The Formation of a new North Queensland State: The Constitutional Issues, and Procedural Pathway

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Content:

I INTRODUCTION

"Australia has created no new state since 1859; the United States in contrast has created close to 20. For a land of this size we do no have enough states. We thus miss one of the advantages of federalism."[2]

The call for the separation of North Queensland as a separate State was strong during the later half of the Nineteenth century,[3] and then throughout the course of the Constitutional Conventions of the 1890s. In the post-federation period there have been several petitions calling for areas of existing States, and for the Northern Territory (NT), to become a new State in the federation. One of the issues that has surfaced repeatedly, in the call for creation of new State from an existing State, is what the Constitutional requirements are for the creation of a new State, and then flowing from that what process needs to be followed for the change to occur.

This paper examines these two broad issues in context of a new State of North Queensland to be formed in the Australian federation. In Part II the Constitutional provisions that may be relevant to the creation of a new State are particularised, and then the key issue of the locus of power to 'initiate' the creation of a new State by separation of territory from an existing State is examined. Part III of the Paper examines the history of the failed referenda held in New South Wales (NSW) and the NT for the creation of a new State. Part IV looks at the historical journey in Queensland toward a new North Queensland State and then, in light of the NSW and NT experiences, sketches a possible political and legislative pathway towards the establishment of a new State of North Queensland. The final section to Part IV argues two key points in favour of separation: (i) that North Queensland has been particularly disenfranchised over the century since federation through centralist power shifting at both the State and Federal levels; and (ii) a failed commitment to the North as evidenced in s.7 of the Constitution. Part V concludes the paper with a summary of the key findings.

II NEW STATES AND THE CONSTITUTION

A *Identifying Relevant Constitutional Provisions*

Research on the creation of a new State in Australia evidences conflicting views about the constitutional requirements for how an area presently part of an existing State could become a new State in the federation.[4]

The issue of the creation of new States is specifically dealt with in Chapter VI of the Constitution under four separate sections:

> CHAPTER VI - NEW STATES.
>
> New States may be admitted or established.
>
> 121. 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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> Government of territories.

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[2] Geoffrey Blainey, 'The Centenary of Australia's Federation: What Should we celebrate?' (Papers on Parliament No 37, Parliament of Australia, November 2001) <http://www.aph.gov.au/senate/~/~/link.aspx?_id=7886EE143B0A43249B78F15D0425681C&_z=z>

[3] Christine Doran, Separation Movements in North Queensland in the Nineteenth Century <https://espace.library.uq.edu.au/view/UQ:207953/DU270_J33_1978_pp85_100.pdf >

[4] See for example, Constitutional Commission, Final Report (1988) (discussed further infra).

> 122. 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, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.
>
> Alteration of limits of States.
>
> 123. The Parliament of the Commonwealth may, with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, increase, diminish, or otherwise alter the limits of the State, upon such terms and conditions as may be agreed on, and may, with the like consent, make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation to any State affected.
>
> Formation of new States.
>
> 124. A new State may be formed by separation of territory from a State, but only with the consent of the Parliament thereof, and a new State may be formed by the union of two or more States or parts of States, but only with the consent of the Parliaments of the States affected.

Interpreting and applying these sections has been the matter of some conjecture, as has been whether they are the only provisions of the Constitution that might apply to the creation of new State. In respect to whether they are the only applicable provisions, Thompson has argued that s.128 paragraph 4 of the Constitution also applies to the creation of new States.[5] Relevantly, s.128 appears in Chapter VIII – Alteration of the Constitution, and paragraph 4 of that section provides:

> No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

Thompson's argument, as to the applicability of s.128, is based on the notion that if a new State is to be created by the separation of territory from an existing State then there would be an alteration to the limits of the State, thus requiring a referendum in the existing State.

Other comments about how provisions of the Constitution apply to the creation of new States also highlight historical uncertainty on the issue. Writing in 1933, Ellis attributes the following statement to the Queensland Premier of 1922, Ted Theodore, quoting advice the latter had received from the State Solicitor General:

> Sections 121 and 123 of the Commonwealth Constitution provide that the Commonwealth Parliament, with the consent of the State Parliament, shall have the power to create new States. This would enable the Commonwealth Parliament to create a new State within the boundaries of an existing State. The State Parliament has no power to create new States or to subdivide its territory for that purpose. The Commonwealth Parliament must *initiate* the necessary legal action in the matter. This would be done by passing a bill establishing the new State, by defining its boundaries and its construction. The bill would provide that the establishment of the new State would be subject to the terms and conditions imposed by the Commonwealth Parliament, including the extent of its representation in the Commonwealth Parliament and the consent of the Parliament of the State.[6]

Acknowledging that this opinion attributed to the Queensland Solicitor General is now of some antiquity, a key issue identified in the quotation is the locus of power to 'initiate' the creation of a new State.

The difficulties that emerge in the literature surrounding the interpretation of the Constitution for the creation of a new State might be said to be two fold: (i) at whose initiation the process is to occur; and (ii) does there need to be a referendum? To elucidate these points, take for example a

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[5] V. Thompson., '*New States in Australia'*, (1929) 1 (3) *The Australian Quarterly* 47.

[6] Ulrich Ellis, *New Australian States* (The Endeavour Press, 1933) 172 (emphasis added). (Ellis states that the statement was a quote by Premier Theodore of an opinion by the State Solicitor General.)

hypothetical situation where a member of the Queensland Parliament might introduce a Private Members Bill[7] for the separation of an area from Queensland to form a new State of North Queensland. Arguably, such an initiative would be in accordance with s.124 of the Constitution to garner the 'consent' of the State Parliament. However, if the Bill was subsequently passed into law, what, if any, challenges might the enactment of such legislation meet, and what other procedural requirements, under either s.123 or s. 124, or possibly s. 128, would need to be met for the separation of the new State to occur in fact? For example, would there need to be a referendum under s. 123 or possibly s. 128? And if so, would that referendum need to achieve the approval of the majority of the electors of the whole state of Queensland, or only of those people in the territory to be separated? And then, supposing these issues were resolved, would the Commonwealth still need to approve the separation and what conditions could it impose on the admission or establishment of the new State?

Each of the sections in Chapter VI (with the exception of s.122 because of its direct application to Territories) and section 128, are now examined in context of the separation of territory from an existing State to form a new State.

B *Interpreting the Constitution and New States: Paterson's Case*

On the issue of the creation of a new State from an existing State, there has been no High Court decision directly interpreting the provisions of Chapter VI of the Constitution. However, there has been authoritative consideration of the relationship between s.111 and s.123 of the Constitution by the High Court in *Paterson v. O'Brien,*[8] and consideration of the extent of power under section 122 in *Kruger v. the Commonwealth*.[9] Whilst the issues in *Paterson's* case are not directly apposite to the creation of a new State, the issues dealt with by the Court indicate how the provisions of Chapter VI, or any other section of the Constitution, may apply to the creation of a new State.

The relevant facts in *Paterson* were that the NT was partitioned from South Australia (SA) in 1907 following an agreement between the State of SA and the Commonwealth. That agreement was subsequently ratified and approved by the Parliament of SA and the Commonwealth. The application to the High Court in *Paterson* was that the partitioning of the NT from SA on 7 December 1907, and the partitioning of the Australian Capital Territory (ACT) from NSW, was not valid because there had not been compliance with ss. 111 and 123 of the Constitution.

