

# Statehood Stalemate: a modest proposal

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## Introduction

For some considerable time the Northern Territory has been attempting to become the seventh state of Australia. Territorians will decide whether or not it is worth the effort. If they are enthused and disciplined, it may happen, but only if it suits the Commonwealth government, and I suspect the states.

I have some advice on how the NT should proceed. Forgive me if it is blunt, but it is free.

In August 1998 then Minister for Territories, the Hon Alex Somlyay MP, addressed the Northern Territory Legislative Assembly about the Commonwealth government's plans for statehood in the Northern Territory. The speech was intended to lay the foundations for a forthcoming NT referendum.

*At this very moment ... the Prime Minister, Hon John Howard, and the Chief Minister of the Northern Territory, Hon Shane Stone, are jointly announcing that the Commonwealth government has agreed, in principle, that Statehood should be granted to the Northern Territory.<sup>1</sup>*

What happened?

The 1988 referendum failed, is what happened, recording a 'No' vote of 51.3 per cent. There has been little public comment from the Commonwealth since that time. In 2008, then Federal Minister for Home Affairs Hon Bob Debus MP attending the launch of a statehood awareness campaign in conjunction with '30 years of Self Government', restated the view that the people of the Territory needed to demonstrate their support for statehood before the Commonwealth would support such a move.

The NT Statehood Steering Committee conducted its final meeting on 6 December 2010, where the Committee decided to release a paper to inform discussion for the next phase of the Statehood Program.<sup>2</sup> In addition, a further paper was released in January 2011.<sup>3</sup> There are plans for a Constitutional Convention to take place in Darwin in November 2011. A second one is planned after significant consultation takes place on the content of the draft document, which will be produced at the November Convention.<sup>4</sup>

If the NT wants to become a state, it will have to provide convincing proof of the intentions of Territorians. The lessons of the 1988 referendum are that Territorians will only vote for something that is spelled out and beneficial.

Equally, the Commonwealth will not allow something with which it disagrees. The NT will have to have a clear strategy to advance negotiations with the Commonwealth on the NT constitution and the powers and representation of the new state.

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<sup>1</sup> Eighth Assembly First Session 11/08/98 Parliamentary Record No:8

<sup>2</sup> Northern Territory Statehood Steering Committee, *Final Report and Recommendations to the Legislative Assembly Standing Committee on Legal and Constitutional Affairs*, 6 December 2010.

<sup>3</sup> Northern Territory Statehood Steering Committee 2005-2010 *What Might the Terms and Conditions of Northern Territory Statehood be?* January 2011

<sup>4</sup> <http://www.ntstate7.com.au/-2011-Constitutional-Convention-.html>

## NT Benefits

The arguments for NT statehood are clear, but the benefits are perhaps not immediately apparent to the daily life of Territorians.

At present, the NT government operates under a number of constraints. The Self Government Act (Cth) allows the Commonwealth to dissolve the NT Parliament at any time, and the laws it makes can be overridden by the Commonwealth. This is illustrated by laws which have been overturned by the Federal Parliament such as euthanasia laws made by the Territory in 1996.

The Commonwealth government has capacity to implement laws and impose decisions over the Territory that could not occur in a state. Two current examples of this are the process used for the Emergency Response (the Intervention) and the consideration process for locating a nuclear waste dump in the Territory.

The Northern Territory's voice in the Commonwealth parliament is limited to two senators compared with 12 senators allocated to each state.

While Territorians can vote in a referendum, the Territory does not count in the Commonwealth constitution's formulation 'a majority of states'.

There is no constitutional recognition of the existence of the NT Supreme Court. Territory residents in disputes with state residents cannot use the inherent jurisdiction of the High Court that state residents in dispute with other state residents can.

The importance of each of these may be apparent to legislators. They may not be immediately apparent to voters.

## Costs and other considerations

The NT is dependent on the Commonwealth, not simply in a political and administrative sense. Many of its people depend on the Commonwealth for their income. These people will not want to disturb the relationship for fear of losing out. The financial relations between the NT and the Commonwealth will probably remain unchanged with statehood, but guarantees would need to be sought.

The NT is numerically small and financially weak. Nothing will change in the near or even intermediate future, and statehood may not help.

A large proportion of NT residents are dependent on welfare, which limits the NT government's income. Commonwealth grants make up some of the short fall but not all. The Commonwealth Grants Commission distributes the approximately \$45 billion GST pool according to the principle of horizontal fiscal equalization. That is, state governments should receive funding from the pool of Goods and Services Tax revenue and Health Care Grants such that, 'if each made the same effort to raise revenue from its own sources and operated at the same level of efficiency, each would have the capacity to provide services at the same standard.'



