Commonwealth Constitutional Matters and Achieving Statehood

The Hon Justice D Mildren, RFD

The Northern Territory of Australia is, since self-government, a body politic under the Crown: see Northern Territory (Self-Government) Act 1976 (the Self-Government Act) s 5. The Constitution of the body politic called the Northern Territory of Australia already exists in the form of the provisions of the Self-Government Act.

However, a Constitution is not necessarily restricted to one law called a "Constitution". For the purposes of s 106 of the Constitution, a State's Constitution may encompass the several constitutional documents of a State's three arms of government: *McCawley v The King* (1918) 26 CLR 9 at 51-52 per Isaacs and Rich JJ. Nevertheless it would be preferable for there to be a single constitutional document at the time the Northern Territory is admitted as a State.

It is clear that under s 121 of the Constitution, the Parliament of the Commonwealth may admit to the Commonwealth, or establish, new States. In the case of self-governing Territories, some take the view that the Northern Territory would be "established" as a new State, rather than admitted (e.g. Lane's Commentary on the Australian Constitution, 2nd ed, p 842) whilst others prefer the view that they will be "admitted" (e.g. *The Constitution of the Commonwealth of Australia*, R D Lamb, 4th ed, p 375). A third possibility is that it be both established and admitted. My view is that, because the Northern Territory is already a body politic, it is appropriate that it be admitted.

There is probably no great difference in the procedure to be adopted. In either case the Northern Territory will need a new Constitution to come into force immediately before it is admitted as a State. The new Constitution will have to be passed as an Act of the Commonwealth Parliament to come into force on the date of the admission of the Northern Territory as a State. The Commonwealth has power to enact the new Constitution under s 122 of the Constitution. It is difficult to see how the Northern Territory has the power to pass such a law at present.

The new Constitution will have to provide for at least the basic constitutional framework of the new State and in particular it should provide for the establishment and powers and privileges of the Legislative Assembly, the powers of the Executive, the Office of Governor, the Supreme Court, the requirement for appropriation bills and for the means of altering the Constitution. The new Constitution will also need to make it clear that it is either a continuation of the old body politic with a new status as a State or the creation of a new body politic. If the latter, it will require some transitional provisions to deal with Acts passed by the former Legislative Assembly remaining in force, the ability to commence former Acts not yet commenced, continuing the Supreme Court and continuing the appointments of Judges, Magistrates and other officials of government and governmental bodies (such as the Solicitor-General, the DPP, the Chairman and other members of the Liquor Commission, government departments and public servants, etc). All contracts entered into or rights acquired by or against the Northern Territory would need to be continued. It is my view that the new

Constitution should be as simple as possible and not be radically different from the Constitutions of the other States if agreement is to be reached on its terms, bearing in mind that agreement is not just a matter for Territorians, but must also be reached with the Parliament and therefore is a matter which must be acceptable to the States as well. For this reason 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 s 106 of the Constitution, even as against the Commonwealth, not enjoyed by the citizens of other States and is likely to be divisive. Nor would I recommend that certain laws, such as Aboriginal Land Rights, can only be changed by a special majority. Entrenching provisions make even simple and necessary changes to the law almost impossible to achieve.

The process of admission to Statehood involves also the terms and conditions of admission. I think what is envisaged by s 121 is the passage of an Act by the Commonwealth admitting the Northern Territory as a State upon the terms and conditions set out in the Act with a separate Act providing for the Northern Territory's Constitution which will come into force immediately before its admission in order for the Northern Territory to obtain the benefit of s 106 of the Constitution, which **continues** the Constitution of the new State as at the time of its admission as a State, until altered in accordance with the State's Constitution. I do not think this can be achieved easily by making the Constitution a schedule to an Act of Admission.

There is no Constitutional requirement for a referendum either in the Northern Territory or elsewhere on the subject of Statehood. History shows that a referendum is never likely to approve the admission of the Northern Territory as a State.

As to the terms and conditions, it is difficult to see why they should be any different from that of any other State. Indeed, Professor Howard has argued that it is not possible to admit a new State under terms which are different from the existing States: see *Australia's Seventh State*, Editors Loveday & McNabb, pp 24-26. Justice Toohey has pointed out, that, notwithstanding the apparent width of expression in s 121, it is arguable that there are limitations upon the power of the Commonwealth to impose conditions upon new States: see the list referred to by Toohey J in *Australia's Seventh State*, op cit, at pp 8-10. Any attempt to impose conditions different from that of the original States is an invitation to constitutional challenge best avoided.