Section 123 is set out above. Relevantly, s.111 is part of Chapter V – The States, and provides:

> States may surrender territory
>
> 111. The Parliament of a State may surrender any part of the State to the Commonwealth; and upon such surrender, and the acceptance thereof by the Commonwealth, such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth.

It was argued by the plaintiff in *Paterson* that the partitioning of the NT and the ACT were not valid because:

> ... s.123 of the Constitution 'controlled' s.111 so that the Parliament of a State might not validly surrender a part of the State to the Commonwealth except with the approval of a majority of the electors of the State. As an alternative, it was submitted that the Commonwealth could not validly accept such surrender unless a majority

[7] As to the process for introducing a Private Members Bill in the Queensland Parliament, see: Queensland, Cabinet Handbook (2015) 7.6 <http://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/cabinet-handbook/legislation/private-members-bills.aspx>.

[8] *Paterson v. O'Brien* (1978) 138 CLR 276 (*Paterson*).

[9] *Kruger v. Commonwealth* (1997) 190 CLR 1 (*Kruger*).

> of those electors had approved of the alteration in the limits of the State which it was submitted was involved in the surrender.[10]

In dismissing the application, the Court made a number of significant statements regarding how different sections from different Chapters of the Constitution are to be applied. In considering the relevant sections, the Court stated:

> Section 111 and s.123 are quite disparate, dealing with quite different matters and powers; they make no impact one on the other; s.111 empowers the legislature of a State to surrender part of its territory to the Commonwealth. It is of a different order to the power to alter State limits given to the Parliament by s.123. The only 'condition' imposed by s.111 on the power to surrender territory is that the surrender must be to and accepted by the Commonwealth.[11]

This statement by the Court on the interaction between ss.111 and 123 highlights a key point in interpreting Ch VI of the constitution - namely, the importance of identifying that different sections deal with 'different matters and powers'. A number of other comments by the Court are also important to the application of the provisions of Chapter VI.

Under s. 111 the 'Parliament of a State' may surrender part of that State and upon such surrender and acceptance by 'the Commonwealth' that part of the State becomes subject to the jurisdiction of the Commonwealth. It was argued by the plaintiff in *Paterson* that the term 'the Commonwealth' in s.111 meant the Parliament of the Commonwealth and not the Executive, and so the acceptance of the surrender by the State needed to be by the Parliament of the Commonwealth. The Court did not accept this argument. Indeed, the Court described the argument as 'fallacious', opining further that:

> ... the ability of the Commonwealth to accept surrender of a State territory is unconditioned. … [A]cceptance can be effected by an executive act of the Commonwealth. Acceptance within s.111 does not have to be by an Act of the Parliament.[12]

The distinction drawn by the Court between 'the Commonwealth' in s.111 to mean the executive of the Commonwealth, and the Parliament of the Commonwealth in s.123, was a decisive difference for the outcome of the case. The Court said that once the fallacy was exposed it left the plaintiff with 'the proposition that the Power of the Executive of the Commonwealth under s.111 is conditioned by the power of the Parliament under s.123.' The Court said: 'By no manner of logic or construction can this proposition, in our opinion, be made good.'[13]

The distinction between the roles of the two arms of government, the executive and the parliament, for the States and the Commonwealth, raised the issue in the case, as it does for any interpretation of the relevant provision in Chapter VI, at whose initiative changes to State boundaries can be made.

It will be recalled that the argument of the plaintiffs in *Paterson* was that s.111 was governed by s.123. Section 123 is predicated upon the 'alteration of the limits' of a State. Section 111 is conditioned upon 'surrender' and 'acceptance'.

In respect to the actions of the Commonwealth, the Court said that:

> ' … acceptance within s.111 by the Commonwealth, even if by the Parliament, is not in our opinion an alteration by the Parliament of the limits of the State, particularly not such an alteration effected by an Act of the Parliament under s.123. Clearly, if the acceptance is by the Executive of the Commonwealth, it could not be such an alteration.'[14]

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[10] (1978) 138 CLR276, 279.
[11] Ibid 281 (emphasis added).
[12] Ibid.
[13] Ibid, 281.
[14] Ibid.

This finding therefore set the stage for the Court to decide the issue of initiative for bringing ss.111 and 123 into operation. According to the Court:

> The initiative for the alteration of the limits of a State under s.123 is with the Parliament (of the Commonwealth) whereas the initiative in the surrender of a part of a State (under s.111) is with the legislature of the State.[15]

The Court's discussion of initiative is thus critical for the decision process for how a new State of NQ might be formed.

In summary, it is suggested that the two principles in *Paterson* relevant to determining the process for separation of a new State, such as North Queensland, are that that the relevant sections of the Constitution must be examined to determine whether they deal with different matters and powers, and secondly the locus of the initiative to bring about the change must be identified.

C *Interpreting and applying ss. 121 and 124*

In 1988, the Constitutional Commission made the following statements about the application of ss.121 and 124:

> The Procedure for the creation of new States is laid down in sections 121 and 124. …
>
> The wording of these sections has given rise to considerable doubt and difficulty both as to their precise meaning, and as to their application for the various ways in which a potential new State may originate.[16]

Unlike s.123, however, the headings to ss.121 and 124 include use of the same term – 'New States'. Respectively, the heading to s.121 also refers to 'admission and establishment', and the heading to s.124 refers to 'formation'.

In respect to s.121, Quick and Garran argue that 'admission' of a new State under that section can only refer to the entry into the Commonwealth of political communities which prior to their admission would be 'duly constituted colonies' – e.g. New Guinea, Fiji or New Zealand. They then argue that the 'establishment of new States' refers to the formation of States out of a Federal territory, or out of States already in existence.[17]

In considering the application of s.121 and s.124, Tappere has commented that the grant of power under section s.121 is an 'exclusive power to bring new States into existence', and that section 124 is an 'explicit limitation on the s.121 power.'[18] Similarly, Twomey has argued that: 'Section 124 qualifies the power granted in s.121. It does not contain a grant of power itself, but rather sets out the conditions precedent for the exercise of s.121 in certain circumstances.' These arguments might suggest that the 'initiative' for the creation of a new State, by separation of territory from an existing State, lies with the Commonwealth. This view, if accepted, would place section 124 subordinate to section 121.

It is contended that there is nothing contained within either s.121 or s.124 that expressly, or impliedly, indicates that the grant of power to the Commonwealth under s.121 is exclusive upon, or a precondition to, the creation of a new State from the separation of territory from an existing State. Indeed, the wording of s. 124 is a separate and substantive source of power to initiate the 'Formation of a new State'. Moreover, the power granted to the Commonwealth Parliament under s.

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[15] Ibid.

[16] The Constitutional Commission, above n 3, 429.

[17] John Quick and Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, first published 1901, 1976 ed) 968.

[18] Chris Tappere, 'New States in Australia: The nature and extent of the Commonwealth Power under section 121 of the Constitution', (1987) 17 (4) *Federal Law Review* 223, 226. See also: Anne Twomey, 'Regionalism – A Cure for Federal Ills? (2008) 31(2) *University of New South Wales Law Journal* 467, 487.

121 could not be exercised without prior consent of the State Parliament. Once that power is exercised, however, and 'consent' of the State Parliament given, it would be a matter then for the Commonwealth to exercise its discretion under s. 121 to establish the new State on relevant terms and conditions.[19]

On the basis that s.124 is the locus of power to initiate the formation of a new State from an area within an existing State, the question that arises is what amounts to 'consent' of the State Parliament?

