

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

**Select Committee on
Constitutional Development**

Information Paper No. 1

Options for a Grant of Statehood

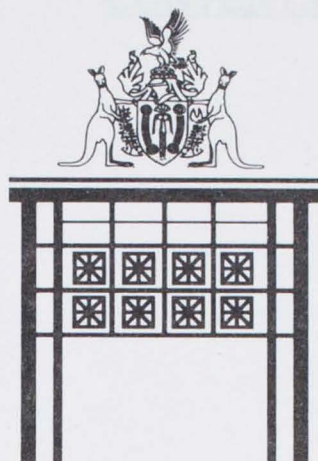
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A paper issued for the information of the public by the
Select Committee on Constitutional Development.

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A. INTRODUCTION

1. *Terms of Reference*

On 28 August, 1985, the Legislative Assembly of the Northern Territory of Australia by resolution established the Select Committee on Constitutional Development. Amendments to the Committee's terms of reference were made when the Committee was reconstituted on April 28, 1987 following the March 1987 election. The main portion of the Committee's current terms of reference is set out in F below. The resolutions were passed in conjunction with proposals then being developed in the Northern Territory for a grant of Statehood to the Territory within the Australian federal system. The terms of reference include provision for the Select Committee to inquire into and to report and make recommendations on the issues, conditions and procedures pertinent to the entry of the Northern Territory into the federation as a new State, this being in addition to its main task in relation to a new State constitution.

2. *Discussion and Information Papers*

- (a) The Select Committee has decided to issue a number of discussion papers for public comment on matters arising from the terms of reference. The discussion papers will deal with the legislature, executive, judiciary of the new State and other matters. The purpose of these papers is to invite public comment with a view to assisting the committee to make recommendations on a new State constitution.
- (b) The Select Committee is also desirous of issuing information papers to the public on issues relevant to a grant of Statehood to the Northern Territory by way of background to assist members of the public in formulating their views on the various matters of importance. This information paper is one such paper.
- (c) This information paper looks at the methods available for making a grant of Statehood and indicates which is the preferred method. Clearly the method of grant is of considerable importance and will inevitably affect the preparation of the new State constitution. Public comment is invited on this paper.

B. OPTIONS FOR GRANT OF STATEHOOD

1. A new State can be created in 2 ways -

- (a) By an Act of the Commonwealth Parliament under section 121 of the Commonwealth Constitution, under which Statehood may be granted on terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit.

OR

- (b) By national referendum to alter the Commonwealth Constitution under section 128 by way of a grant of Statehood.

2. Copies of both sections 121 and 128 are set out in D below.

3. A national referendum of Australian electors is not mandatory for the section 121 method, but is for the section 128 method. The record of success with national referendums in the past has not been very good. For either method, legislation must be passed by the Commonwealth Parliament.

4. Either method gives rise to some constitutional uncertainties in relation to the representation of the new State in the Commonwealth Parliament in particular, the uncertainties arise from section 24 and the second last paragraph of section 128 of the Constitution.

5. In addition, the section 121 method gives rise to doubts as to the scope of the Commonwealth's power to impose terms and conditions on a new State that might place that new State in an inferior constitutional position compared with existing States.

6. It is beyond the scope of this paper to enter upon a detailed consideration of these doubts and uncertainties.

7. There is no mechanism for seeking an advisory opinion of the High Court to clarify the constitutional doubts and uncertainties surrounding either method. However, a High Court decision could be sought upon the passage of the relevant Statehood legislation by the Commonwealth Parliament but before its commencement.

8. Advice has been sought from Professor Howard on the question of the most appropriate method for the grant of Statehood. He has advised that the only practical option is to pursue the section 121 method and hope for co-operation in seeking to resolve the serious doubts about its meaning by bringing an action for a declaration in the High Court before any proposed legislation comes into operation.

9. The Select Committee is of the view that the section 121 method is the preferred option. Planning for a grant of Statehood should proceed on this basis.

