NEW STATES IN AUSTRALIA: THE NATURE AND EXTENT OF COMMONWEALTH POWER UNDER SECTION 121 OF THE CONSTITUTION

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INTRODUCTION

The campaign being waged by the Government of the Northern Territory to have the Territory granted statehood,[1] if successful, should result in the first use of s 121 of the Australian Constitution.[2] The section reads:

> 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.

It is the primary power for the creation of new States and yet, despite the intense debate that has accompanied the activities of the various new State movements which have flourished from time to time throughout this century,[3] surprisingly little attention has been paid to the section. This can be partially explained by the fact that, historically, new State campaigns have focused upon the subdivision of existing States and so the requirements of s 124 have been a dominating practical concern.[4] In the case of the Territory, section 121 constitutes the sole power available to advance it to statehood. Its situation sharpens concern with only some of the problems inherent in the section. The Commonwealth could well, for example, attempt to deny to the State of Northern Australia legislative capacity over certain topics such as aboriginal land rights, minerals and national parks.[5] On the other hand there is already in place a government structure analogous to that of the existing States and, as there is little likelihood of an attempt to change its fundamentals, this issue should not test any limits.

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[1] Chief Minister of the Northern Territory (S P Hatton) *Towards Statehood,* Ministerial Statement, 28 August 1986.

[2] Unless otherwise stated, references to sections are to the sections of the Australian Constitution and those to clauses are to the "covering clauses", ss 1 to 8 of the Commonwealth of Australia Constitution Act 1900 (UK).

[3] New State issues have been examined and debated in many forums — including a number of Royal Commissions and in the lead up to a new State referendum. New South Wales *Report of the Royal Commission of Inquiry into proposals for the establishment of a new state or new states, formed wholly or in part out of the present territory of the State of New South Wales* (The *Cohen Commission*) 1925. Commonwealth of Australia *Report of the Royal Commission on the Constitution* (The *Peden Commission*) 1929. New South Wales *New States: Report of the Royal Commission of Inquiry* (The *Nicholas Commission*) 1935. A referendum held in northern New South Wales on 29 April 1967 voted against a new State proposal.

[4] The *Cohen Commission, supra* n *3* recommended against new States and therefore did not have to concern itself with such matters. Section 121 was discussed briefly by the *Nicholas Commission, supra* n 3, 9–10.

[5] B F Kilgariff *The State of the Northern Territory* unpublished paper by Senator B F Kilgariff, April 1985, p 10. These are areas in which capacity has been withheld from the present Territory Government. See G R Nicholson "The Constitutional Status of the Self-Governing Northern Territory" (1985) 59 ALJ 698, 706.

This discussion seeks an answer to the fundamental policy question: what is the role of a new States power in the Australian Federation and is the present provision appropriate to its requirements? In consequence it explores the boundaries of the s 121 power. This approach is prompted not only by the situation of the Northern Territory and the fact that any decision on a particular application of the section must to some extent take account of its general scope, but also because, at the time of writing, s 121 is under active review by the Constitutional Commission.[6]

In examining the scope of the section three fundamental issues must be examined: the generation and content of a new State's constitution; transitional provisions; and the ongoing relationship between the new entity and the federal constitutional framework. With these issues in mind the words of the section itself and the direct effect of other constitutional provisions are first examined. The second major inquiry is whether, consistent with Australian canons of interpretation, there are any limitations that must be implied upon the power which the section grants. Fundamental to both inquiries is one question: does the Constitution define a precise and controlling concept of statehood?

1 THE ROLE OF A NEW STATES POWER IN THE AUSTRALIAN FEDERATION

It has been said that an essential feature of a federation is a rigid constitution, one that is "either legally immutable, or else capable of being changed only by some authority above and beyond the ordinary legislative bodies . . . existing under the constitution."[7] Such rigidity is necessary to preserve the federation and prevent component legislatures ignoring its distribution of powers. What a federation sacrifices is a capacity to respond with ease and expedition to circumstances that require change in the fundamentals of government. Australia clearly conforms to the paradigm with its power to legislate changes to the Federal Constitution being conditioned by a demanding referendum requirement. Considerable rigidity has, indeed, resulted with only eight of the some seven dozen amending enactments introduced into the Parliament having been successfully passed. Further, many of those that have passed have involved comparatively minor matters.

The sections in Chapter VI of the Constitution are thus exceptional in as much as they grant to the Commonwealth legislative power over some fundamental aspects of government structure. Admittedly only ss 121 and 122 are unfettered. It is difficult to envisage a practical alternative to giving the central government in a federation the power over national territories. The Australian States might well have sought to retain a veto on the admission of new States as this is a matter

[6] The very wide terms of reference of the Constitutional Commission extend to all sections of the Constitution. *Constitutional Commission: Bulletin* Canberra, The Constitutional Commission, No 1 May 1986, 4. For discussion of the recommendations in the first report of the Commission see n 162 below.