On 28 July 1910 a resolution containing the following passage was passed by the Legislative Assembly of the Queensland Parliament: ' .. Queensland should be divided into three States ...'.[20] That resolution, however, was not approved by the Upper House, the Legislative Council (which still existed at that time) meaning that it could be argued that is was not consent of the Queensland Parliament.

If the Legislative Assembly today passed a resolution in the form of the resolution of 1910, (the Legislative Assembly being the only House in the contemporary Parliament), would it amount to 'consent' under section 124 of the Constitution and thereby be the impetus for the Commonwealth Parliament to establish a new State under section 121? The answer to the question hinges on the meaning of the term 'Parliament' as used in s.124.

The term 'Federal Parliament' is defined in Chapter 1, section 1 of the Constitution to '.. consist of the Queen, a Senate, and a House of Representatives'. State Parliaments are not defined in the Commonwealth Constitution. For a definition of State Parliament attention has to be turned to each State's own Constitution. In Queensland, Parliament is defined in section 2A of the Queensland *Constitution Act 1867*:

> **2A The Parliament**
>
> (1) The Parliament of Queensland consists of the Queen and the Legislative Assembly referred to in sections 1 and 2.
>
> (2) Every Bill, after its passage through the Legislative Assembly, shall be presented to the Governor for assent by or in the name of the Queen and shall be of no effect unless it has been duly assented to by or in the name of the Queen.

Section 124 of the Constitution is specific in requiring the '*consent of the [State] Parliament'*. In view of s.2A of the Queensland Constitution, it is contended that for an initiative to have efficacy for purposes of s.124 of the Constitution it must be in the form of an Act of the Queensland Parliament.

D *Interpreting and Applying ss. 123 and 128*

As noted a above, one of the key issues (and questions often heard anecdotally) surrounding the creation of a new State is: Would there need to be a referendum under the Constitution, and would that need to be for the whole of the existing State or only that part of the State that may be separated?

The arguments supporting the mandatory holding of a referendum may find their origins in the terms of ss.123 and 128.

It will be recalled that s.123 appears in Ch VI – New States, and is headed: Alteration of Limits of States. The terms of s.123 that give rise to the argument that it would apply to the creation of a new

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[19] See Tappere, above n 17, for a discussion of what terms and conditions might be able to be imposed by the Commonwealth.

[20] Queensland, Parliamentary Debates, Legislative Assembly, Debates 1910, 221-239 and 3122.

State are in the first part of the section: 'The Parliament of the Commonwealth may, with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, increase, diminish, or otherwise alter the limits of the State …' For the same reasons that Thompson has argued s.128 is relevant, s.123 is applicable because if a new State is created from the territory of an existing State then that would necessarily 'diminish, or otherwise alter the limits' of the State. Accordingly, a referendum of the electors of the State must vote upon the question.

In determining the application of s.123 to the creation of a new State the question becomes whether ss.121, 123 and 124 apply to different subject matters or whether they possibly apply conjointly to the one subject matter.

There are several theories about how provisions of the Constitution should be interpreted.[21] One of those theories is that resort can, and should, be made to the constitutional convention debates.

However, the purpose and weight to be given to the history of a provision of the Constitution (including the conventional debates) has been elucidated by the High Court in *Cole v. Whitfield*.[22] There the full bench of the Court in a unanimous judgment said:

> Reference to the history [of a provision of the Constitution] may be made, not for the purpose of substituting for the meaning of the words used the scope and effect - if such could be established - which the founding fathers subjectively intended the section to have, but for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged.[23]

In their commentary on the historical development of the Constitution, Quick and Garran argue that s.123 " .. is worded, not as a limitation on powers elsewhere conferred, but as an additional and substantive power", meaning that it was not intended to fetter the power given in s.124 but rather as a substantive power applying to other matters.

In support of this assertion, Quick and Garran note that s.123 is an exercise of power by the Commonwealth to 'increase, diminish or otherwise alter the limits of a State', which is different to the issue of a 'new State' for which direct reference and power is provided for in ss. 121 and 124.

To indicate how s. 123 would apply to a specific matter, Quick and Garren refer to the amendments to section 127 (which later became section 123 in the Constitution) made at the 1897 Constitutional Convention. The authors state:

> Sec. 123 could receive a reasonable construction by confining its operation to the modification of boundaries of States by cession and acquisition, giving and taking, which are within the possible mischief intended to be guarded against. What was in the minds of those who advised and framed the amendment was to make more adequate provision to guard against the possible taking of country from one State and transferring it to another; such as for example the annexation of Riverina to Victoria. [24]

As another example of how s.123 was intended to apply, Moore points to the case where a State may, under s. 111, without the consent of the electors of the State surrender a part of the State to the Commonwealth. Once surrendered 'the Commonwealth Parliament under s. 123 could transfer that

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[21] J. Heydon, 'Theories of Constitutional Interpretation: A Taxonomy', The Sir Maurice Byers Lecture delivered on 3 May 2007 NSW Bar Association Common Room <http://archive.nswbar.asn.au/docs/resources/lectures/byers07.pdf>

[22] *Cole v Whitfield* (1988) 165 CLR 18 [9].

[23] Ibid.

[24] Quick and Garran above n 16, 975.

territory to another State, but not unless the Parliament and a majority of electors of the accepting State assented'.[25]

The above examples serve to show that s.123 was not intended to apply conjointly with ss. 121 and 124. In addition to those examples, however, there are further compelling reasons indicating why ss.121 and 123, and similarly ss.123 and 124, are to be read disparately.

Turning first to ss.121 and 123, the introductory words to each of those sections is a separate grant of power to the Commonwealth Parliament. To wit, s.121 begins with the words: 'The Parliament may admit to the Commonwealth..', and s.123 begins with the words: 'The Parliament of the Commonwealth may ..'.[26] Thus if ss.121 and 123 are not disparate provisions intended to deal with different subject matters, then the inevitable conclusion is reached that there is a double grant of power to the Commonwealth to deal with the same matter. A proposition that, from any statutory interpretation viewpoint, would be difficult to accept.

Turning to the wording of ss.123 and 124, there is reference in both of those sections to 'consent' of the Parliament of a State. If the two sections were not intended to apply disparately it would mean there exists a duplication between the two sections on the issue of consent applying to the same subject matter. It could hardly be inferred that this was the intention of the founders of the Constitution.[27]

Once s.123 is isolated as a distinct head of power by the Commonwealth to 'increase, diminish or otherwise alter the limits of a State', then the qualifications on the exercise of that power – i.e. that the exercise of that power is subject to the consent of the State Parliament and the majority of people in that State – are confined to exercise of that power. Thus meaning that s.123 does not qualify, or impose additional referendum requirement upon the exercise of power by a State Parliament under s.124 or the Commonwealth Parliament under s.121.

The question that then arises is if s.123 doesn't apply to the creation of a new State under Ch VI, where does this leave the terms of s.128, since both sections refer to the 'alteration to the limits' of the State.

Section 128 appears in Chapter VIII and includes a number of paragraphs dealing with how any proposed amendment to the Constitution is to be made. It is the terms of paragraph six of the section that are relevant to the new State discussion.