The growth rate in the NT is sometimes touted as exceptional. Using three different growth scenarios out to 2056, the Australian Bureau of Statistics estimates that the NT will remain around 1 per cent of the Australian population. NT growth rates will not alter the fact that, for the foreseeable future, the NT will remain a very small component of the Commonwealth.

## Advice

Taking into account these benefits, costs and further considerations, I have the following advice for those who would prosecute the case for NT statehood.

The least contentious issue in prosecuting statehood is the choice of a legal mechanism by which NT could become the seventh state. New states may be established using s.121 of the Australian Constitution 'by the Parliament imposing such terms and conditions as it thinks fit'. I believe this is the sensible course to take. Using s.128 of the Australian Constitution to hold a national referendum is unlikely to succeed.

The contentious issues, however, are many. The Territory must decide on the nature of its constitution and on the terms of its statehood, that is, whether it is to have the same powers as other states and the same basis for representation. These matters will have to garner a strong Territory vote, but also attract support from the Commonwealth government or Opposition. While a 2006 survey conducted as part of presentations for the statehood committee indicated that 82 per cent of Territorians were in favour of statehood, the sample was possibly confined to those participating in the consultations for statehood and therefore not representative.

It is likely that the Commonwealth will do nothing unless it believes that there is benefit or at least no cost to them and possibly, to the states. The only benefit for the Commonwealth will be if it believes that it can win a seat in the Territory, or at least, not risk losing one. For example, will Labor offer statehood in a bid to pick up Solomon next time, or the Coalition Lingjari next time? This depends on the ability of the promise of statehood to sway votes. There is no evidence that statehood is a vote changer at the Federal election in the NT.

There are risks in having either a 'big' agenda or in having a 'modest' agenda to take to the Commonwealth. On balance, however, I firmly believe that any unfinished Commonwealth business will not be settled by allowing the NT to finish it ahead of the Commonwealth. It is better to proceed with a modest agenda. Indeed, euthanasia alone has probably killed any chance of statehood. If, however, the NT allows the Commonwealth to continue to reserve legislation in this area it will remove the blocker. My advice is come back to it later, as a state, and when and if Australia catches up you might have your way. I do not think that the Commonwealth will allow NT to be some sort of crucible for experimentation.

That being so, the following judgements are relevant –

- Any move on statehood as a means of overturning The Emergency Response will fail
- Any move on statehood as a means of advancing an Aboriginal 'treaty' will fail
- Any move on statehood as a means of advancing a Bill of Rights will fail, and

- Seeking 'equal' representation will fail.

The most important principle in negotiating statehood is this. In the initial settlement, take what you can, achieve statehood and come back later for more. Attempting to combine all of the aspirations of the various constituencies in the NT will burden the bid and be sure to sink it. Taking on debates that have not been settled nationally will be fatal.

## Unfinished business

There is much to be negotiated and much unfinished business. In the lead up to the 1988 referendum the Commonwealth Minister for Territories established an Interdepartmental Committee to advise the Commonwealth government in preparation for negotiating the terms and conditions for a grant of statehood. Its work was focused on:

- Legal and Constitutional Affairs (including representation)
- Indigenous issues
- Environment, National Parks and Commonwealth land
- Uranium mining
- Commonwealth Territories
- Industrial relations, and
- Financial implications.<sup>7</sup>

By the time of the referendum, the position of the Commonwealth on statehood was not finalised and negotiations between the Commonwealth and Northern Territory governments on the terms and conditions of a grant of statehood did not commence.

These matters will have to be re-visited. I believe that the first two are the most important and I will consider these in light of my general advice to be modest in negotiations with the Commonwealth.

## NT constitution

Using the s. 21 provisions of the Commonwealth Constitution, the NT constitution has to pass the Commonwealth parliament. It needs the Commonwealth's support.

In 1988, the chair of the Statehood Steering Committee stated that, 'becoming a State ... provides an opportunity to look at a broader set of issues about governance and lawmaking in the 21<sup>st</sup> century, and human rights is one such issue ...'.<sup>8</sup>

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<sup>7</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, 2007. *The Long Road to Statehood*. Report of the inquiry into the federal implications of statehood for the Northern Territory, page 10

<sup>8</sup> The 7<sup>th</sup> State and Human Rights – 18 August 2008 – National Community Legal Centres Conference.

