads into the federal principle.

It is clear that constitutionally speaking, the fact of the self-governing Northern Territory not presently participating in and having the benefit of this federal division of powers constitutes the Territory's primary constitutional disadvantage. Even though the grant of self-government to the Territory is very broad, in the final analysis the Commonwealth Government, acting through the Commonwealth Parliament, can insist upon its view in every situation. Section 122 of the Commonwealth Constitution, known as the "territories power", gives the Commonwealth Parliament virtually unlimited legislative power in all Commonwealth territories. A Commonwealth law made under this section can override an earlier Territory law on any subject[18]. The existence of a grant of self-government to a territory offers no constitutional protection in this regard. But section 122 only operates whilst the jurisdiction in question continues to be a Commonwealth territory. As soon as the entity becomes a new State, section 122 ceases to apply, and the question of the operation of the federal division of legislative powers arises.

This issue was considered in the Final Report of the Northern Territory Statehood Working Group comprising Commonwealth and Northern Territory representatives[19]. It reviewed the views of a number of legal experts on the question whether the Commonwealth Parliament could reserve additional legislative power to itself in respect of a new State beyond that which it has in respect of existing States, and came to the conclusion that it was impossible to express a firm view on the point. It stated that it could not rule out the possibility of the High Court taking the view that it would be beyond constitutional power for the Commonwealth Parliament to alter the federal division of legislative powers in this manner in respect of a new State[20].

There is also some doubt that the Commonwealth Parliament can constitutionally impose restrictions, using its terms and conditions power in section 121, on the plenary legislative powers of the new State Parliament[21].

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[18] Northern Territory v GPAO (1999) 196 CLR 553, High Court per Gleeson CJ and Gummow J.
[19] NT Edition, May 1996.
[20] Ibid, 26.
[21] Ibid, 25-26. The Report seemed to express the view that there was somewhat less constitutional doubt about this aspect than a straight-out alteration of the federal constitutional division of legislative power by a purported reservation of additional legislative power to the Commonwealth, but the writer is unable to see

It would in any event be inconsistent if the new State constitution provided for a plenary and unqualified grant of legislative power to the Parliament of the new State with respect to the new State and if the Commonwealth terms and conditions sought at the same time to impose restrictions on that grant of legislative power. This inconsistency would have to be resolved before the grant could proceed.

This does not necessarily exclude the possibility of the Commonwealth Parliament enacting temporary transitional provisions to deal with the transfer of responsibility of certain matters to the new State in an orderly way. For example, it has been suggested that the new State might not wish to establish its own State industrial system upon a grant of Statehood, but might wish to make a reference of powers[22] back to the Commonwealth to maintain the existing industrial system in the Territory. Such a reference back could only be made after the grant of Statehood, thus requiring some transitional provisions in the interim. The exact nature of those provisions would be a matter for negotiation.

The Northern Territory has consistently taken the view that the terms and conditions of the proposed grant of statehood should be negotiated and agreed in some form of Memorandum between the Territory and Commonwealth Governments. That Memorandum would then be made public so that Territorians were aware of the proposed terms and conditions before the grant was made[23] and the terms and conditions were fixed by Commonwealth legislation.

I understand that the Statehood Executive Group has become aware of delays encountered in the period leading up to the previous statehood referendum in the Territory in trying to negotiate the terms and conditions of the proposed grant through the Commonwealth bureaucracy. Constitutionally all the issues are potentially capable of being resolved in

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the strength of the distinction. A restriction on new State legislative power in the terms and conditions of the grant would be likely to have much the same effect as such an alteration, in the sense that the new State Parliament would not be able to legislate on the topic either because of the restriction, or because of overriding Commonwealth legislation made under the alteration. The federal division of legislative power would be affected either way, in that a restriction on State legislative power would eat into the residual legislative powers of the new State, which residue is otherwise left by the Constitution to the States.. A restriction alone, if valid, might have the added detrimental effect that neither the new State nor the Commonwealth could legislate on the topic, leaving a vacuum.

[22] Under section 51 (xxxvii) of the Commonwealth Constitution.

[23] And presumably before Territorians voted on statehood, although this did not occur on the previous occasion in the NT as it was apparently not possible to agree on the terms and conditions in time.

this respect even though some of them may be difficult and complex[24], so this is a matter that comes back to one of sufficient political will.

C. The Constitution of the New State

It seems essential that a new State have a new constitution. In the case of the Northern Territory it could not be the Northern Territory (Self-Government) Act 1978 in its present form. And in any event that is just an ordinary Commonwealth Act. The Territory will wish to ensure that the new constitution has a secure constitutional status, beyond change by ordinary later Commonwealth legislation. The Northern Territory has taken the view since first examining this issue that that new constitution should be prepared by Territorians alone, not by the Commonwealth, through the Territory's own indigenous, democratic process[25]. Once that new constitution was adopted by some means that reflected at least a majority view of Territorians, then it should be submitted to the Commonwealth Government as the basis for a grant of statehood. The Commonwealth could then accept or reject it and act accordingly. If the Commonwealth accepts it, then the admitting Commonwealth legislation could simply refer to the new constitution and bring it into operation, while still making it clear that it is a law of the new State.

There is potential for overlap between the content of that new constitution and the terms and conditions of the proposed grant. This could be avoided if the preparation and adoption of the new constitution occurred concurrently with the negotiation of the proposed Memorandum on terms and conditions. This again raises the need for the necessary political will to give effect to the grant of statehood.

The new constitution would need to be brought into operation at least concurrently with the grant of statehood by Commonwealth legislation under section 121. It has been suggested that the new constitution could be brought into operation just before the grant of statehood, so that it would be

[24] Examples of issues that may need to be resolved in the context of a grant of statehood include the future of the Aboriginal Land Rights (Northern Territory) Act 1976, ownership of and control over the mining of uranium and other prescribed substances in the Territory, and the future of the two Commonwealth-controlled national parks in the Territory.

[25] A local process leading to the adoption of a proposed constitution was in fact followed in the previous exercise in the NT except that the resultant Territory referendum failed to achieve a majority of votes.

constitutionally continued on and from that grant and be protected under section 106 of the Commonwealth Constitution. This may be particularly important if the new constitution contains some entrenched provisions requiring special procedures to be observed for any later change to that constitution[26].

D. Other Matters

Apart from the matters discussed above there are a whole range of specific issues with constitutional/legal implications that will need clarification in any grant of statehood to the Northern Territory. It is perhaps better that I do not attempt an exhaustive analysis of these issues in this submission at this time. Many of them are mentioned in the Northern Territory Statehood Working Group Final Report, referred to above. These include that of the federal representation of the new State, being an issue that I have largely left untouched in this submission. Some other specific issues have arisen since the time of that Final Report, such as the future of the euthanasia legislation, the matter of storage of radioactive wastes, the proposals for entry onto Aboriginal land under the Aboriginal Land Rights (Northern Territory) Act 1976, etc. There are also ramifications that arise under the Commonwealth Constitution from any grant of statehood. I am of course prepared to try and answer questions from a constitutional/legal point of view or to provide supplementary written submissions at a later time if requested.

Thank you.

Graham Nicholson
October 2006.

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[26] Such as requiring a new State referendum for any later change, see the draft Constitution prepared and adopted by and for the Northern Territory on the previous occasion. The manner and form provisions in section 6 of the Australia Acts 1986 would not in their terms apply to any such entrenched provisions inserted from the inception of the new constitution. But by a combined application of sections 106 and 121 of the Commonwealth Constitution it would in my opinion be possible to validly entrench such provisions in the new State constitution. I do not comment on the political desirability of entrenching the new constitution.