The relevance of identifying the different matters dealt with by the respective Chapters in the Constitution was considered in *Kruger's* case where the purpose, and arguably the extent of power, resident with the Commonwealth under Ch VI was discussed. In referring to the powers of the Commonwealth under s.122, Brennan CJ stated:

> Section 122 is found in Ch VI of the Constitution – "New States". It *stands outside* Chs I to V which govern the relationship between the Commonwealth and the States. It stands in a Chapter that confers on the Parliament of the Commonwealth the powers required to vary the constituent polities of the federal compact and to govern the territories on the Commonwealth that are not, or not yet, a constituent of that Compact.[28]

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[25] W. Moore, *The Constitution of the Commonwealth of Australia* (Charles Maxwell Law Booksellers and Publishers 2nd ed 1910) 594. See also for example *Paterson* (supra), and *Commonwealth v Woodhill* (1917) 23 CLR 482.

[26] '*The Parliament*', or '*The Parliament of the Commonwealth*' are defined to mean the same in section 1 of the Constitution.

[27] It is also contended that an interpretation of s.123 that would require its application in conjunction with either s.121 or s.124, would also be inconsistent with intrinsic grammatical aid to interpretation, *Expressio unius est exclusion alterius*.

[28] See: *Kruger,* above n 8 (emphasis added).

As noted, s. 128 is found in Ch VIII, and 'stands outside' Ch VI – New States. The heading to section 128 is explicit, 'Mode of altering the Constitution', and the opening paragraph to the section sets the context for the following paragraphs 'This Constitution shall not be altered except in the following manner'. In short, s.128 is a manner and form provision for how the Constitution can be 'altered'.

Quick and Garran note that the relevant parts of section 128 referring to the alteration of the 'limits of a State' were added at the Premiers' Conference of 1899. They go on to argue that the purpose of paragraph six (6) of section 128 is to set out a number of restrictions on the amending power of the section. In their view, paragraph six applies to specific sections of the Constitution, and in respect to these sections:

> No amendment:
>
> 1) Diminishing the proportionate representation of any State in either House of the Parliament (secs. 7, 24);
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> 2) Diminishing the minimum number of representatives of a State in the House of Representatives (sec.24);
>
> 3) Increasing, diminishing, or otherwise altering the limits of a State (sec.123);
>
> 4) Affecting the provisions of the Constitution in relation to the foregoing matters;
>
> may be carried, unless a majority of the electors voting in the State interested approve of the proposed law. …"
>
> The alteration of the Constitution in these respects is not prohibited altogether, but is made subject to a three fold assent: not only the assent of (1) the people of the nation, and (2) the peoples of more than half the States, but also the assent of (3) the people of States affected. [29]

The nub of the argument supporting the application of s. 128 of the Constitution to the creation of a new State is that there would need to be a referendum for the whole of the voting population of the State for a part of the territory of the State to be separated. Based on the arguments above it is submitted that view is erroneous. Section 128 has no application to the creation of a new State of North Queensland.

III REFERENDA FOR A NEW STATE: THE NSW AND NT EXPERIENCES

The identification of the Constitutional provisions that apply to the creation of a new State is enabling – i.e. at least to the extent of identifying the locus of power to initiate the process. The historical attempts in NSW and the NT where referenda have been held on the question of creating a new State, however, show the complexities of achieving the outcome.

A *New South Wales*

Over the last century and a half, calls for new States to be formed out of existing States have been episodic; certainly that has been the case in both Queensland and NSW on the back of disaffection by people in the regional areas of each of those States with the policies of centralised State governments.[30]

[29] Quick and Garran, above n 16, 988.

[30] For a discussion of the initiatives in New South Wales, see M. Drummond, PhD thesis titled: *Costing Constitutional Change: Estimates of the Financial Benefits of New States, Regional Governments, Unification and Related Reforms, Appendix 2A (*University of Canberra) 2007. See also: Tappere, above n 17.

In New South Wales, for example, a New England movement became active in the 1920's, and a Riverina Movement grew out of disaffection with the Lang Government in 1931.[31] Following the Lang Government's dismissal in 1932, and the formation of the Provincial Government of NSW, a Royal Commission was formed to inquire into the formation of new States in NSW (the Nicholas Commission).[32] As part of its findings, released in 1935, the Nicholas Commission found two areas (one including central, southern and western parts of NSW (the Riverina area), and the other in the northern part of NSW (the New England area)), suitable for self government, and recommended that referenda be held to determine the voice of the people.[33] In the Riverina area, nothing ever came of the Commission's recommandation.[34] In respect to the New England area, in the post World War II period a New England New State Movement was formed in 1949, and in the early 1960's this group lobbied strongly for the holding of a referendum.[35] A referendum was subsequently held on the following question on 29 April 1967:

> Are you in favour of the establishment of a new State in north- east New South Wales as described in Schedule One to the New State Referendum Act, 1966?[36]

The referendum was lost, with 168,103 in favour and 198,812 against.[37]

The Nicholas Commission's findings that led to the referendum, and the voting patterns within the referendum areas, are germane to any future referendum on the creation of a new Sate.

The terms of reference for the Nicholas Commission were to:

> [I]nquire and report as to the areas in Our State of New South Wales suitable for self-government as States in the Commonwealth of Australia, and as to areas in Our said State in which referenda should be taken to ascertain the opinions of the electors qualified to vote for the election of Members of the Legislative Assembly on any question in connection with the foregoing.[38]

As part of the preliminary considerations in his Report, Commissioner Nicholas noted a number of limits within which he would admit evidence. On the issue of 'areas .. suitable for self-government', Commissioner Nicholas noted:

> .. [I]t was not part of my duty to inquire whether the subdivision of New South Wales or the establishment of New State in any of the areas proposed was desirable. On this point I express no opinion whatever. I endeavoured throughout my inquiry to keep the two question of desirability and suitability distinct.[39]

After making the distinction between desirability and suitability, and considering a number of sections of the Constitution (including the conditions the Commonwealth may impose under s.121), Commissioner Nicholas identified seven heads for determining suitability:

a) Nature of boundaries.

b) Size of area.

c) Population.

d) Nature of production and resources.

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[31] J. Logan, *The Riverina Movement (1931-1932),* Regional Records On-line Guide, Charles Sturt University <https://www.csu.edu.au/research/archives/collection/regional/agencies/rivmovement>

[32] New South Wales, *New States: Report of the Royal Commission of Inquiry* (The *Nicholas Commission Report)* 1935.

[33] The Nicholas Commission Report, 62.

[34] Logan, J., above n 31.

[35] Ulrich Ellis, 'The New State Movement in Action' (1966) 1 [1] *Australian Journal of Political Science*, 17.

[36] New South Wales, Writ issued by Governor Sir Arthur Roden Cutler to the Electoral Commissioner of New South Wales, 31, March 1967.

[37] Twomey, above n17, 46.

[38] The Nicholas Commission Report, 1 (emphasis added).

[39] The Nicholas Commission Report, 8.

e) Community of interest.

f) Means of communication.

g) Miscellaneous.

In a general sense each of these heads of suitability was given wide consideration by Commissioner Nicholas in reaching his findings. The Size of area, for example, was given consideration in context of agitation against centralism and the size of the State of NSW. The Nature of production and resources was also given extensive consideration in terms of industry diversification and economic sustainability of the areas proposed as new States. Interestingly, Population was given consideration in the context of federal parliamentary representation, Commissioner Nicholas noting:

> In my opinion it follows that the population of a State should at least approximate in number to that required to return five members to the House of Representatives, regard being had to the increase in the number of member of the House of Representatives which would follow an increase in the number of senators (see Constitution Act, section 24 …).[40]

Arguably the most contentious issue dealt with by the Commission was the issue of the Nature of boundaries, which also indirectly included consideration of Community of interest.