Objections that the Northern Territory does not have the population to support 12 Senators overlooks the fact that in 1901 the populations of both Western Australia (184,000) and Tasmania (172,000) were not greatly different from the Northern Territory's present population of a little over 200,000 (allowing for the fact that the 1901 census did not include persons of Aboriginal descent). Of course, this will mean an increase in the number of Members in the House of Representatives because of the requirement of s 24 of the Constitution that the House of Representatives has twice the number of Senators. In my opinion, the Act of Admission should make it clear that the Northern Territory is admitted on the same terms and conditions as if it were an original State, so that the constitutional protections given to the original States under s 7 of the Constitution (ensuring, for example, that all States have an equal number of senators bring not less than 6 is maintained) and also ensuring that there be least 5 Members of the House of Representatives, vide s 24 of the Constitution. It is almost certain that if this were to be done, there would be a number of Aboriginal senators elected, which might go someway towards recognition of the different needs and viewpoints of the Aboriginal people.

It would be open, consistently with s 7 of the Constitution for the Act of Admission to provide for the Parliament of the Northern Territory to make laws dividing the Northern Territory into divisions, etc, as was provided in the case of Queensland.

Some may argue that there are already too many politicians in the Federal Parliament, but unless the Northern Territory is admitted on equal terms to the original States, it will be seen as a second class State and undesirable differences could develop between the original States and the new State which are presently difficult to foresee and perhaps may be difficult to alter. Professor Howard argues that the creation of a constitutionally inferior, or relatively weak, State "can only tend to destabilise a Federation which depends heavily upon the basic belief of its population in the virtues of politically and social equality" (*Australia's Seventh State*, op cit, at pp 25-26). I respectfully agree.

There are some consequences of this process which need to be considered:

1. There is no Constitutional need to decide at this time any questions concerning the future of the administration of the Aboriginal Land Rights (Northern Territory) Act. The Commonwealth already has power under s 51(xxvi) to make special laws relating to Aborigines. Statehood does not require transfer of ministerial control.

2. However, if the Land Rights Act is not repatriated to the Northern Territory, s 3A(2) of that Act excludes the liability of the Commonwealth for payment of compensation to the Northern Territory by reason of the making of a grant to a Land Trust of Crown Land that is vested in the Northern Territory. One alternative is to change that provision so that compensation is payable. It may be difficult for that provision to survive s 51(xxxi) of the Constitution which requires that acquisitions of State property be on just terms. New grants under the Land Rights Act are still possible, as I understand it. There would need to be a negotiated solution to this. Another possibility is that all land claimed under the Act at the time of Statehood be held by the State in escrow for the Commonwealth in the event that the claim is successful. Yet another is the acquisition by the Commonwealth before Statehood, of all such land, to be held by the Commonwealth in escrow for (1) the successful claimants; and (2) to the extent that there are no successful claimants, for the new State. The radical title in all cases must vest in the Northern Territory. I would also recommend that s 69 of the Land Rights Act which prevents compulsory acquisition, be repealed.

3. There is no need to be concerned about the future of the mining of uranium. The Commonwealth already has adequate powers dealing with that subject matter under the Defence power and the trade and commerce power. The new State should control the exploration for uranium, the grant of mining leases and the conditions of mining operations as it presently does. However, the Atomic Energy Act 1953 vests ownership of uranium and certain other minerals located in the Northern Territory in the Commonwealth and as a result there are special provisions under that Act that deal with mining in the Ranger Project area. It is open to argument whether there is any need to change these arrangements and it is possible that it is simpler to allow those arrangements to continue so far as the Ranger Project area is concerned, at least for the time being. Otherwise, all minerals not presently owned by the Northern Territory, including uranium, should vest in the Northern Territory.

4. I do not support the idea that the Supreme Court should be entitled to give advisory opinions, as proposed in 1997, for the simple reason that any opinion could be overruled by the High Court.

5. Whether or not national parks are handed over to the new State is not strictly related to the admission of the new State and is a matter which is open to be negotiated separately. However, it is difficult to see why there should be national parks controlled by the Commonwealth only in one State but not in others and the minerals in national parks must be vested in the Northern Territory.

Finally, in my opinion, any further delay in the admission of the Northern Territory as a new State or any suggestion that the new State should have fewer rights than an original State based on arguments that it is still in a state of learning should be rejected. The Northern Territory has now been self-governing in most State-like matters for 30 years. It is time to recognise that it is capable of admission as a State on equal terms to that of the original States.