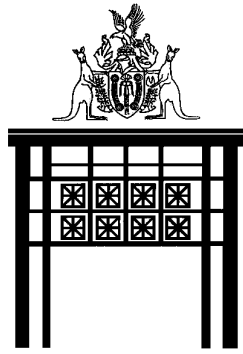


# **CHAPTER 4**

## **INFORMATION PAPER NO. 2**

### **ENTRENCHMENT OF A NEW STATE CONSTITUTION**



**LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY**

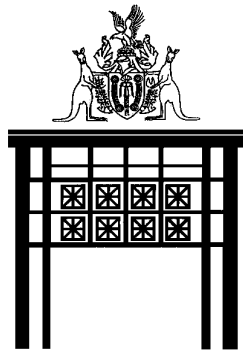
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**Select Committee on  
Constitutional Development**

**INFORMATION PAPER NO. 2**

**ENTRENCHMENT OF A NEW STATE CONSTITUTION**

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**LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY**

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*Select Committee on Constitutional Development*

**INFORMATION PAPER NO. 2**

**Entrenchment of a New State Constitution**

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



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## INTRODUCTION

### *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 28 April 1987 following the March 1987 election. The main portion of the Committee's current terms of reference is set out in Part E 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.

### *Discussion and Information Papers*

- (a) The Select Committee decided to issue a number of discussion papers for public comment on matters arising from the terms of reference. Two such discussion papers have already been issued, as follows:

- \* A Discussion Paper on a Proposed New State Constitution for the Northern Territory
- \* A Discussion Paper on Representation in a Territory Constitutional Convention.

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 and the procedure for adopting it.

- (b) The Select Committee has also issued an abbreviated paper, with illustrations, based on the first of those discussion papers, entitled "Proposals for a new State Constitution for the Northern Territory".
- (c) 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. The Select Committee has already issued one such information paper, as follows:

- \* Information Paper No. 1, Options for a Grant of Statehood.

- (d) This further information paper constitutes the second in this series, and deals with the matter of how a new State constitution can be entrenched; that is, how such a constitution can be made in a manner that limits the powers, whether of the Commonwealth or of the new State, to amend it in the future. The purpose of this paper is not to discuss the type of provisions that could be entrenched.

- (e) To some extent, the subject of entrenchment has already been discussed in the first of the discussion papers mentioned above, dealing with a proposed new State constitution for the Northern Territory. The subject of entrenchment in relation to the legislature was dealt with in Part E paragraph 3 of that paper. That same subject, in relation to the judiciary, was dealt with in Part O of that paper. The subject of entrenchment generally was dealt with in Parts P and Q of that paper. The Committee also dealt with the recognition of local and community government in a new State constitution (Part R), the entrenchment of guarantees of Aboriginal ownership of land and possibly other Aboriginal rights in the new State constitution (Part S) and invited comment on the possible inclusion of other guarantees of human rights in that constitution (Part T). It is not proposed to deal further with these matters in this paper, although public comment is still invited upon them.

### ***The Merits of Entrenchment***

- (a) A "constitution" is the fundamental legal document of any social or political entity, governing its existence and operation and establishing its rights and obligations and those of its members. In the Select Committee's view, there is considerable merit in the suggestion that such a fundamental law should not be easy to change. Rather, it is a law that in some respects is more akin to Aboriginal traditional law, a law that should continue into the future. It should not be subject to the whim of the legislators at any particular future point in time who might perceive some need for change for some limited or narrow purpose.
- (b) The Select Committee took the view in the first discussion paper that, generally speaking, it favoured some degree of entrenchment of the whole of the new State constitution. The constitution should be a document that is accorded special status in the law and should only deal with those matters considered to be of vital importance in the functioning of the new State and its institutions. Matters of lesser importance should be relegated to ordinary legislation.
- (c) The Select Committee added that entrenchment should comprise or include the requirement that any proposed change be submitted to and be supported by a specified majority of new State electors at a referendum. It may be considered appropriate that for certain provisions, any change may require more than a simple majority of voters in any referendum. Certain minimal provisions would be necessary dealing with referendums in the new State constitution (Part P, paragraph 1(d) and (e) at pages 82-83).
- (d) The mechanism of entrenchment may be thought more important to some sections of the Territory public than others. For example, the Select Committee is aware that Aboriginal people maintaining traditional lifestyles are particularly concerned about their land, law, language and religion. Entrenchment in a constitution can provide a legal method of safeguarding these interests and removing them from the control of politicians.