In his considerations of the boundaries that might be drawn for a new State, Commissioner Nicholas referred to the submissions and evidence provided to the Commission and commented that:

> [A] river was not a good boundary, because people on either side of it are likely to be engaged in the same occupations, and a frontier should not traverse any thickly-populated area. The best boundary is the ocean or a desert, and the next best a watershed. A line through mountainous or sparsely-settled country may be regarded as a good boundary because it is not likely to disturb the relations of any large number of people.

Commissioner Nicholas also noted submissions that 'urged that a boundary should not be drawn which would divide existing holdings.'[41]

Also in respect to the Boundaries head of suitability, two key issues Commissioner Nicholas considered pivotal to his recommendations were: '(a) water supply schemes, and (b) the control of rivers and conservation of water.' These issues were also relevant to other water related matters - rivers and streams, catchments, and riparian rights.[42]

Water related issues were to have a decisive effect in the drawing of boundaries by the Commission. During the course of the Inquiry, submissions were made by various interest groups on where the southern boundary of a proposed new State of New England should be drawn. On one side of the debate was an argument by the 'Northern Movement' that Newcastle should not be included within the boundary on a Community of interest grounds. Whilst this view was not unanimously held, the proposed boundary attracted strong criticism from the Commissioner:

> The southern boundary as proposed, however, is open to the very serious objection that it would place the sources of the Newcastle Water Supply with its catchment area in one State, and Newcastle and its suburbs in another.[43]

Despite an intervening period of 35 years from when the Nicholas Commission made its recommendation to the time of the referendum in April 1967, the referendum boundaries were as recommended by the Commission. What the results show is a north/south boundary divide within

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[40] The Nicholas Commission Report, 19.

[41] Ibid 16.

[42] Ibid 17.

[43] Ibid 33. On the issue of water and catchment, the Commissioner had earlier commented: " .. it seemed clear to me that a catchment area should not be divided except for very good reasons, and that there were overwhelming advantages in keeping the sources of water supply and the distribution itself under the same control."

the area of the referendum. The northern electorates of the proposed State voted strongly in favour of the establishment of a new State. In the southern area, however, the YES vote accounted for just 28% of all formal votes in Newcastle, and 34% in the other southern electorates of Gloucester, Maitland, Oxley and Upper Hunter.[44] From the results it is open to conclude that had the area of Newcastle not been included in the referendum boundary, as had been propounded before Commissioner Nicholas, then it is likely that the referendum would have succeeded.

Despite the referendum loss, interest in the creation of a New England State continues,[45] with support possibly coming from the current Federal Minister for Agriculture, Senator Barnaby Joyce. Writing in the Canberra Times in 2014, following the release in that month of the Federal Government's White Paper, Reform of the Federation, Senator Joyce reflected on the NSW 1967 referendum in the following terms:

> Growing up in New England I was acutely aware of the 1967 referendum for a seventh state, in northern NSW, which was lost narrowly by an ill-fated late decision to include the city of Newcastle within the proposed borders.
>
> The opposition to the proposition was that Newcastle would never swallow being run from Armidale. But the question northern NSW was posing at the time was: why should it be run from Sydney? [46]

Senator Joyce, it would seem, is also an advocate of the creation of new States. His article in the Canberra Time is headed, Time to Rethink the Federation, and he concludes his commentary with the following statement:

> Australia is a young and growing nation-continent and just as the creation of Melbourne as the national capital was deemed not to be the best long-term solution as the national capital, *neither is the six-state condition*.[47]

B *The Northern Territory*

Agitation for Statehood in existing States has been accompanied in more recent years by calls for the Northern Territory to become a State.[48]

Historically, the progress of the NT from its partitioning from South Australia on 7 December 1907 to 'the grant of 'limited' Self-Government' in 1978 might be described as slow and arduous.[49] From the time of Self-Government, however, momentum towards achieving Statehood gathered pace until a referendum was held on the issue in 1998.

On 3 October that year, Territorians voted on a referendum that asked the following question:

> Now that a constitution for a State of the Northern Territory has been recommended by the Statehood Convention and endorsed by the Northern Territory Parliament: Do you agree that we should become a State?[50]

The result of the Referendum was a No vote with 51.3% voting against the proposal. In light of the result, in 1999 the Northern Territory Legislative Assembly requested the Standing Committee on Legal and Constitutional Affairs (the 1999 Committee) 'to inquire into the appropriate measures to

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[44] New South Wales, New State Referendum, Miscellaneous Papers, State Library of NSW, (Call no. Q328. 230997).

[45] See: http://newenglandaustralia.blogspot.com.au/search?updated-min=2015-01-01T00:00:00%2B11:00&updated-max=2016-01-01T00:00:00%2B11:00&max-results=14

[46] Barnaby Joyce (Senator), 'Time to rethink the Federation', *Canberra Times* (on line) 12 July 2014 <http://www.canberratimes.com.au/comment/time-to-rethink-the-federation-20140712-zt3yj.html>

[47] Ibid (emphasis added).

[48] See: P. Loveday P. McNab, (Eds), *Australia's Seventh State* (The Law Society of the Northern Territory and the North Australia Research Unit, the Australian National University, 1988).

[49] Ibid, Dean Jaensch, 'The Slow Road to Statehood',63-81.

[50] Standing Committee on Legal and Constitutional Affairs, Legislative Assembly of the Northern Territory, *Report into appropriate measures to facilitate Statehood*, April 1999, 1.

facilitate Statehood by 2001'.[51] As part of its review the 1999 Committee found a number of key reasons why people voted No in the referendum. The Committee reported:

> In summary, while there is a small core of people (approximately 23% according to the market research) who are opposed to Statehood, most who voted No are not opposed to Statehood *per se* but listed certain deficiencies in past processes as the reasons for the No vote. These included a lack of information and understanding about Statehood, concern about the Statehood Convention process and the events surrounding it, a lack of trust in those responsible for last year's process, inadequate consultation, the role and approach of the Chief Minister, and a protest against the then Chief Minister and "the arrogance of politicians".[52]

The 1999 Committee also identified issues of particular concern to Aboriginal people in remote areas. The Committee found:

> Aboriginal people voted very much as a block No vote and while the factors described above also featured, particular issues stood out. These were an almost total lack of understanding of what Statehood meant and a distrust of the Northern Territory Government. There was a fear that Statehood would increase the power of the NT Government, a strong lobby for the No vote from ATSIC, the Central Land Council and the Northern Land Council (and virtually no alternative information), and no knowledge of the provisions of the Draft Constitution. These factors led to serious concerns in respect of losing existing rights, especially land rights, and concern about the impact of Statehood on law, culture and language. [53]

As part of their review the 1999 Committee considered whether there should be a continued push towards Statehood. From its review, the Committee concluded:

> The overwhelming message from all over the Territory - whether it was from the public or individual meetings, written submissions or from the independent market research - was that Territorians do support Statehood and want the process of constitutional development to continue.[54]

In 2004 a Northern Territory Statehood Steering Committee (the Steering Committee) was established to provide advice and assistance to the Legislative Assembly Standing Committee on Legal and Constitutional Affairs.[55] In 2010, the Steering Committee released its Information Paper and in considering the reasons for the No vote at the 1998 referendum, commenting:

> The referendum was conducted on the same day as the 1998 federal election, thus requiring the permission of the Governor General of the day to hold it in conjunction with a national poll to elect a Federal Government.
>
> The referendum was not accompanied by a published 'No Case' as there had been no official negative position taken by any member of the Northern Territory Legislative Assembly.
>
> The question was ratified by the Assembly some months prior. During the debate the Assembly rejected a proposal the question be broken into three distinct questions and instead opted for one question which in essence was made up of three parts.
>
> In order to receive a 'yes' vote the question assumes support not just for Statehood as a concept, but also for a draft constitution that had been formulated in controversial circumstances as well as support for the Statehood convention process that developed the draft constitution which itself had attracted a great deal of criticism about the representatives appointed to attend.
>
> Whilst the 'no' vote was not a resounding defeat (51.3%) it nevertheless demonstrates the difficulty of a multi faceted question receiving widespread support when aspects of the process remained controversial and unresolved and were well scrutinised by media and interest groups leading up to the final poll.