[7] A V Dicey *Introduction to the Study of the Law of the Constitution* (8th ed 1920) 142–3.

that affects the Federation in a quite fundamental way, but the decision was clearly that the Commonwealth was to act for Australia in this matter.[8]

In what circumstances, then, might it be called on to act? There are three classes of territory that could go to comprise new Australian States: that of the existing States; that of Commonwealth territories; and foreign territory. Chapter VI provides in some detail for the first of these possibilities. The second and the third must be accommodated by s 121 alone. The only immediately obvious candidate for statehood is the Northern Territory. However, the past vigour of new State movements agitating for the partition of existing States suggests they might easily revive. That it requires some imagination to postulate other scenarios is a tribute to the relative stability that Australia has enjoyed both internally and in its geographic region since Federation, and, indeed, since settlement. Change is the eternal condition of both local and national politics, however, and it is not too difficult to postulate other situations. A worsening economic or security situation could make some form of unity with either New Zealand or Papua New Guinea appear desirable. Increasing international pressure on Australia's claim to sovereignty over the Australian Antarctic Territory might make it desirable to "upgrade" its status if it were technically possible to provide for a permanent population there of any size. It is not inconceivable that progressive political and economic polarisation within the Australian population, particularly if combined with racial factors, might lead to the development of new and distinct regional groupings. There is no predicting the outcome of a war should one involve Australia or her neighbours.

Undoubtedly changes will occur in Australia's society and circumstances. Some may require the cumbrous process of basic constitutional reform. Others might not only be appropriately accommodated by legislative action but positively require its comparative speed and flexibility. The new States power is an important and desirable attribute of the Federation. It is appropriately exercised by the Commonwealth as the guardian of the national interest. It should also be of wide capacity. If and when new States are admitted, the circumstances must differ from those that preceded 1901. It will not necessarily be that State government in its present familiar form is appropriate to new requirements.

Policy is not the chief arbiter of the scope of Commonwealth power, however, and the question remains: what is the scope of s 121?

2 SECTION 121

Chapter VI of the Constitution is entitled "New States". Section 121 is the first of the four sections that comprise the chapter and is the locus of the power to create new States. Section 124 states additional requirements when territory from an existing State goes to form part, or all, of the new entity. Section 122 provides for the government of territories and s 123 gives a conditional power to alter the

[8] *Infra* n 12 and associated text.

limits of States. Neither of these latter, in terms, refer to new States but both merit some consideration in an examination of s 121.[9]

However enigmatic or sphinx-like the words of s 121[10] it is they that delimit the power the section confers.

That power is entrusted to "The Parliament" and must fall into the list of Commonwealth powers that are impliedly exclusive,[11] When the embryonic forms of the section were debated in the several sessions of the Australian Federal Convention, the width of the power was contested, particularly as it might affect existing colonies that did not immediately join the Federation and in relation to fixing the extent of parliamentary representation. There was, however, no contention that the Commonwealth was not the proper body for its exercise or that existing States should have any role therein except where their own territory would be involved.[12]

In providing for this last eventuality s 124 states the only explicit limitation on the s 121 power. While it does not derogate from the Commonwealth's exclusive power to bring new States into existence, it provides that a new State "may be formed by separation of territory from a State, but only with the consent of the Parliament thereof". Further, it envisages the creation of a new State from the union of two or more States, here requiring the consent of the Parliaments of all the States concerned. Such consent is thus a precondition to the effectiveness of any legislation purported to be passed under s 121 concerning State territory and would, it seems clear, take the form of legislation passed according to the requirements of the Constitution of the particular State or States concerned.

The question arises whether s 123 erects an additional prerequisite to action pursuant to s 124. It requires "approval of the majority of the electors of [a] State voting upon the question" where the Commonwealth increases, diminishes or otherwise alters the limits of that State. The answer depends upon viewing s 124

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[9] The texts of the other sections in Chapter VI are as follows:

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.

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 provisions respecting the effect and operation of any increase or diminution or alteration of territory in relation to any State affected.

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.

[10] As "enigmatic as a hard boiled egg" and "positively Sphinx-like in its failure to communicate" are phrases employed by Professor Colin Howard in relation to s 121. "Statehood on Conditions: Federal Representation and Residual Links", an unpublished paper delivered at the Law Society of the Northern Territory Conference, *The Northern Territory of Australia and Statehood,* 2 October 1986, 3–4.

[11] As Professor Howard says, their exclusiveness is implied because "their subject matters are of a character which could not possibly be within State legislative competence unless expressly assigned thereto, which they are not." *Australian Federal Constitutional Law* (3rd ed 1985) 17, text at n 95.