### ***Double Entrenchment***

- (a) The Select Committee considers it to be desirable that, whatever the method chosen of amending the new State constitution (i.e. referendum or some other method), that method should itself be entrenched in the new State constitution. This is known as "double entrenchment". It ensures that amendment of the constitution by some other method cannot be achieved by changing the amendment mechanism itself. This is in effect the position under the Commonwealth Constitution.
- (b) On the basis of the Select Committee's views referred to above, the provision in the new State constitution dealing with the method of amendment should be such that both it and the rest of that constitution are only capable of being changed by a referendum of new State electors.

## B. THE COMMONWEALTH CONSTITUTION AND ENTRENCHMENT

1. Prior to federation in 1901, each of the Self-governing Australian colonies had their own constitutions, with powers (subject to Royal reservation and assent) of amendment vested in the colonial legislatures. No referenda were required for change.
2. Section 106 of the Commonwealth Constitution was designed to continue those colonial constitutions at federation as State constitutions, subject only to the provisions of the Commonwealth Constitution. Section 106 provides -

"The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State."

3. It is to be observed that section 106 also continues, subject to the Commonwealth Constitution, the constitution of a new State as at its admission or establishment.
4. In addition to section 106, the Commonwealth Constitution in sections 107 and 108 also continued the powers of the Colonial Parliaments that became States and their colonial laws. However these sections may not apply to the Northern Territory if it becomes a State, as it is doubtful that the Northern Territory has the status of a "colony" for the purposes of these sections.
5. It seems clear that section 106 is intended to have a continuing effect in relation to State constitutions. That is, the protection given by that section continues to operate in respect of a State constitution during the continued existence of that State.
6. However there are a number of legal questions concerning the correct interpretation of section 106, the answers to which are not clear, as follows :-
  - (a) Does the section only operate to guarantee State constitutions that were in operation prior to the grant of Statehood? Put another way, does the section protect new State constitutions that only became legally operational at the time of the grant of Statehood, or is it necessary for those constitutions to have been in operation before that time?
  - (b) Does the section only guarantee State constitutions contained in documents that are so labelled as the "Constitution" of those States? In other words, is the label critically important for the purpose of the section, or does the section extend to protect any new State laws of a "constitutional" nature?
  - (c) Are all provisions contained in State constitutions guaranteed by the section, or is the guarantee limited to only certain types of provisions. For example, does the section only extend to provisions dealing with the basic framework of the principal State institutions? Alternatively, does the section go further to protect, for example, provisions in State constitutions dealing with State powers or limitations on State powers?

- (d) What is the effect of the reference in the section which makes it "subject to this (the Commonwealth) Constitution"? Does this mean that the section and the protection it affords to State constitutions can be overridden by the exercise of the legislative powers of the Commonwealth Parliament?
7. The greatest concern is of course the danger that the Commonwealth Parliament might seek to legislate after Statehood in a way that directly affects the provisions of the new State constitution. There is judicial authority to support the view that, section 106 notwithstanding, the Commonwealth Parliament can validly enact legislation of general application under some federal head of legislative power which only incidentally affects a State constitution. How far the Commonwealth Parliament can go beyond this is not clear. It is to be noted that the main source of federal legislative power in section 51 of the Commonwealth Constitution is itself expressed to be "subject to this Constitution".
8. The latter issue in paragraph 7 would be particularly important if a State constitution entrenched certain provisions, such as Aboriginal traditional ownership of land, and the Commonwealth Parliament sought, by ordinary legislation enacted under a federal head of legislative power, to alter the effect of those provisions. Although arguably the Commonwealth legislation would be invalid, the issue is not beyond doubt.
9. On one legal view, an effect of section 106 is to incorporate State constitutions into the Commonwealth Constitution as if they were all part of the same document. If this view is correct, it would seem to follow that State constitutions could be amended by successfully using the national referendum procedure in section 128 of the Commonwealth Constitution. There is a further question whether this gives rise to the inference that State constitutions can only be amended by such a national referendum or, as contemplated in the wording of section 106 itself, by the mechanism for amendment contained in those State constitutions.
10. The comments in the recent High Court decision in Re Tracey; Ex.pt. Ryan (1989) 63 A.L.J.R. 250 per Mason C.J., Wilson and Dawson JJ. at page 258 (second column) and Brennan and Toohey JJ. at page 269 (first column) and page 271 (second column) see also Gaudron J. at page 282, (second column) suggest that reliance may be placed on section 106 to strike down Commonwealth laws that interfere with State judicial powers and their exercise, and not just the State judicial institutions themselves. This reinforces the view that State constitutions, including provisions therein that relate to the exercise of powers by the essential constitutional organs of that State and the protection of civil rights which those organs assure to citizens, are protected by section 106.
11. Apart from section 106, the High Court has developed a doctrine by implication from the Commonwealth Constitution designed to protect the States. This doctrine prevents the Commonwealth Parliament from legislating in a way that discriminates against States and their agencies by placing on them special burdens or disabilities, or that operates to destroy or curtail their continued existence or their capacity to function as governments. However it is not clear how far the protection of section 106 extends beyond this doctrine. This doctrine has been successfully relied upon in two court cases. There has been less reliance by the existing States on section 106 in litigation.