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[51] Ibid.
[52] Ibid, p. 2
[53] Ibid.
[54] Ibid., p.3.
[55] Northern Territory Statehood Steering Committee, Legislative Assembly of the Northern Territory, *Information Paper: What Might the Terms and Conditions of Northern Territory Statehood be?*, 2005-2010, 5.

> The Statehood Steering Committee held the view that the next referendum on Statehood should not seek approval for a multi faceted question.[56]

The finding of the Standing Committee, on how the question of Statehood should be framed, is an important one for any future referendum, whether in the NT or any other part of Australia, including North Queensland. The Standing Committee's finding was consistent with the 1999 Committee's view about a future referendum when it said that if there was a future initiative to move towards Statehood there should be a number of stages, and that if a referendum was held it should ask only one question: 'Do you agree that the Northern Territory should proceed towards Statehood?'[57]

VI A NORTH QUEENSLAND STATE: HISTORY AND POSSIBLE CHANGE

The referenda in NSW and the NT show that enthusiasm for change, despite legal clarity, can be met with esoteric obstacles on the pathway towards creating a new State. This part of the paper looks at the enthusiasm for change in Queensland, and then suggests a possible pathway given the NSW and NT experiences.

A *Historical Perspectives and Contemporary Petitions*

In 1896, the Queensland Labor member for Rockhampton, William Kidston, moved a motion for a referendum for the separation of northern and central Colonies which was 'passed' in the Queensland Parliament on a Speaker's vote after a twenty for, and twenty against, split in the vote.[58] The next day, a number of members absent when the vote was taken managed to have their votes recorded, and the movement was blocked.

The agitation for separation of the north from the south in Queensland remained intense throughout the 1890s, and was one of the factors that led to Queensland not being represented at the 1897–8 Constitutional Convention.[59]

Subsequently, at the Premiers' Conference of 1899, as a concession to Queensland, it was agreed that provision would be made in s.7 of the Commonwealth of Australia Constitution (the Constitution) for the Senators of Queensland, if it were an original State, to be chosen from separate divisions rather than the State as one electorate.[60]

Since the time of Federation there have been a number of Parliamentary initiatives to create a new Sate of North Queensland.

On 28 July 1910, the Labor Member for Barcoo, T.J. Ryan, introduced into the Legislative Assembly of the Queensland Parliament the following motion for the separation of Northern and Central Queensland States:

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[56] Ibid, 11.

[57] Standing Committee on Legal and Constitutional Affairs, above n 50, 7.

[58] The Motion, as moved, read: "That, in the opinion of this House, it is desirable to obtain a direct expression of opinion from the electors of Northern and Central Queensland as to the desirability of their respective districts being constituted separate colonies, and that for this purpose legislation should be introduced with the view of submitting the questions of Northern and Central separation to the electors of those districts respectively by means of the referendum." Queensland, Legislative Council Debates, 1896, 886 (W Kidstone).

[59] Twomey, above 17, 484.

[60] Ibid.

> That in the opinion of this House, the time has arrive when Queensland should be divided into three States, and when Central and Northern Queensland should each be granted separate Constitutions subject to the Constitution Act of the Commonwealth of Australia.[61]

Ryan's motion was passed by the Legislative Assembly on 23 December 1910, but was never dealt with by the Legislative Council and the resolution has never been acted upon.[62]

On 25 November 1910, the Honourable W.G. Higgs, Federal Member for the seat of Capricornia, moved the following motion in the Federal House of Representatives:

> That this House is prepared, in accordance with Chapter VI of the Commonwealth Constitution, to form two new States out of the Territory known as Northern and Central Queensland.
>
> That this resolution be forward to the Senate with a request for its concurrence therein.

On 21 December 1912 the Senate considered the above resolution and the question was resolved in the negative.[63]

Subsequently, on 6 July 1922 in the Queensland Legislative Assembly, the Labor Member for Rockhampton (and later Prime Minister of Australia) LM Forde described the 1910 resolution of the Queensland Legislative Assembly (above) as 'pious', and then followed saying that: 'Legislation is what is required.' Forde was speaking to the motion he had moved in the House:

> That in the opinion of this Parliament, the time has arrived for the remodeling of the Commonwealth Constitution, providing for the subdivision of Australia into greater number of self-governing States, making for more economical and effective government, and also providing an easy method for the people in any district, such as Central Queensland or Northern New South Wales, to obtain self-government, and that the Prime Minister of Australia be urged to take the necessary steps to bring about those reforms.[64]

The substance of Forde's motion was hotly debated around the application of sections 123 and 124 of the Constitution. Despite a failed attempt to amend the motion (i.e. to a motion for the creation of Northern and Central Queensland as two separate States) Forde's original motion was passed on 13 July 1922.[65] Again, nothing became of the resolution.

One of the possible reasons for a lack of action on resolutions passed by the Houses of the respective Parliaments might have been the special provision made for Queensland in the Constitution at the 1899 Premiers' Conference to garner support for federation. As noted, that special consideration was in the form of an amendment to s. 7 of the Constitution to allow Senators for Queensland, if the Queensland Parliament so chose, to be elected on a regional basis. The relevant part of s.7 provides:

> " *.. until the Parliament of the Commonwealth otherwise provides, the Parliament of the State of Queensland, if that State be an Original State, may make laws dividing the State into divisions and determining the number of senators to be chosen for each division, and in the absence of such provision the State shall be one electorate. …"*

The Queensland Parliament has never invoked this part of s. 7 of the Constitution. Importantly, however, in 1983 s. 39 of the *Commonwealth Electoral Act 1918* was amended removing the

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[61] Queensland, Legislative Assembly, Debates 1910, 221-239, and 3122 (T. J. Ryan). For a discussion of the history of parliamentary initiatives for a separate North Queensland state in the 19th Century, see: Doran, above n 2.

[62] The Legislative Council was the former 'upper house' of the Queensland Parliament. It was abolished by the *Constitution Amendment Act 1921*, which took effect on 23 March 1922.

[63] Australia, Senate, Debates, 1912, 7719-7722.

[64] Queensland, Legislative Assembly, Debates 1922, 58-72 (L.M. Forde).

[65] Queensland, Legislative Assembly, Debates 1922, 219-224.

possible application of section 7.[66] Thus the compromise reached at the 1899 Premier's Conference to accommodate the needs and wishes of the people in the northern parts of the State has now been removed.

The enthusiasm for the creation of new States of Central and Northern Queensland in the Queensland Parliament in 1910 and in 1922 has been noted above.

In the 1950s the 'North Queensland New State Movement'[67] emerged as voice calling for change, and in the 1970s there also emerged the 'North Queensland Self-government League'.