[12] *Official Report of the National Australasian Convention Debates,* 1891, 883. *Official Report of the National Australasian Convention Debates* 1897, 1007–1012. *Official Record of the Debates of the Australasian Federal Convention* 1898, 694–698. See particularly Mr (Edmund) Barton at 695 of the 1898 *Debates.*

in its context. The overall chapter title of "New States" might suggest the affirmative but the comprehensiveness of this descriptive heading is brought into question by the presence of the territories power. Section 122 clearly deals with territories other than in the condition of being embryonic States.[13] It has already been suggested that the chapter is better seen as the repository of such limited powers as are granted to the Commonwealth over the fundamentals of government in the Federation. In this light ss 121 and 124 are each separate and substantive grants of power. Section 123 specifies the circumstances in which the Commonwealth may exercise a power to effect alteration of State boundaries. Section 124 specifies the circumstances in which the Commonwealth may exercise its power under s 121 to create new States when it does so from the territory of existing States. That process may entail alterations to existing States' limits but it does so only incidentally. This interpretation would be consistent with the reasoning of the High Court in *Paterson* v *O'Brien* where it was held that surrender of State territory under s 111 was not controlled by s 123.[14]

The Commonwealth's capacity to use s 121 to transform a territory into a State seems beyond doubt, if for no other reason, then because of the wording of the definition of "States" in covering clause 6. It includes, ". . . and such colonies or territories as may be admitted into or established by the Commonwealth as States", a clear reference to s 121, which explicitly echoes its terms.[15] Likewise, although the possibility is not explicitly provided for, a new State could be formed partly from a territory and partly from a portion of an existing State. Even if a restrictive interpretation were placed upon the first part of s 124[16] nothing would prevent the surrender of the State territory under s 111 and its subsequent unification with the Commonwealth territory concerned, once the surrendered part came under the "exclusive jurisdiction of the Commonwealth".

One other issue is raised by the cl 6 definition. Can only "colonies or territories" be transformed into new States? It has been suggested that "territories" here is used in a different sense from "territory" in s 122 where it is said to refer to the "area of land . . . not the political entity."[17] The implication being that in cl 6 it is restricted to the meaning "political entity".[18] If this interpretation were correct then the cl 6 definition of "The States" could not be comprehensive. The territory separated from an existing State to form a new State under s 124 could not be a colony, nor need it go through the stage of being

[13] "The power conferred by s 122 is a plenary power capable of exercise in relation to Territories of varying size and importance which are at different stages of political and economic development." *Berwick* v *Gray* (1976) 133 CLR 603, 607 *per* Mason J.

[14] (1978) 138 CLR 276. The thrust of the decision was that the two sections were not related and any action by the Parliament of the Commonwealth under s 111 was not "an alteration by the Parliament of the limits of the State and particularly not such an alteration effected by an act of the Parliament under s 123." See the unanimous joint judgment at 281. See also R D Lumb "Territorial Changes in the States and Territories of the Commonwealth" (1963) 37 ALJ 172, 173; W A Wynes *Legislative, Executive and Judicial Powers in Australia* (1976) 112.

[15] P Durack and M H Byers *Northern Territory: Establishment as a State* Joint Opinion of the Attorney-General and the Solicitor-General 18 July 1978.

[16] For instance, that it only encompasses the entirety of the new State being derived from the original State or that combination with a territory is excluded *expressio unius* by the remainder of the section — although there seems little to recommend either view.

[17] Toohey J "New States and the Constitution: An Overview" a paper delivered at the Law Society of the Northern Territory Conference, *The Northern Territory of Australia and Statehood*, 1–3 October 1986, 7.

a Commonwealth territory. The preferable view must be that "territories" in cl 6 is a term of general import encompassing political entities and mere areas of land. From this it can be concluded that the Commonwealth's exclusive power to admit or establish new States is unrestricted as to the land on which it may operate except that it is subject to conditions where that land comprises part of an existing State.

Two verbs are applied to the generative capacity granted to the Parliament by s 121. It "may *admit* to the Commonwealth or *establish* new States".[19] They formed part of an explicit distinction made in the wording of the then cl 114 as debated at the Melbourne Convention: "The Parliament may, from time to time, admit to the Commonwealth any of the existing colonies (naming those that did not immediately adopt the Constitution) . . . and may, from time to time establish new states".[20] As Edmund Barton explained: "The admission phrase is designedly used so as to enable it to apply only to those colonies which might at first enter the Federation, and with their existing autonomy,[21] and the remainder of the clause is intended to apply to the other colonies."[22] When the clause was subsequently recast the warning sounded by Mr Higgins, who opposed the use of the word "establish", was apparently ignored. He had said: "I only want to take care that there shall be no mystical distinction urged hereafter as between 'establish' and 'admit' ".[23] Even if the debates are not consulted, a simple comparison between the current wording of the section and that of cl 114,[24] in light of the fact that all the "existing colonies" became Original States, leaves open the argument that the word "admit" is spent and of no effect. It remains a part of s 121, however, and "mystical" distinctions quickly emerged and are still urged.[25]

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[18] An interpretation consistent with the tenor of Quick and Garran's treatment of the clause. J Quick and R R Garran *The Annotated Constitution of the Australian Commonwealth* (1901) 376.

[19] Emphasis added.

[20] 1898 *Debates, supra* n 12, 694.

[21] That is, as the context makes clear, the "existing colonies": *Ibid* 694–695. This intrinsically imprecise phrase was used in the Convention debates to refer to those colonies which were likely to (some delegates would have said, had a right to) join the Federation. Essentially these were the mainland colonies and Tasmania. In the 1897–1898 Convention there was no question of New Zealand's joining but Queensland was seen as an existing colony despite its non-participation. Edmund Barton made clear that it would only enjoy this status if the State remained undivided. Had moves to create new entities in the central and northern parts proved successful all three areas would have had to have been, in the terms of cl 114, established as new States.