12. There is a further consideration in relation to new States only. Once a new State is admitted or established under section 121 of the Commonwealth Constitution, and the Commonwealth Parliament has passed the necessary legislation granting Statehood and fixing the terms and conditions of the grant, there is a view that the Commonwealth Parliament may not thereafter be able to legislate to alter these constitutional arrangements. The power under section 121 can only be exercised at the time of the grant and once exercised it is said to be exhausted. This may provide added support for the view that the Commonwealth Parliament could not, by subsequent ordinary legislation, affect the constitutional provisions applicable to the new State. However, as no new State has ever been created in Australia before, the correctness of this view is uncertain.
13. The matters raised in this Part were referred for a legal opinion to Professor Colin Howard. A copy of his opinion dated 29 June 1989 is set out in Schedule 1 to this Information Paper. A copy of subsequent correspondence to and from Professor Howard clarifying the application of two recent cases is set out in Schedule 2 to this Information Paper.

## **C. EFFECT OF ENTRENCHMENT ON NEW STATES**

1. It is clear that a new State can be legally bound by its constitution, including any special entrenchment provisions (such as those requiring a referendum for change) contained in that constitution. The rights and obligations contained in a new State constitution would as a result be binding on the new State, its Parliament and Government, and any breach of those rights and obligations would be enforceable in the courts in accordance with the terms of that constitution.
2. This binding effect referred to in paragraph 1 above may be achieved by one or more of the following methods -

- (a) Under section 6 of the Australia Act 1986, which is binding on both existing and new States (see the definition of "State" in section 16(1) of that Act to include new States), a law made by the Parliament of a State as to the constitution, powers and procedures of that Parliament is of no force and effect unless it is made in the "manner and form" required by a law made by that Parliament.

If the constitution of the new State had effect as a law of the Parliament of the new State, and if that constitution also required a successful referendum for any change before that change was carried into effect by legislation of the Parliament, it would be a "manner and form" provision within section 6. As such, the new State and its Parliament would be legally bound to observe the referendum requirement.

- (b) Such entrenchment may also be binding on a new State as a consequence of the wording of section 106 of the Commonwealth Constitution (see Part B above), in that it provides that the new State constitution should continue "until altered in accordance with the Constitution of the (new) State".
- (c) Further, Commonwealth legislation granting Statehood under section 121 of the Commonwealth Constitution could itself make it clear that the new State was bound by the terms of its own constitution.