C. BASIC STEPS TO STATEHOOD

1. Given the critical constitutional role of the Commonwealth in effecting any grant of Statehood, it is clearly desirable to obtain in advance a public commitment from the Commonwealth Government to support the proposed grant.
2. Such a commitment is unlikely to be forthcoming unless there is demonstrable support in the Northern Territory for the proposed grant. To this end, the Select Committee concurs with the holding of a Territory referendum within a reasonable time to assess support for the proposal generally. Work already in progress in the Territory on the proposed grant should not be held up pending the holding of this referendum, but the continuance of that programme would be conditional ultimately upon a successful referendum result.
3. The Commonwealth should give an early undertaking to broaden the Northern Territory (Self-Government) Regulations to ensure that Ministers and the Legislative Assembly of the Territory have the necessary authority to enable planning to proceed with a view to seeking a grant of Statehood.
4. The Select Committee envisages that, two concurrent courses of action will take place in preparing for a grant of Statehood:
 - (a) the preparation of a new State constitution; and
 - (b) the negotiation and conclusion of a Memorandum of Agreement between the Territory and Commonwealth Governments, incorporating the terms and conditions of the proposed grant.
5. The implementation of (a) above is already proceeding through the Select Committee. Part A of each of the Discussion Papers outlines and endorses the three stages for adopting a new State constitution. These are:
 - (i) the Committee will prepare a draft constitution for presentation to the Legislative Assembly. Options, where necessary, will be included;
 - (ii) the draft constitution will be put before a Territory Constitutional Convention. The Convention will be established by appropriate action of the Legislative Assembly and will include broad representation from across the Northern Territory community. It will receive the recommendations of the Legislative Assembly following debate on the Committee's report, will discuss the proposals and ratify a final draft of the constitution; and
 - (iii) the constitution as ratified by the Convention will be submitted to a referendum of Northern Territory electors for approval. This will be a subsequent referendum to that mentioned in paragraph 2 above.

The ability to legally adopt a new State constitution is dependant upon a specific grant of powers by the Commonwealth.

6. Concurrently with the preparation of the new State constitution, the Select Committee envisages that the Territory and Commonwealth Governments will negotiate and conclude a Memorandum of Agreement, incorporating the terms and conditions of the grant of Statehood for implementation under section 121 of the Constitution.

This should provide for the new State to be placed in substantially the same constitutional position as existing States. It should not deal with matters more appropriately dealt with in the new State constitution.

7. Consultation with the existing States will also be necessary to seek their support to the proposed grant of Statehood, including in particular the proposals for representation of the new State in the Commonwealth Parliament and as to financial arrangements.
8. Once a new State constitution has been adopted and approved at a referendum, and the Memorandum of Agreement has been concluded, proposed legislation should be placed before the Commonwealth Parliament to give effect to the grant of Statehood. That legislation should accurately reflect the terms and conditions of the Memorandum of Agreement and should refer to, but not set out in full, the new State constitution. That constitution should be part of new State law and not be part of a Commonwealth Act.
9. In the event that the legislation, as finally enacted by the Commonwealth Parliament, contains any significant variations from the terms and conditions contained in the Memorandum of Agreement, the legislation should provide that the grant of Statehood should not take effect until proclaimed, and that the proclamation is conditional upon a further referendum of Territory electors being carried. This would ensure that the Commonwealth Parliament did not impose any terms and conditions on the new State that were not acceptable to Territorians. In the absence of any such significant variations, the legislation should come into operation automatically on a specified date.
10. The Commonwealth Parliament should contemporaneously enact other legislation consequential upon the grant of Statehood to make any necessary changes to other existing legislation. A summary of possible changes to Commonwealth legislation is contained in E below.
11. Amendments to some Territory legislation may also be necessary, with effect from the grant of Statehood.
12. Prior to the grant taking effect, it will be necessary to hold elections for the new State representatives in both Houses of the Commonwealth Parliament (possibly in conjunction with a federal election) and to make any appointments that are to take effect on and from the grant (for example, the appointment of the new State Governor). Savings provisions can deal with the position of those officers and employees whose positions are to be continued on and from the grant (for example, judicial officers, public servants, etc). The question whether the Legislative Assembly is to be continued as the Parliament of the new State remains to be determined.

D. SELECTED PROVISIONS FROM THE COMMONWEALTH CONSTITUTION

"7. The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.

But 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.

Until the Parliament otherwise provides there shall be six senators for each Original State. 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.

The senators shall be chosen for a term of six years, and the names of the senators chosen for each State shall be certified by the Governor to the Governor-General."

"24. The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.

The number of members chosen in the several States shall be in proportion to the respective numbers of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner:-

(i.) A quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of the senators:

(ii.) The number of members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.

But notwithstanding anything in this section, five members at least shall be chosen in each Original State."

"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."

"128. This Constitution shall not be altered except in the following manner:-

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and

Territory to the electors qualified to vote for the election of members of the house of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State **and Territory** qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

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.