[22] *Ibid* 695.

[23] *Ibid* 696.

[24] It is clear that the drafts of the Constitution Bill are permissible aids to construction. *Tasmania* v *Commonwealth* (1904) 1 CLR 329, 333. The rejection of any use of the Convention Debates for such a purpose, in that case and subsequently, may no longer represent the attitude of the Court: *Seamen's Union of Australia* v *Utah Development Co* (1978) 144 CLR 120, 143–144 and A Mason "The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience" (1986) 16 FL Rev 1, 25–26.

[25] Quick and Garran, *supra* n 18, 968, attempted the first resuscitation by suggesting that "admission . . . can only refer to the entry into the Commonwealth of political communities which, prior to their entry, were duly constituted colonies". They instance New Guinea, Fiji and colonies yet to be formed. See also W H Moore *The Constitution of the Commonwealth of Australia* (2nd ed 1910) 593; G Sawer "The Northern Territory: Constitutional Status Present and Future" in R Herr and P Loveday (eds) *Small is Beautiful: Parliament in the Northern Territory* Canberra, Australasian Study of Parliament Group and the North Australia Research Unit of the Australian National University (1981) 91, 95.

For Professor Lumb the distinction is an important one:

> The importance of the distinction is reflected in the wording of s 106 of the Constitution which contains an implication that a political community with a constitution already formed (that is a Territory which has attained a degree of autonomy) is admitted with that Constitution which continues as at the admission. . . . The function of the Federal Parliament is to ratify such a Constitution . . . and to approve admission on terms and conditions. It is not the function of the Parliament to establish or create a State Constitution. If this view is correct the word "establishment" would in practice be limited to the formation under s 124 of new States out of existing States.[26]

It is hard to discover the implication Professor Lumb finds in s 106 for it saves the Constitution of a new State either "at the admission or establishment of the State". It is equally difficult to discover the consequences he suggests. What are *admitted* or *established* both in s 106 and in s 121 are new States. Nowhere are these terms applied to Constitutions. The Constitution of a new State will derive its effectiveness as such under the Federal Constitution by virtue of s 106 when the Commonwealth chooses to exercise its power, under s 121, to admit or establish it as a new State. No other act of "ratification" is required. Section 106 simply does not address itself to the question of Constitution formation and it cannot be used to imply some limitation upon it.

The word "admit" could be seen to be more appropriate to the case of an existing political entity that is to become a State, substantially unchanged. To say the Constitution allows for such a possibility is one thing; to imply that, in such a case, Commonwealth power is somehow limited to ratifying its Constitution is quite another. If "admit" is of continuing force, it does no more than present one alternative way in which the Commonwealth can bring a new State into existence.[27] Should the Commonwealth enact legislation, relying on s 121, declaring some foreign, self-governing polity a State of Australia and providing for it a constitution, it could not be seriously suggested that, for the purposes of Australian law, its indigenous constitution would be preserved by s 106 to prevail over that which had been enacted.[28]

The first eleven words of s 121 grant the substance of the power that is given. It is to admit or establish new States. To the extent that these are alternatives, it is for the Commonwealth to choose one or the other as seems expeditious in the circumstances and, indeed, any particular new State might be part established

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[26] "The Northern Territory and Statehood" (1978) 52 ALJ 554, 559.

[27] In the case Professor Lumb cites, that of a territory which has attained a degree of autonomy, it is likely that it would be made a State with its constitution and institutions substantially unaltered. That there is no constitutional imperative to do this can be seen from the fact that it is open to the Commonwealth to impose upon it an entirely new constitution, exercising the s 122 power, prior to its being "admitted" to statehood. If Professor Lumb's distinction were meaningful then his suggestion that "establishment" is confined to s 124 entirely overlooks the situation of a territory or an area of foreign land, having no previous autonomy, that it is desired to elevate to statehood.

[28] As Federal executive power probably extends to supporting a claim, unquestionable in the courts, of sovereignty over such an entity, (Diplock LJ *Post Office* v *Estuary Radio* [1968] 2 QB 740, 753, cited with approval in *New South Wales* v *Commonwealth* (The *Seas and Submerged Lands* case) (1975) 135 CLR 337, 388 *per* Gibbs J; 453 *per* Stephen J) it could first be constituted a Commonwealth territory and any constitution the Australian Government chose might be imposed on it under s 122. There is, however, no conceivable reason why this intermediate step could be required.

and part admitted.[29] The Commonwealth is free to adopt or recognise any process of constitution formation it deems fit. A final point to note is the inclusion of the word "may". There is no legal compulsion on the Commonwealth to exercise the s 121 power.[30]

The remaining words of the section give to the Parliament a power to make or impose terms and conditions. Its exercise is equally optional, although, if it is only through the imposition of such terms and conditions that the extent of representation in the Parliament can be set, then failure to exercise it in this respect would lead to confusion.[31] The fact that these conditions are made "upon" admission or establishment has troubled at least one commentator.[32] When it is realised that it is the Parliament that is exercising this power there should be no difficulty. The Executive could undoubtedly enter any agreement with a potential State as to terms and conditions but the only way the Parliament can impose them is via legislation. This, most logically, would be done as part of the Act creating the State or in complementary legislation.[33] The fact that the Parliament can either "make" or "impose" these terms and conditions imports no substantial distinction. The former might be seen as more appropriate to an act of establishment, while the latter, to admission. There are no grounds to suggest that the scope of the terms and conditions is differentially affected.