#### **D. EFFECT OF ENTRENCHMENT ON COMMONWEALTH**

1. As indicated in Part B, the extent to which the Commonwealth, its Parliament and Government, are bound by the provisions of State constitutions is a matter of some legal uncertainty. This uncertainty extends to the constitution of a new State created under section 121 of the Commonwealth Constitution although, as discussed above, there may be an added reason to support a limitation on Commonwealth power in this regard.
2. There would at least be some reticence on the part of the Commonwealth to seek to override entrenched new State constitutional provisions, given these doubts and the risks inherent in any resulting litigation.
3. The Commonwealth would also have to consider the effect of any constitutional guarantees already contained or implied in the Commonwealth Constitution. Thus, for example, if the entrenched provisions included guarantees of Aboriginal traditional ownership of land and if the Commonwealth sought to modify those provisions, there would be the added consideration that the Commonwealth must provide just terms if its legislation results in the acquisition of property in terms of section 51(xxxi) of the Commonwealth Constitution. The effect of the doctrine already referred to in Part B paragraph 11 would also have to be considered.
4. Whether a future Commonwealth Parliament would ever seek to override entrenched provisions in a new State constitution of course involves not only legal considerations, but also political and other considerations. Given the methodology proposed by the Select Committee for the adoption of a new State constitution in the Northern Territory, involving substantial involvement and support from within the Territory community, there may well be strong resistance to any such Commonwealth intrusion. This resistance may be reflected in any increased federal Parliamentary representation that the new State may have.
5. If the above factors are not considered to be adequate, and if it desired to remove all doubts as to the inability of the Commonwealth to directly interfere with a new State constitution, the only solution presently available would be to remove those doubts by way of an amendment to the Commonwealth Constitution as a consequence of a successful national referendum. For several reasons, the Select Committee does not at this stage favour a national referendum on Statehood (see Information Paper No. 1, Part B at pages 3-4), or for that matter on any particular aspect of Statehood, although it invites comment on this matter.

## **E. 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;

- (1) 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;
    - (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.





## SCHEDULE 1

### Memorandum of Advice

from Prof. Colin Howard

### Northern Territory Statehood

1. I am asked to advise the Select Committee of the Legislative Assembly of the Northern Territory of Australia on Constitutional Development, a bipartisan committee of the Legislative Assembly. I am indebted to instructing solicitor for the background material, discussion paper and citations which accompany the brief.
2. In general terms the advice sought is on the extent to which the constitution of a new State, formerly the Northern Territory but admitted to Statehood under s.121 of the Commonwealth Constitution, would be constitutionally protected from subsequent Commonwealth legislation. My advice is to include consideration of six topics specifically mentioned in the brief.
3. It is apparent from the background materials that the Committee's advice to the Legislative Assembly in due course may include recommendations that a number of the provisions of the proposed State constitution for the Northern Territory be entrenched, the method of entrenchment envisaged being by way of referendum requiring a specified majority for its passage. As I understand the matter, the cause of concern to which my advice is to be directed is whether such entrenched provisions would be vulnerable to being overridden by Commonwealth legislation enacted within the scope of the legislative powers of the Australian Parliament. I am nevertheless not asked to confine my advice to entrenched provisions but to consider generally the situation of a new State constitution with respect to subsequent Commonwealth legislation. This being the nature of the problem, it is convenient to proceed in the first instance by taking up the particular matters specially mentioned in the brief.
4. The extent to which s.106 of the Commonwealth Constitution protects a new State constitution. For convenience of reference I reproduce the text of s.106.

The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or the establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

5. I agree with instructing solicitor that although the primary purpose of s.106 appears to have been to preserve continuity between the pre-federation colonial constitutions of the original States and their post-federation State constitutions, except to the extent that they were necessarily altered by the fact of federation, the section is not well drafted to express this purpose. In support of that interpretation, and I agree, instructing solicitor cites Victoria v. Commonwealth (1971) 122 C.L.R. 353, 371-2, 386; New South Wales v. Commonwealth (1975) 135 C.L.R. 337, 372; and Western Australia v. Wilsmore (1981) 33 A.L.R. 13, 16.