In this section, "Territory" means any territory referred to in section one hundred and twenty-two of this Constitution in respect of which there is in force a law allowing its representation in the House of Representatives . "

E. POSSIBLE CHANGES TO COMMONWEALTH LEGISLATION

It is clear that a number of items of Commonwealth legislation will require amendment upon a grant of Statehood to the Northern Territory.

It is not possible at this stage to be precise about the nature and extent of these amendments. This is because -

(a) final policy positions have not yet been arrived at and agreed with the Commonwealth in the various key areas affected by Commonwealth legislation and relating to the grant;

(b) Commonwealth legislation may change prior to the grant.

It is, however, possible to identify most of the legislation and to indicate in broad terms the nature of the amendments which may be required. The legislation is listed below.

1. Northern Territory (Self-Government) Act 1978 and Regulations

Probable complete repeal of this Act. Query, whether certain institutions and officers established or appointed under that Act will be continued on and from the grant of Statehood.

2. Northern Territory Acceptance Act 1910

Possible consequential amendments to this Act only, to reflect the change in status from a Commonwealth territory to a new State.

3. Aboriginal Land Rights (Northern Territory) Act 1976

On current proposals contained in the paper "Land Matters upon Statehood", this Act would be patriated to the new State as part of its law.

4. Petermann Aboriginal Land Trust (Boundaries) Act 1985

Possible consequential amendments may be required to this Act as a result of 3 above only.

5. Coastal Waters (Northern Territory Powers) Act 1980 Coastal Waters (Northern Territory Title) Act 1980

Possible repeal of these 2 Acts. Query amendments to the Coastal Waters (State Powers) Act 1980, the Coastal Waters (State Title) Act 1980 and the Seas and Submerged Lands Act 1973.

6. National Parks and Wildlife Conservation Act 1975 and Regulations

On current proposals contained in the paper "Land Matters upon Statehood", this Act would require substantial Amendment to reflect the transfer of National Parks in the Northern Territory from Commonwealth to new State ownership and control and to terminate the special application of this Act to the Northern Territory.

7. Environment Protection (Alligator Rivers Region) Act 1978 and
Environment Protection (Northern Territory Supreme Court) Act 1978

These Acts to be repealed with appropriate savings.

8. Northern Territory (Commonwealth Lands) Act 1980

Consequential amendment to this Act may be desirable to reflect the fact that the relevant land is now vested in the new State.

9. Lands Acquisition Act 1955
Lands Acquisition (N.T. Pastoral Leases) Act 1981

Consequential amendments to these Acts are required to treat the Northern Territory in the same way as the States. It may be necessary to amend the latter Act to reflect the fact that the relevant land is now vested in the new State.

10. Atomic Energy Act 1953

Under this Act, unlike the States, ownership of uranium and other prescribed substances in the Northern Territory remains with the Commonwealth. This Act would need substantial amendment to reflect the current proposals that ownership and control of uranium and other prescribed substances in the Territory are to be transferred to the new State, together with the Ranger licence granted under the Act.

11. Koongarra Project Area Act 1981

Possible consequential amendments may be required to this Act as a result of 10 above.

12. Commonwealth Electoral Act 1918
Representation Act 1983

Substantial amendments will be required to these Acts to facilitate representation of the new State in both Houses of the Commonwealth Parliament and to terminate existing Territorial representation. This includes a consideration as to whether Cocos (Keeling) Islands and Christmas Island Territories, which are presently included with the Northern Territory for federal electoral purposes, are to be incorporated as part of the new State, thus enabling a continuation of these electoral arrangements, or are to be incorporated with the A.C.T. or some other State, or are to be left as separate territories.

13. Referendum (Machinery Provisions) Act 1984

Consequential amendments to this Act to reflect the status of the new State for the purpose of referendums.

14. Ashmore and Cartier Islands Acceptance Act 1933

On current proposals, this Act probably would require repeal with appropriate savings, to enable the Territory to be incorporated in the new State.

15. Judiciary Act 1903

Consequential amendments to this Act to reflect the status of the new State and to delete special provision applicable to the Northern Territory and to the Northern Territory Supreme Court, and to provide for Appeals from the Supreme Court of the new State to the High Court on the same basis as other State Supreme Courts.

16. Family Law Act 1975

Amendment of this Act to ensure that the present jurisdiction of the Supreme Court of the Northern Territory is carried over to the Supreme Court of the new State.