If, as suggested above, the first eleven words of s 121 grant the substance of the power, the question arises as to why the terms and conditions provision was required and what function it performs. The best answer to the first question is probably an historical one. Two clauses covering new States were presented to, and debated at, the 1897 Adelaide Convention.[34] The first, cl 113, dealt with the admission of "existing colonies" which upon adopting the Constitution would "thereupon" have become States of the Commonwealth. The second, cl 114, in terms very similar to the current section, granted the general new States power. That a particular matter was of importance to those drafting the clause is indicated by one of the significant differences. The terms and conditions aspect of Parliament's power only extended to "such conditions, as to the extent of representation in either House of the Parliament or otherwise, as it thinks fit." It was necessary to be specific on the question of representation because the

[29] Had the wording of cl 114, as presented to the 1897 Adelaide Convention, prevailed then the Commonwealth would have had no "choice". The two terms were combined in a compound expression. The Parliament's power was from time to time to "establish *and* admit" new States. Emphasis added. (Adelaide *Debates*, *supra* n 12, 1010.) The interests of clarity would have been well served had this version been retained.

[30] Toohey J *supra* n 17, 6. Also Sawer *supra* n 25, 96.

[31] This is distinct from the case where the Commonwealth purported to set the extent of representation at zero. For discussion of this possibility see text *infra* at n 44. In the unlikely event that no references were made to parliamentary representation, s 24 may, of its own force, establish the number of members of the House of Representatives. No number of Senators could be determined, however, as s 7 only provides a number for Original States in default of parliamentary provision. Note the comment of Barwick CJ in *Western Australia* v *Commonwealth* (the *First Territories Representation* case) (1975) 134 CLR 201, 229.

[32] "Strictly speaking", says Professor Howard, "it can be said that this makes no sense, for once the admission or establishment of the new State has taken place it must be too late to start imposing conditions." Howard, *supra* n 10, 10.

[33] The word "upon" might also bear a limiting, temporal sense — that is "at the same time as". Whether the s 121 power extends to a new State after it is admitted or established is discussed below — see text at n 56.

[34] *Supra* n 12, 1007–1012.

Chapter I provisions would not, of themselves, apply. This was even more the case given that it was intended to give the Commonwealth a discretion as to its extent. In the absence of contrary words the elaborate formula applying to existing States might well have been taken as implying a requirement of equality. In a "volcanic" series of amendments that left some delegates gasping for breath,[35] the two sections were conflated. Edmund Barton's concern was that the explicit mention of representation might "exclude the Commonwealth from making provision, except as to" that matter.[36] In a clear attempt to conserve a full measure of Commonwealth power, the words "terms and" were placed before "conditions" and "as to" were abandoned in favour of "including" in front of "the extent of representation".

This historical perspective provides the best way of viewing the ongoing significance of the latter part of s 121. It specifies the extent of Commonwealth power over the level of parliamentary representation. The word "including" prevents an *expressio unius* reading limiting the substantial power granted by the section. Outside of parliamentary representation does the phrase "terms and conditions" add anything to its scope? Both the constitution of the new State and any transitional provisions could be provided for by legislation that admits or establishes. This leaves the one remaining possibility that because the form of "terms and conditions" that receives express mention relates to the relationship between the new State and the provisions of the Constitution in one respect, that of representation, this is indicative of the genus of allowable terms and conditions generally. This type of reasoning leads to the suggestion that a new State might be able to coin its own money, raise its own defence force, impose its own customs and abolish the "absolute" freedom of trade across its borders.[37] Whether it is open to the Commonwealth to rewrite the Constitution in relation to new States cannot be determined from the words of s 121 alone. It is enough for present purposes to remark that, to the extent the Constitution as a whole might allow for this possibility, it could just as well be provided for under a plain power to establish or admit. The answer must be that, representation aside, the "terms and conditions" provision neither adds to nor restricts the scope of the section.

Of all the questions raised by the words of s 121, the question of the provision of representation has achieved the most attention.[38] There is substantial agreement that the words bear their natural meaning and the discretion given with respect to the "extent" of representation is substantially unfettered. One dissenting voice is that of Professor Howard who, in his conference paper,[39] argues that there is no reason why the Northern Territory, admitted as a new

[35] *Ibid*, 1010–1011.

[36] *Ibid* 1009.