6. In para. 3 of my previous advice dated 31 October 1986 I expressed the opinion, which I still hold, that no particular significance is to be attached to the contrast between the words "admission" and "establishment" which appear in both s.121 and s.106 of the Commonwealth Constitution. Nevertheless it serves to emphasize that the power to admit new States encompasses not only new States formed within Australia but also new States added by territorial expansion of Australia. In the latter category New Zealand was the most prominent possibility at the time of federation. In my view, in such a case s.106 has basically much the same constitutional effect on the new State as it did on the original States. That is to say, the section has the effect of continuing the pre-federation constitution of the new State except to the extent that it is necessarily modified by the fact of becoming a State and, to some extent perhaps, by terms and conditions imposed under s.121.
7. It will be recalled also from my previous advice, passim, that the terms and conditions available under s.121 do not extend to imposing upon a new State any restriction which would preclude it from being properly described as, or from having the status of, a State within the meaning of the Commonwealth Constitution. I am still of the same opinion on this point too and observe in the present context that it harmonizes with the apparent intention and effect of s.106 as well as of s.121.
8. The question becomes therefore whether a similar mode of interpretation can be extended to the remaining category, the case of a new State being formed from an area within Australia, specifically in this instance the Northern Territory. One immediate difference from the preceding situations is that the concept of the constitution which is notionally to be continued is of itself less clear than the case with the original States or would be the case with such a separate body politic as New Zealand. In those instances the prospective new State already has a reasonably well defined constitution which derives from a history wholly independent of the Commonwealth. That is not the case with the Northern Territory.
9. Whatever the precise content of any former constitution which is continued by virtue of s.106, the argument is strong that the intention and effect of s.106 is to preserve at least part of that constitution independently of the Commonwealth Constitution; and see the citations in para. 5 above. It is not possible to apply this line of thought to the Northern Territory because constitutionally it exists in consequence only of the Commonwealth Constitution and of Commonwealth legislation thereunder. There is nothing constitutionally independent of those sources to continue. In this situation it can be argued that the establishment of the former Territory as a State cannot alter the legislative quality of its pre-State constitution: it was Commonwealth legislation before Statehood, hence its continuation must mean that it remains Commonwealth legislation after Statehood. If this argument is correct, the new State's constitution in such a case can be further argued to be subject not merely to amendment by referendum under s.128 (a danger which may be shared by all States notwithstanding s.106) but by an ordinary exercise of Commonwealth legislative power.
10. In my opinion such an argument overlooks a fundamental feature of admission as a new State. I refer again to my previous advice. The interpretation of s.121 which I there advanced, and which I still believe to be the correct understanding of that section, depended ultimately upon

the meaning to be attached to the use of the word "State" not merely in s.121 but throughout the Commonwealth Constitution. Section 106 is expressly subject to the Constitution and is therefore subject to s.121, which includes no such limitation. It follows that the reference to States in s.106 must be read in the same sense as in s.121.

11. It follows further that any argument that after its establishment as a State the new State, whatever its origins, remains subject to Commonwealth legislative power to any greater extent than any other State is inconsistent with s.121 and therefore also with s.106. It follows further that the Northern Territory (Self-Government) Act 1978 cannot be validly continued by the Commonwealth Parliament as an incident of the admission of the Northern Territory to Statehood because that statute is manifestly inadequate for, and indeed in many respects inconsistent with, the status of being a State of the Australian federation.
12. Some of the difficulties that have been thought to arise out of s.106, as applied to the Northern Territory case, are the consequence, as with s.121, of its interpretation having been approached in too narrow a context. Discussion has hitherto been much conditioned by the unique situation of the original States in light of their former status as colonies. The constitutional consequences which have flowed from that status, particularly the peculiar and often obscure post-federation relation of the original States with the United Kingdom, have no relevance to the application of s.106 to the admission to Statehood of the Northern Territory.
13. The problem presented by the pre-federation colonial constitutions of the original States was how, and to what extent, to cut down the operation of those constitutions to a point where, as separate bodies politic, the status of the original States became consistent with the terms of the Commonwealth Constitution. By contrast the problem presented by the Northern Territory, in order that its constitution after admission to Statehood should be consistent with s.106, is not how to cut it down to Statehood but how to enlarge it up to Statehood. This can hardly be done by continuing anything. In my view it can be done only by designing an entirely new document, consistent with the status of Statehood, which upon the admission or establishment of the Northern Territory as a State becomes, in the words of s.106, "the Constitution of the State".
14. Although I agree with instructing solicitor that s.106 would be clearer if it referred to "as from" instead of "as at" the establishment of the new State, I see no particular difficulty in ensuring that a wholly new constitution becomes the instrument which is treated technically as having been continued by s.106. In all probability all that is needed is to include in the Commonwealth statute which enacts it an expression to the effect that the constitution is deemed to be the constitution of the new State as at the moment of its admission or establishment. Alternatively the wording could be taken from s.121 and refer to the new constitution becoming the new State's constitution immediately "upon" its admission or establishment. Yet another possibility is to combine the two into some such composite expression as "upon and at" admission or establishment.
15. Under this head therefore I arrive at the following conclusions:-