17. Bankruptcy Act 1966

Consequential amendments to this Act as to the jurisdiction of the Courts of the new State.

18. Acts Interpretation Act 1901

Consequential Amendments to this Act to ensure that any reference to a State in Commonwealth laws prima facie includes the new State.

19. Commonwealth Places (Application of Laws) Act 1970

Possible amendment of this Act to make it clear that it extends to the new State.

20. Ombudsman Act 1976

Administrative Appeals Tribunal Act 1975

Administrative Decisions (Judicial Review) Act 1977

Appropriate amendments to these Acts to delete entirely their application to new State laws and actions thereunder.

21. States Grants (General Revenue) Act 1985 (or its successor)

Commonwealth Grants Commission Act 1973

Consequential amendments to these Acts to place the new State in the same position as the existing States, subject to any special financial arrangements negotiated upon Statehood.

22. Financial Agreement Act

Amendments to this Act or a new Act to facilitate the acceptance of the new State as a party to the Financial Agreement and the Loan Council.

23. Payroll Tax (Territories) Act 1971

Payroll Tax (Territories Assessment) Act 1971

Commonwealth Authorities (Northern Territory Pay-roll Tax) Act 1979

Consequential amendments may be required to these Acts.

24. Superannuation Act 1976 and Regulations

It is assumed that there will still be a number of officers employed by the new State, being officers formerly employed by the Northern Territory or by Northern Territory authorities, who will continue as "eligible members" in the C.S.S. by arrangement with the Northern Territory, they not having elected to join NTGPASS. This will necessitate the continued operation of the Superannuation Act 1976 and Regulations in respect of these officers in the new State, with appropriate amendments to reflect this continued operation.

25. Public Service Act 1922

Commonwealth Teaching Service Act 1972

Depending on the decisions made as to the continuing status of compulsorily transferred employees as from the grant of Statehood, amendments may be required to the relevant provisions of the above two Acts.

26. Conciliation and Arbitration Act 1904

Depending on the decisions taken as to the industrial powers of the new State, it will probably be necessary to amend this Act in conjunction with the repeal of section 53 of the Northern Territory (Self-Government) Act 1978.

27. Advisory Council for Inter-Governmental Relations Act 1976

Consequential amendments to this Act to reflect the change in status to a new State.

28. Transfer of Prisoners Act 1983

Consequential amendments to this Act to reflect the status of the Northern Territory as a new State.

29. Australian National Airlines Act 1945

Given some of the services of Australian Airlines are provided in reliance upon the territories power in Section 122 of the Constitution, the continued operation or those services may depend on appropriate amendments to this Act of other Commonwealth legislation, or alternatively on legislative support by the new State.

30. Air Navigation Act 1922 and Regulations

Consequential amendments may be required to this legislation to reflect the status of the new State.

31. Air Accidents (Commonwealth Government Liability) Act 1963

Possible consequential amendments to this Act.

32. Commonwealth Motor Vehicles (Liability) Act 1959

Consequential amendments to this Act required.

33. Railways Standardisation (South Australian Agreement) Act 1949

This Act incorporates an agreement with South Australia to construct a standard gauge railway to Darwin. It parallels a similar agreement scheduled to the Northern Territory, Acceptance Act 1910 (see above). Depending on the arrangements made with the Commonwealth at Statehood, it may be necessary to amend this Act.

34. Human Rights and Equal Opportunity Commission Act 1986

Consequential amendments only to this Act to reflect the status of the new State.

35. Tertiary Education Commission Act 1977

Depending on decisions taken as to the status of the University College on Statehood, amendments may be required to this Act.

F. TERMS OF REFERENCE

Whereas this Assembly is of the opinion that when the Northern Territory of Australia becomes a new State it should do so as a member of the federation on terms resulting in equality with the other States with its people having the same constitutional rights, privileges, entitlements and responsibilities as the people of the existing States;

And Whereas in so far as it is constitutionally possible the equality should apply as on the date of the grant of Statehood to the new State;

And Whereas it is necessary to draft a new State constitution;

- (l) A Select Committee be established to inquire into, report and make recommendations to the Legislative Assembly on:
 - (A) A constitution for the new state and the principles upon which it should be drawn, including;
 - (I) legislative power;
 - (II) executive powers; and
 - (III) judicial powers; and
 - (IV) the method to be adopted to have a draft new State constitution approved by or on behalf of the people of the Northern Territory; and
 - (B) The issues, conditions and procedures pertinent to the entry of the Northern Territory into the federation as a new state.