And further, that

*the possibility of human rights being part of a new Territory Constitution is very much part of our current debate in developing the 7th state of Australia. The Statehood discussions in the Northern Territory allow human rights issues to be explored not only as a separate document but also as an inclusion in the actual NT constitution.*<sup>9</sup>

The chair also noted the alternative view, that the constitution should be separate from human rights matters. The constitution should simply set the powers of the Parliament, the Executive and the Judiciary but not dictate specific content or direction of laws.

One does not need to have a view on the merits of the arguments about incorporating rights into the NT constitution. The fact is, the matter of a Bill of Rights has not been settled in Australia and, despite support within the present government for a legislative Bill of Rights, there is no bipartisan support for the Bill. There is no major party support for a constitutional Bill of Rights.

It is unlikely that the Commonwealth will allow the NT a privilege it is not willing to grant its own. Similarly, there is no sentiment in the Commonwealth to incorporate into the Commonwealth Constitution sentiments from the UN Declaration of the Rights of Indigenous Peoples, accepted by the Rudd Government. The Howard Government rejected the Declaration (along with USA, Canada and New Zealand) and the current Opposition has not changed that view. Without bipartisan support it will not happen in the Commonwealth. The Commonwealth will not allow the NT to experiment with such a change to its constitution.

## Representation

On the matter of representation, there has been a contradictory gambit by statehood proponents – equality with the states in Senate representation, but a special deal on the House of Representatives.

At present the NT has two Senators and two Members of the House of Representatives. In the recent past it has had two Senators and one Member. The formula in s.24 of the Commonwealth Constitution requires that there be an apportionment of the number of House of Representative seats in each state based on a population quota. It is uncertain if this apportionment system can be varied for a new state under the ‘terms and conditions’ power.

Politically, it is unlikely that the Commonwealth will allow a variation, given the small size of the NT population, and the population projections suggesting no change for many years in the proportion of Australians living in the Territory.

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<sup>9</sup> ibid

Because of the nexus provision (s.24 of The Constitution) should the Northern Territory obtain more Senators, the House of Representatives membership would need to grow to keep the required balance of approximately twice the number of Senators.

It is unlikely that the Commonwealth government would welcome the many additional politicians into the Australian Parliament that equality of Senators generates in the House of Representatives. The creation of more political positions is likely to be unpopular with the electorate.

Two Senators and two members of the House of Representatives is probably as good as it gets.

## Aboriginal issues

Aboriginal issues may be the toughest of all in which to manage expectations.

Generally, Aboriginal interests have been in favour of Commonwealth control, especially with Labor in power in the Commonwealth and CLP in power in the Territory. Those views could change post intervention, but the default position is not favourable to statehood. The price of Aboriginal consent appears to be some form of constitutional recognition, tantamount to a treaty.

In 1998 the Land Councils declared their opposition to statehood until such time as the NT Government negotiated Aboriginal interests.

In 1998 the Central Land Council organised a conference at Kalkaringi in anticipation of the referendum. From that convention a statement known as the *Kalkaringi Statement* was issued. Following that convention another was held at Batchelor, arranged with the participation of the other Land Councils. The result was a combined document called the *Indigenous Constitutional Strategy*.

The document states,

*The Aboriginal Nations of The Northern Territory are governed by our own constitutions (being our systems of Aboriginal law and Aboriginal structures of law and governance, which have been in place since time immemorial). Our constitutions must be recognised on a basis of equality, coexistence and mutual respect with any constitution of the Northern Territory.*

The document also notes the Aboriginal peoples represented will,

*Withhold our consent (to statehood) until there are good faith negotiations between the Northern Territory Government and the freely chosen representatives of the Aboriginal peoples of the Northern Territory leading to a Constitution based upon equality, coexistence and mutual respect.*

The document outlines a range of issues that Aboriginal people considered vitally important in the context of statehood in 1998.

Many Aboriginal people see statehood as an opportunity to realise some long held goals in terms of recognition of traditional laws and culture.



Such recognition has not been resolved in the Commonwealth. Following my earlier arguments, it is doubtful that the NT will be the crucible for such an experiment.

## Conclusion

If, in order to satisfy various constituencies, Territory politicians present the Commonwealth negotiators with a wish list, I believe that the statehood bid will once again fail.

Territory politicians will need to convince Territorians to support a very disciplined and modest package. That is a difficult task. My advice is to undertake that task, gain statehood under the Commonwealth, and build from there.