- (i) the appropriate Commonwealth power to establish the new State and enact all matters incidental thereto derives from s.121 of the Commonwealth Constitution;
  - (ii) the appropriate mode of proceeding is to enact the constitution of the new State as an original document expressed to take effect simultaneously with the coming into existence of the new State;
  - (iii) such a constitution would receive the same protection from s.106 of the Commonwealth Constitution as the constitution of any other State in the matter of its alteration;
  - (iv) and, if it be relevant, it is undesirable to complicate the matter by any reliance on s.122 of the Commonwealth Constitution because (a) there is no need to do so, and (b) it is unlikely that a law for the government of a prospective new State is properly characterized as also a law for the government of a territory.
16. The extent to which the implied immunity of the States from discriminatory Commonwealth legislation protects a new State constitution.
- The origin and basis of this rule are set out in Howard, Australian Federal Constitutional Law, 3rd ed., at pp. 173-180. Its origin is the judgment of Dixon J. in the State Banking Case, Melbourne Corporation v. Commonwealth (1947) 74 CLR 31, 82-4. His views were effectively adopted by the rest of the court in the following year in the Bank Nationalization Case, Bank of New South Wales v. Commonwealth (1948) 76 CLR 1. Since then the existence of the rule has not been doubted but the High Court has declined several invitations to apply it (Howard, 180-183).
17. There is neither reason nor authority to suggest that a new State would be any less entitled than an original State to rely on the discrimination immunity. My understanding of s.121 similarly supports that view. The rule is that the Commonwealth, by virtue of the very fact of federation, cannot enact a law which singles out the States, or presumably any one or more of them, in a manner which restricts or controls them in the exercise of their executive government powers. So much is well established in principle. It does not however fully answer the question asked of me, which is directed to protection of the whole of the new State's constitution, not only its executive power.
18. In its own terms, and on the facts of the cases cited in paragraph 16 above, the discrimination rule does not extend so far. Yet in some circumstances it surely must apply. By definition a Commonwealth law which purports to amend a State constitution in a manner which restricts, controls or prohibits the exercise of a State power of any description must be a discriminatory law, for it cannot apply to the population at large.
19. If this be correct, the question next arises whether a State, by entrenching certain rights or guarantees in its constitution in the manner previously referred to, can exclude the operation of a Commonwealth law on subject matters otherwise within its scope. In the case of a new

State of the description now in contemplation this question is less complicated than with an original State because there is no need for uncertainty about what is its constitution.

20. A distinction has to be drawn between a Commonwealth law which purports to operate directly upon the entrenched clause in the State constitution and a law which operates upon a different subject matter in a manner which effectively nullifies the safeguard of the entrenched clause. In light of both s.106 and the discrimination doctrine it seems clear that a purported law of the former variety would be ineffective. A law of the latter variety of general application however would be prima facie effective pursuant to the relevant legislative power of the Commonwealth, supported if necessary by the inconsistency rule of s.109.
21. Entrenched guarantees in a State constitution would normally be construed as limited in their operation to the State legislature. The case we are considering however does suggest other possibilities. They arise out of the novel character of the conversion of the Northern Territory into a new State and the accompanying need to draft an entirely new constitution.
22. One is that if clear guarantees on such matters as those mentioned in my instructions, namely, land rights, sacred sites, customary law, religion and language, were included in the new constitution in a suitably entrenched form they could be said to go to the essential character of the new State: the type of society within the general Australian framework which that particular State wished to be. From this it could be argued that a Commonwealth law which effectively negated any of the entrenched guarantees would be invalid to that extent in its application to the new State. In that form the argument would have to rest upon implication, either as an extension of the existing discrimination doctrine or as a new but closely analogous doctrine.
23. Alternatively the same result might be reached by relying on the terms and conditions clause of s.121. It can be said that it is contrary to the clear import of s.121, particularly taken in conjunction with s.106, that the Commonwealth, having neglected opportunity before the admission of the new State to require modifications to its proposed constitution, should subsequently be able to enact legislation which effectively nullifies an important part of that constitution.
24. A further alternative is the argument that the Commonwealth legislation in question directly contravenes s.106, and is to that extent invalid, because it prevents the State constitution from continuing as at the establishment of the State. The natural assumption, if one reads s.106 without such a problem as the present in mind, is that the word "continue" has exactly the same range of reference as the word "altered". It is apparent from s.128 that the word "alter" in the Commonwealth Constitution means formally amend. Hence the most obvious application of "continue" is to preserve State Constitutions from formal amendment by the Commonwealth, except possibly under s.128. This is not necessarily its only application.
25. Unquestionably a great deal has changed since 1901 in the practical operation of the State constitutions insofar as that bears upon relations between the Commonwealth and the States and their respective powers. The changes owe much to High Court interpretation and to the operation of s.109 of the Commonwealth Constitution. But owing to the vagueness of the