[37] This straw man is raised by Professor Howard courtesy of Professor Whalan. Howard, *supra* n 10, 3 citing: D J Whalan "Aspects of Northern Territory Law: Backbone or some Skeletons in the Constitutional Cupboard" in Rhys Jones (ed) *Northern Australia: Options and Implications (1980) 208–9*.

[38] A detailed consideration of all the issues is not attempted, principally because of the excellent analyses available among those here listed. Consistent with the theme of this paper, concentration is placed upon the boundaries of Commonwealth power in this respect. See M H Byers *Northern Territory: Establishment as a State* Opinion of the Solicitor-General 10 December 1980, 2–5; C Howard *supra* n 10, 8–14; Quick and Garran *supra* n 18, 970; Toohey J *supra* n 17, 5–6; L Zines "Representation of Territories and New States in the Commonwealth Parliament" *Proceedings of the Australian Constitutional Convention* Vol 2 Adelaide 26–29 April 1983, Appendix H.

[39] *Supra* n 10.

State, "should not have the same representation in the Federal Parliament as any other State". He says that he can "think of no acceptable principle upon which any variation in the rules of representation in the Federal Parliament should be (made)" and bases this upon a view that "State" in s 121 bears a meaning "which, for all practical purposes, is the same as the meaning the word bears in the context of original State." To reach his conclusion he must, however, urge that "as a matter of policy . . . s 121 of the constitution be treated as if the reference to federal representation were not there."[40] This is not a course likely to be taken by the High Court.[41]

The prevailing view is that the s 121 power over the number of represenatives a new State will have in the Houses of the Parliament is not constrained by other constitutional provisions.[42] The *Territories Representation* cases amply demonstrated the difficulty of reconciling the representation provisions of Chapter I with those of Chapter VI. They decided that s 122 operated as a qualification to ss 7 and 24. Because of the similarity in its wording in this aspect, the same must apply to s 121.[43]

The one limitation that appears to apply to the width of this discretion is that the Commonwealth could not set the extent of representation in either House at nought. Mr Justice Aickin in the *Second Territories Representation* case[44] bases his assertion to this effect, partly on the words of s 121 which, he says, "shows that it is only the 'extent', and not the fact or mode, of representation which is committed to the Parliament" and, in relation to the Senate in particular, on the words of ss 7 and 9. In the *First Territories Representation* case Barwick CJ implied the same conclusion in the context of discussing s 24, the provision that establishes the composition of the House of Representatives. He distinguishes between the fact of representation which is provided "by the Constitution itself" and the power to set the extent of representation which is concerned with its "numerical strength".[45] In the case of the Senate, s 7 provides that "The Senate shall be composed of senators for *each* State".[46] The relevant part of s 24 reads, "The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth". In *Attorney-General for New South Wales (Ex rel McKellar)* v *Commonwealth*[47] the High Court held that the phrase "people of the Commonwealth" did not include the people of the Territories. There is a strong commonsense case for the corollary, that on the erection of a new State, its people become "people of the Commonwealth". It was, after all,

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[40] *Ibid* 9, 14.

[41] Particularly in view of the decision on the equivalent words in s 122 in the *First Territories Representation* case, *supra* n 31; confirmed in *Queensland* v *Commonwealth* (the *Second Territories Representation* case) (1977) 139 CLR 585.

[42] M H Byers *supra* n 38, 2–5; Toohey J *supra* n 17, 5–6, L Zines *supra* n 38, 10–13.

[43] L Zines *ibid* 12. This should be *a fortiori* as there can be no doubt as to the meaning of its use of the word "representation". The minority in the *First Territories Representation* case read down its signification in s 122 to exclude senators or members with full voting rights. Those judges who referred to s 121 recognised that no such limitation could be applied there. The restricted reading of s 122 was powerfully reasserted in the second case which only upheld its predecessor by application of the principles of *stare decisis*. However, even if the decision should at some time be overturned this would not disturb the reasoning which supports the proffered view of s 121.

[44] *Supra* n 41, 617.

[45] *Supra* n 31, 229.

[46] Emphasis added.

[47] (1977) 139 CLR 527.

the "people" of the several original States who were united, by the cl 3 proclamation, in the "Federal Commonwealth".[48] If this is accepted, then the quoted parts of ss 7 and 24 are incompatible with an unrepresented State. Section 121 prevails over the numerical aspects of the two sections because of the inconsistency between them in that respect.[49] There is no reason to extend this to the fundamental assertions made by ss 7 and 24 regarding the composition of the two Houses.

At the other end of the scale there is raised the fear that the Commonwealth might "swamp" the Parliament with the disproportionately large number of representatives. There is nothing in the words of the Constitution to prevent such abuse. With respect to the equivalent power in s 122, Murphy J has found an implied limit to the discretion because suggestions of swamping are "not compatible with the democratic theme of the Constitution."[50] This is at odds with the views expressed by his Honour in the *First Territories Representation* case[51] and is otherwise unsupported.[52] Many aspects of s 121 demonstrate that constitutional interpretation cannot be conditioned by fear of unreasonable application or abuse of power. Quite properly, the practical boundaries of Commonwealth power in particular situations will be drawn by the prevailing political realities and the ballot box.