In 1994, Frank Rossitor formed the North Queensland Party with the express goal of achieving a New State for North Queensland.[68]

In 2010, at a North Queensland Local Government Association meeting, just two out of 100 delegates voted against a motion calling for a new State of North Queensland and a referendum to be held in 2012.[69]

On 8 July 2013, Brad Archer of Townsville lodged an e-petition with the Queensland Parliament in the following terms:

> Queensland Citizens draws to the attention of the House the desire of the people of North Queensland to be recognised as a separate and distinct community with its own regional character and identity.
>
> Your petitioners, therefore, request the House to: conduct a referendum at the next State election regarding the formation of a North Queensland State with the question to be asked of the people being as follows: "Should North Queensland become a separate State?"[70]

In respect to Archers e-petition, on 12 March 2104, the Acting Premier of Queensland, Jeff Seeney, wrote to the Clerk of the Parliament saying that the Government did not support the holding of a referendum:

> We would lose part of our identity and our combined strength by splitting this great state and, as a Government for all of Queensland, we will continue to work every day to deliver better government for the whole of the State.

More recently, in 2013, Clive Palmer, Member of the House of Representatives (MHR) called for the creation of a new North Queensland State,[71] and in April 2015, Bob Katter MHR also called for the creation of a new State in the North.[72]

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[66] The current section 39 of the *Commonwealth Electoral Act 1918* was inserted per force of the *Commonwealth Electoral Legislation Amendment Act 1983, No. 144*, section 9. S.39 now reads:

> *"Division 1—Choosing of senators for Queensland*
> *s. 39 Senators to be directly chosen by people of State etc.*
> *(1) Senators for the State of Queensland shall be directly chosen by the people of the State voting as one electorate.*
> *(2) The Parliament of the State of Queensland may not make laws pursuant to section 7 of the Constitution dividing the State into divisions and determining the number of senators to be chosen for each division."*

[67] Ulrich Ellis, 'The Case for the State of North Queensland', Paper presented to the Convention of the North Queensland New State Movement, Mareeba, 6 August 1955.

[68] Drummond, above n 30.

[69] S. Volger, 'Northern Queensland mayors want to break free from the high-growth areas of the state', *Courier Mail*, 10 August, 2010.

[70] Queensland Parliament, E-petition no. 3137-13 < https://www.parliament.qld.gov.au/work-of-assembly/petitions/closed-e-petitions>

[71] *Sunshine Coast Daily*, 2 September, 2013 <http://www.sunshinecoastdaily.com.au/news/id-make-north-queensland-separate-state-says-clive/2005639/>

[72] 'Let us Go! Bob Katter wants North Queensland to take the first step to a new state', *Tully Times*, 16 April, 2015, 1.

B *Formation of a new North Queensland State: A Political Roadmap?*

There can be little doubt that if a future proposal to change the makeup of States in the federation is begun in Queensland it will likely meet with resistance and challenges. Certainly all historical evidence shows that. The lessons from NSW and the NT, however, indicate that the obstacles are more political than Constitutional or legal.

In taking an initiative to form a new State from an existing State there is no Constitutional requirement for a referendum – neither for the existing State as a whole, nor for the intra-State territory to be separated.[73] This does not mean, however, it would not be politically prudent to hold a referendum, at least within the territory to be separated. Certainly, in the absence of a referendum affirming the will of the people in the territory to be separated, it would be unlikely that a Bill for 'consent' to separation would be successful in the Queensland Parliament. With this important point in mind, two questions immediately become apparent: (a) How to define the boundaries of the area to be separated as North Queensland? and (b) How to initiate a referendum for the area to be separated?

The order of these two questions would, at first blush, seem to be chronologically sound – that is, the first issue should be to define the area, and then to initiate the referendum. Certainly this was the order taken in NSW, with the Nicholas Commission first finding the area suitable for self-government in 1935, and then in 1967 the referendum being held.

The history of NSW, however, also shows another important political point; namely, that the initiative for change in that State arose out of political tumult – i.e. the removal of the Lang Government and the taking of power by the Provincial Government of NSW. Does such a situation of political turbulence exist in Queensland at this time?

On 13 February 2015, the Australian Labor Party's (ALP) Annastacia Palaszczuk accepted Governor Paul de Jersey's offer to form government in Queensland having secured 44 seats in the 89 seat Parliament. On 30 March 2015, Billy Gordon, State MP for the seat of Cook, resigned from the ALP leaving the Palaszczuk government with a two seat minority and relying on the vote of Gordon and one other in the legislative assembly.

A key point of interest here is that there are now three members of the Queensland Legislative Assembly sitting on the cross-benches whose seats are located geographically above the 22 degree south parallel.

The 22 degree south parallel has often been touted as the southern boundary of a possible North Queensland State[74] and includes the State electoral seats of Mount Isa and Dalrymple, held by Robert Katter (Jnr) and Shane Knuth respectively for the Katter Party. Together with Billy Gordon in the Seat of Cook, this 'trio' holds substantial power in the Parliament.[75]

Against the background of the issues discussed in this paper, one of the ways that the power held by the three members of Parliament might be exercised is for one of those cross-bench members to

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[73] See also: Moore, above n 25, 587-596.

[74] Robert Katter (MHR), 'State Split: north Queensland seeks independence', *Brisbane Times*, 10 August 2010. See also: *Brisbane Courier*, 27 April 1931 <http://trove.nla.gov.au/ndp/del/article/21691010> And: *ABC News*, 20 June 2007, http://www.abc.net.au/news/2007-06-20/referendum-urged-for-far-north-separate-state-push/74620>

[75] Dale, A. (Prof.), "North Queensland's powerful trio will shake up the state", The North West Star, 7 May 2015 < http://www.northweststar.com.au/story/3062962/opinion-north-queenslands-powerful-trio-will-shake-up-the-state/,>

introduce a private Member's Bill for the holding of a referendum for a defined northern area within the State to establish whether the people of the area wish to separate and establish a new State. In defining the southern boundary for the referendum, it is suggested that it could either align with the 22 degree south parallel, or be a boundary negotiated consistent with the boundaries of the local councils that voted in favour of separation in 2010.[76] If the subsequent referendum vote achieves a majority then a further Bill would be introduced to the State Parliament for 'consent' to the creation of a new State under section 124 of the Constitution.

Should the above steps be successful, it would then fall to the Commonwealth Parliament under section 121 of the Constitution to establish the new State upon '.. such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit.'

C *Terms and conditions under s.121 for a NQ State – A chance to right a wrong?*

The terms and conditions of representation for a new North Queensland State, to be determined by the Commonwealth Parliament under s.121, have the potential to (a) redress an unfulfilled commitment, and also (b) correct an evident federal imbalance.

One of the fundamental tenets embodied in the Constitution is federalism - the distribution of power in the Commonwealth. The Constitution's provisions, whilst being the terms of a national consensus, were, at the time of federation, also the subject of compromise. In the case of North Queensland a key part of that compromise was a commitment about representation and the distribution of power in the State by provision in s.7 of the Constitution to allow senators to be elected on a regional basis. That commitment, however, has never been lived to, and the mechanism for it to occur has now been removed by the amendments to the *Commonwealth Electoral Act 1918*.

The provision made in s.7 relating to Queensland was, pure and simple, about power balance. However, if there were concerns by North Queenslanders about the centralization of power in Queensland at the time of federation, and in the immediate post-federation period, those concerns ought now to be at fever pitch.