concept of the constitutions of the original States, and the absence from them of any such guarantees as those under discussion, the present question has never arisen. That question is whether formally entrenched guarantees in a State constitution, which formed part of that constitution as at the establishment of the State and operate in restriction of its legislative powers, are protected by s.106 from being set at naught by Commonwealth legislation on the ground that such an event would be a discontinuance of the State constitution even though accomplished without formal amendment.

26. Notwithstanding anything said by Isaacs J. in R.v. Barger (1908) 6 CLR 41, 83, and A-G for Queensland v. A-G for the Commonwealth (1915) 20 CLR 148, 172, in a different era of constitutional interpretation, the matter is not settled in favour of Commonwealth legislative power by the "subject to this Constitution" clause of s.106. The main source of relevant Commonwealth legislative power is s.51, which is similarly subject to the Constitution. The two sections cannot be subject to each other, so the two reservations cancel each other out, cf Australian Railways Union v. Victorian Railways Commissioners (1930) 44 CLR 319, 392, Dixon J.
27. Neither does it assist to contend that a State cannot extend constitutional protection to a matter merely by including it in its Constitution Act. Guarantees of the kind under consideration are unquestionably proper objects of constitutional protection. Doubts which have arisen about the scope of constitutional protection accorded to the original States by s.106, cf Evatt J. in Stuart-Robertson v. Lloyd (1932) 47 CLR 382, 491-2, and NSW v. Bardolph (1934) 52 CLR 455, 459-60, have been a natural consequence of uncertainty about what s.106 means when it refers to the constitutions of the original States. Such doubts need not arise in the present case.
28. Although, therefore, the argument that Commonwealth laws which effectively nullified entrenched guarantees in the constitution of the new State would be in direct conflict with s.106 is novel, and for that reason devoid of authority, the question which it raises is by no means unimportant or the suggested solution far-fetched. I include it in this advice as a serious contention without suggesting, of course, that it would necessarily carry the day any more than the arguments outlined in paragraphs 22, 23 and 24 hereof.
29. Under this head therefore I arrive at the following conclusions:-
  - (i) the constitution of a new State would be protected to at least the same extent as the constitutions, whatever they may be thought to be, of the original States by the discriminatory legislation doctrine
  - (ii) in practice the degree of protection is likely to be greater, especially if that doctrine is combined with s.106 of the Commonwealth Constitution, because matters which in character can be legitimately regarded as having constitutional status, including guarantees of various kinds, can be expressly included in the new constitution as at the establishment of the new State;