In the *First Territories Representation* case, Mason J said: "the representatives of a new State necessarily enjoy the rights and privileges of the representatives of the original States — Parliament cannot diminish their rights and privileges."[53] He based this on the view that Commonwealth power over new State representation is limited to its extent only.[54] This also would appear to follow from a finding that the word "representation" in s 121 means representation by Senators and Members with full voting rights.[55]

One final consequence can be gleaned from the words of s 121. The power it gives is to establish or admit. Once a new State has been established or admitted the power over that State is spent. The conclusion, reached here, that the power to impose terms and conditions is co-extensive with the substantial power denies any argument that that aspect of the section allows their retrospective imposition. This does not necessarily confine the Commonwealth to a single legislative act or simultaneous proclamation of various enactments. At some point, however, the new State will be constituted and further changes to, for example, its constitution will depend on its own powers of constitutional amendment.[56]

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[48] This outcome is assumed by Barwick C J in the *First Territories Representation* case, *supra* n 31, 229.

[49] *Supra* text at nn 42, 43.

[50] *Attorney-General for New South Wales (Ex Rel McKellar)* v *Commonwealth*, *supra* n 47, 569.

[51] *Supra* n 31, 287.

[52] Contrast the views of Mason J, *ibid* 271, who explicitly refers to the position of new States in this regard. See also the various other judicial views on the question collected by Zines, *supra* n 38, 7–8.

[53] *Supra* n 31, 268.

[54] *Id* for discussion of this proposition see Zines *supra* n 38, 10.

[55] Part of the logic that supported the prevailing view in the *Territories Representation* cases was that the word "representation" in s 122 included representation by Senators and Members with full voting rights because this was its signification in s 121. The *First Territories Representation* case *supra* n 31 *per* Mason J, 282–283 *per* Murphy J. The *Second Territories Representation* case, *supra* n 41 *per* Mason J, 606.

[56] S 106.

Prima facie s 121 gives to the Commonwealth an extremely wide power. It is exclusive and applicable, for the purposes of domestic Australian law, to any territory, subject only to the requirements of s 124. The Commonwealth may dictate the process of constitution making and specify transitional provisions. It may set the extent of representation in the Senate and the House of Representatives provided there is at least one member for each. What remains unclear is whether there are any restrictions on the nature of the entity it elevates to statehood or on the relationship that is established between the new State and the other provisions of the Constitution. There is only one word in the section that might dictate such restrictions: the Commonwealth can only admit or establish entities that can properly be described as "States".

3 STATEHOOD PART 1: THE WORD "STATE" IN THE CONSTITUTION

While the principal function of the Constitution was to erect the Federal Power it nonetheless concerned itself much with the States. The term "State" or a variant occurs in four of the eight covering clauses and 70 of the 128 sections.[57]

On the formal level "The States" are defined in cl 6:

> "The States" shall mean such of the colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia, including the northern territory of South Australia, as for the time being are parts of the Commonwealth, and such colonies or territories as may be admitted into or established by the Commonwealth as States; and each of such parts of the Commonwealth shall be called "a State".

The clause also defines "Original States" as meaning "such States as are part of the Commonwealth at its establishment". It is axiomatic that an Original State cannot be a new State. Although the nature of the Original States is manifest, there is nothing in the words of the clause *per se* to justify an implication that States generally must conform to their pattern. Likewise, the main definition does little to specify the nature of a State. States, other than the named colonies, are simply such colonies or territories as are admitted or established, by the Commonwealth, as States. Any definition of the word "States" derived from cl 6 and s 121 alone would be circular and aside from cl 6 there is no other explicit definition or description of its meaning.[58]

One aspect of cl 6 is particularly important. The clause directly echoes the words of the s 121 power and makes explicit that, when a new State is established or admitted to the Commonwealth, it becomes one of the "parts" of

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[57] The amended Constitution still has 128 sections because the addition of s 105A is matched by the repeal of s 127.

[58] The explicit mention of New Zealand and the Northern Territory in cl 6 now confers upon them no special status under the Constitution as potential States. The simplest justification for this statement is that the "colon(y)" of new Zealand and the "northern territory of South Australia" no longer exist. The latter was surrendered to the Commonwealth, being accepted under s 111 by virtue of the Northern Territory Acceptance Act, No 20 of 1910 and thus becoming a Commonwealth territory. The former, not having become an Original State, could only now become a State by virtue of legislation under s 121 and even if cl 6 could be construed as referring to the modern nation of New Zealand, this could have no bearing on the scope of the s 121 power. At most it could require that New Zealand could not become a part of the Commonwealth other than as a State. See G Sawer *Australia-New Zealand Association: Some Constitutional Problems*, New Zealand Institute of International Affairs, Auckland Branch, Occasional Paper No 1 1968, 21–25.