Today, Queensland is the only State in Australia with a unicameral legislature, with a total of 89 seats in the single-house Parliament, and just 28 of those seats being outside southeast Queensland. In the absence of an upper house, as a check and balance on centralist executive decision making, the principle of subsidiarity[77] (i.e. that governance decisions should be made as close to the people they affect as possible) becomes all the more important in a State that covers 1.852m sq/km.

The affliction of centric decision making felt in North Queensland, arising from the unique government structures in the State, has been compounded since federation by the conspicuous shift of power towards the Commonwealth from the States - particularly by the use of tied grants from the Commonwealth to the States under s.96 of the Constitution.[78]

Relevantly, s.96 of the Constitution provides:

> 96. During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

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[76] Volger, above n 69.

[77] Australian Government, *Reform of the Federation White Paper: A Federation for Our Future* (the Federation White Paper), September 2014, 20.

[78] For a short discussion of a submission to the bi-partisan Constitution Review Committee (1956-59) for the creation of new northern States, and comments on the use of s.96 grants to 'develop' the north by the then Deputy Opposition Leader, Gough Whitlam, see: L. McGarrity '"Necessary or Urgent?" The Politics of Northern Australia 1945-75', *Journal of the Royal Australian Historical Society* 97 [2] 136, 143.

The issue of increased centralism by the use of s.96 tied grants is clearly articulated in the 2014 Federal Government White Paper on Reform of the Federation:

> Over the last century, the role of the Commonwealth has gradually expanded into more areas of government activity that many regard as the traditional sphere of the States and Territories, particularly through the use of tied grants under section 96 of the Constitution. This Commonwealth expansion has led not only to inefficient overlap and duplication – with associated cost- and blame-shifting – but loss of accountability to voters, and has also impinged on States' sovereignty. This has partly been possible because the States and Territories are reliant on revenue collected by the Commonwealth to deliver services in the areas they are responsible for, with around 45 per cent of State and Territory revenue now coming from the Commonwealth.[79]

Arguably the main difficulty with this shift of power towards the Commonwealth is accountability. Again to quote from the White Paper:

> Using conditional grants under section 96 of the Constitution, the Commonwealth puts a sizeable and difficult-to-resist sum of money on the table as an inducement to States to shape their policies in ways that align with the Commonwealth's view of what the 'agreed' priorities should be in a particular area of activity. As States and Territories seek to secure reward funding, they surrender a degree autonomy to pursue their own preferences. As a result, this version of cooperative federalism can undermine the ability of the electorate to hold either level of government accountable for failure to deliver on their commitments.[80]

The concern raised can be articulated thus: By dint of Commonwealth intervention under s.96 there has been a seismic shift in the distribution of power away from the States and a diminution of the federal compact. Somewhat ironically, this greater role of the Commonwealth is used by opponents of new States as a reason for not creating more States. The twist to that supposition, however, is in the accountability tale.

The areas the Commonwealth funds under s.96 grants are those it would otherwise would not have direct jurisdiction over, and which the States would normally manage. Under s.96 Commonwealth grants are 'tied', and thus must be spent as directed. The upshot, however, is that when State elections are held the electorate holds State governments accountable for what in essence has been a Commonwealth initiative.

Looking to the future, it is unlikely that s.96 Commonwealth tied grants will diminish. So how should the Commonwealth be held accountable for this development? The Senate is the States' House, and it is where an important issue could be played out if North Queensland were to become a new State. Relevantly, s.7 of the Constitution provides:

> … The Parliament may make laws increasing or diminishing the number of senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six senators. …

If North Queensland were to become a separate State, on a liberal interpretation of the above provision, that part of Queensland remaining as 'Queensland' after the separation would retain its current quota of 12 Senators. The new North Queensland State, however, would arguably have its quota of Senators determined by the Commonwealth under s.121.[81] Just how many Senators would be the subject of much negotiation, and important in this would be the history and the perceived role of the north in Australia's future.

On 18 June 2015, the Federal Government released its White Paper on Developing Northern Australia (the NA White Paper). Explicitly and repeatedly framed in the NA White Paper is the phrase 'northern jurisdictions'. This is nowhere defined in the Paper, and, at best, is a reference to

[79] The Federation White Paper, above n 77, 2.
[80] Ibid, 19.
[81] For a discussion of what terms could be imposed in a new State, including the number of Senators, see: Toohey, J. "New States and the Constitution", in Loveday and McNab, above n 48, Ch 1.

some amorphous area taking in part of two States, Western Australia and Queensland, whose jurisdictional boundaries extend well beyond areas that might reasonably be regarded as 'north', and 'part' of the Northern Territory. The gap in the governance logic evidenced in the use of phrase 'northern jurisdictions' becomes all the more poignant in the NA White Paper's section on 'Good Governance for Northern Australia', where the following passage appears:

> Unique challenges in the north shape the behavior, interactions and decision making required to effectively govern northern Australia. The North's small and widely dispersed population makes the machinery of government exceptionally challenging, and distance from the major centres in the south can make it difficult to engage with decision makers. [82]

The aspirations set out in the NA White Paper are not new,[83] but if they are to be achieved there must be a rethink of the balance of power in the federation. In consideration of that, the two principles outlined above, subsidiarity and accountability, mandate that North Queensland not only become a State but also have a full quota of 12 Senators. A situation, it is contended, that would reflect the aspirations of those from the North whose commitment was given, but subsequently not reciprocated, throughout the Constitutional conventions of the 1890s.

V CONCLUSION

The arguments supporting the creation of new States in Australia are not simply about regions feeling neglected, or about cutting up the national economic pie.

Sir Henry Parkes, the putative founder of the Federation, is said to have once opined "[A]s *a matter of reason and logical forecast it could not be doubted that if the Union were inaugurated with double the number of States the growth and prosperity of all would be assured.*"[84] Parke's implicit comment, that strength in the Federation lies in diversity, has been recently supported by Pape in his thought-provoking work on the benefits of Competitive Federalism – and particularly on tax competition between the States, and possibly new States.[85]

Supposing the fervor for the creation of a new State of North Queensland reached critical mass (based on whatever arguments), the inevitable challenge for those promoting the change will be surmounting the political impediments to its creation. Historically, one of those impediments has been the politicization of the Constitutional requirements for the creation of a new State. This Paper has sought to clarify those Constitutional requirements.

In summary, there are two sections of the Commonwealth Constitution directly relevant to the establishment of a new State of North Queensland. Section 121 provides that the Commonwealth Parliament may establish a new State. Section 124 provides that a new State might be formed by the separation of territory from an existing State provided it is with the consent of the Parliament of the existing State. Applying these sections to the case for new North Queensland State, it is within the prerogative of the Queensland Parliament to *'initiate'* the division of its own territory and to form a new State of North Queensland. That initiative must be in the form of an Act of the State Parliament. The journey towards that end is complex as has been demonstrated by the experiences

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[82] Australian Government, White Paper on Developing Northern Australia, 2015, 115.

[83] McGarrity, above n 77.

[84] Quoted in Ellis, above n 5, 2.

[85] See: Brian Pape, 'Competitive Federalism' July 2013 <http://bryanpape.com.au/wp-content/uploads/2013/06/Competitive-Federalism-PDF.pdf> See also: Richard Murray, 'A New federation with a Cities and Regional Approach', Australian School of Government, February, 2012 <https://www.anzsog.edu.au/media/upload/publication/103_Research-paper-A-New-Federation-with-a-Cities-and-Regional-Approach-Richard-Murray-120912.pdf>

in NSW and the NT. Those experiences are there to be heeded if a proposal for the formation of a new North Queensland State is to be initiated.

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