- (iii) and although the consequence of my advice under both this and the previous head is that the new State constitution could not be formally amended by Commonwealth legislation, it is a novel question, on which no firm conclusion can be drawn, whether guarantees included in the new State constitution, being of a character appropriate for constitutional protection, can be effectively nullified in practice by Commonwealth laws of general application.
30. Whether the constitution of a new State would be in a different position in relation to the discrimination doctrine from the constitutions of the original States. For the most part I have answered this question already under the previous head, the answer being no. There is nothing in the reasoning of the State Banking Case, especially the judgment of Dixon J, to suggest that any distinction be drawn for this purpose between original and new States. If anything, the reasoning implies the contrary because, as I set out at length in my previous advice, the word "State" in s.121 means that there is no such thing as second class Statehood.
31. Other relevant constitutional provisions of doctrines. I am not asked to deal with the entrenchment process itself but I express my agreement with instructing solicitor that there is no reason to doubt that it would be effective for the end in view. Section 128 of the Commonwealth Constitution may be argued to be relevant also on the theory that power to amend State constitutions can be found in it, e.g., by first removing or amending s.106 or, alternatively, on the basis that State constitutions are within, or at all events are now within, the expression "This Constitution" in s.128.
32. I confess that amending a State constitution in reliance on s.128 strikes me as a highly theoretical exercise, unless perhaps as a technique for effectuating an uncontentious co-operative change of some description in constitutional arrangements. It is inconceivable that any attack on a State constitution by way of s.128 would have the smallest prospect of success. Even in the unlikely event that it passed it might well founder on the discrimination doctrine.
33. I have concluded earlier in this advice that both s.106 and the discrimination doctrine protect State constitutions, original or new, from direct amendment by Commonwealth legislation. I agree with instructing solicitor (p.9 of his paper on s.106) that if the view (to which he refers at pp.7-8) that State constitutions are incorporated in the Commonwealth Constitution is correct, the consequence is that s.128 operates as yet a further protection.
34. Timing of new constitution. I have adverted to this matter in paragraph 14 above.
35. Draft Information Paper No. 2. The only statement which I believe needs correction is the sentence in paragraph 10 on pp.9-10 that the doctrine has been successfully relied upon in several cases. The only clear instance that I can recall is the State Banking Case. With reference to paragraph 4, p.6, in my view ss.107-8 have no application to the present case for the reason given.
36. I so advise.

Sgd/-

Latham Chambers  
29 June 1989

Prof. C. Howard





## SCHEDULE 2

3 August 1989

Professor C Howard  
Owen Dixon Chambers  
205 William Street  
MELBOURNE VIC 3000

Dear Professor Howard

Re: Northern Territory Statehood

I am grateful for your advice in this matter dated 29 June 1989.

May I please refer to the implied immunity of States doctrine with which you have dealt.

Do you think that the decision in Queensland Electricity Commission v Queensland (1985) 159 C.L.R. 192 could be regarded as another example of a case where the High Court has applied this doctrine to strike down Commonwealth legislation? I refer to your comment in paragraph 35 of your opinion.

Do you feel that the comments in Re Tracey, Ex.pt. Ryan (1989) 63 A.L.J.R. 250 per Mason C.J., Wilson and Dawson JJ. at page 258 (second column) and Brennan and Toohey JJ. at page 269 (first column) and page 271 (second column) (see also Gaudron J. at page 282, second column) justify any additions to the draft information paper? These comments suggest that reliance may be placed on section 106 of the Constitution to strike down Commonwealth laws that interfere with State judicial powers and their exercise, and not just the State judicial institutions themselves. This would seem to reinforce the view that State constitutions, including provisions therein that relate to the exercise of powers by the essential constitutional organs of that State and the protection of civil rights which those organs assure to citizens, are protected by section 106.

I would much appreciate your further comments on these matters.

Yours sincerely

Sgd/  
GRAHAM R NICHOLSON  
Crown Counsel



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7 August 1989

Mr G.R. Nicholson  
Crown Counsel for the Northern Territory  
GPO Box 1722  
DARWIN NT 0801

Dear Mr Nicholson,

In response to your letter of 3 August 1989, I thank you for recalling to my attention the Queensland Electricity case. It does indeed provide a further instance of the State immunity doctrine and attracted attention at the time for that very reason. My comment in paragraph 35 of the advice is too widely expressed. It should refer to two clear instances, not one.

I am equally obliged for the citations to Re Tracey. They seem to me to justify the insertion on p.9 of the draft information paper of an additional paragraph immediately following paragraph 9 to take account of them. The wording you use in your letter to me seems to me, with respect, entirely apt save that "This would seem to reinforce" could well be strengthened to "This reinforces".

Yours sincerely

Sgd/-  
Colin Howard