the Commonwealth and is called "a State". This, in the clearest possible terms, brings the new entity within the force of the Constitution for cl 5 declares that the Constitution is binding on the "people of every State and of every part of the Commonwealth". This is of great significance for the relationship that the Constitution bears to the new State for, to put it simply, every time the Constitution uses the word "State", unless the contrary is indicated or can otherwise be established, it refers, *inter alia,* to that new State. The most obvious contrary indications appear in the provisions that refer to "Original States". Indeed, the fact that there is this explicit distinction makes the conclusion that an unqualified reference to a "State" *prima facie* embraces any new States, unavoidable.[59] This, in turn, makes a nonsense of the proposition, referred to above, that the terms and conditions provided for by s 121 could be used to exempt a new State from the operation of constitutional provisions that would otherwise apply and are currently applicable to existing States.[60] In consequence a new State will be subject to the various restrictions placed upon State power, such as those in ss 109, 114, 115 and 117. By the same token, it must benefit from the phalanx of protections, rights and guarantees that are provided for, of which ss 51(xxxi), 92 and 119 spring most readily to mind.[61] Consistency would suggest that its residents could also not be put outside the general "guarantees" such as those in ss 80 and 116.[62]

It is one thing to say that when the Constitution uses the term "State" it, in most cases, refers to a new State. It is, however, another question whether the Commonwealth is compelled to construct the new State so that all the sections referring to States are applicable to it.

The Constitution makes many assumptions about the attributes of States, these being reflected in various phrases it employs. Some of the more common include: "people of every State";[63] "senators for each State";[64] "Parliament of a State";[65] "The Governor of any State";[66] "laws of any State";[67] "the courts of the

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[59] Discussion above reveals that s 24 is an exception. The specific provision in relation to represenation in s 121, when exercised, has the effect of making a reference to a "State" therein only applicable to Original States. See text nn 42–43 *infra* and L Zines "Representation of Territories and New States in the Commonwealth Parliament" *Proceedings of the Australian Constitutional Convention* Vol 2 Adelaide 26–29 April 1983 Appendix H, 12.

[60] *Supra* text at n37.

[61] For a more comprehensive list see Toohey J "New States and the Constitution: An Overview" a paper delivered at the Law Society of the Northern Territory Conference *The Northern Territory of Australia and Statehood,* 1–3 October 1986, 11.

[62] This argument does not follow from the present analysis because, with the exception of the requirement that a trial on indictment be held in the State where the offence was committed, these guarantees are not expressed in terms of States or their residents, but, rather, are generally expressed limitations on Commonwealth capacity. There seems no reason why these specific provisions should not subjugate the general s 121 power as they would any other that did not clearly authorise their violation. As Latham CJ said of s 116, it "is a general prohibition applying to all laws, under whatever power those laws may be made." *Adelaide Company of Jehovah's Witnesses* v *Commonwealth* (1943) 67 CLR 116, 123. Generally approved in *Attorney-General for Victoria (Ex rel Black)* v *Commonwealth* (the *DOGS* case) (1981) 146 CLR 559.

[63] Clause 5, with similar wording in ss 7, 15, 24, 25, 75, 100, 117.

[64] Section 7, with similar in ss 9, 10, 12, 13, 14.

[65] Section 9, with similar in ss 10, 15, 25, 29, 30, 31, 41, 51, 90, 105A, 107, 108, 111, 123, 124.

[66] Section 12, with similar in ss 7, 15, 21, 84, 110.

[67] Clause 5 with similar in ss 9, 10, 25, 30, 31, 34, 44, 76, 84, 85, 90, 105A, 109, 112, 113, 118.

States"; "the judicial proceedings of the States";[68] "public service in each State"[69] and "debts of the several States".[70] It would be remarkable indeed if the Commonwealth attempted to constitute a new State containing no people. The general expectation would undoubtedly be, that a new member of the Federation should be self-governing with a gamut of legislative, judicial and executive powers. However, the proposition that, because the Constitution makes reference to an attribute of statehood, it therefore commands its presence, if advanced, would be manifestly simple minded. A State would not cease to be a State because it had no "State banking", "State insurance"[71] or, that favourite topic of the Constitution, a State railway.[72] An assessment of what, if any, attributes are required of a new State by the Constitution entails an examination of the relevant sections for language that, either expressly or by necessary implication, imports compulsion.

While it would in any event appear obvious, for the purposes of legal analysis it is cl 6 that establishes that a State must consist of an area of land. States are defined in terms of either "colonies" or "territories" both of which have this common, minimum characteristic.[73]

In providing for the situation where the place of a senator becomes vacant before the expiration of his term, s 15 refers to three institutions, one legislative and two executive. Does the Constitution thus require a new State to have: a "House or Houses of Parliament"; a "Governor"[74] and an "Executive Council"? Or, to put the question generally, must a new State be "more or less sovereign and independent in regard to internal affairs"[75] and possess a government patterned upon those in the Original States?

The Constitution does not expressly require the existence of those State institutions to which it refers, and this is consistent with its function and history. It was drafted to erect a Federation and a Federal Government and, in consequence, it is concerned with Federal matters. It is not surprising, therefore, that it compels representation in the Federal Parliament and submits new States to a position similar to that of the Original States in the Federation. The Constitution did not, however, create the substance of the Original States.[76] Even if the constitutional theory is that they owe their continuing existence solely to ss 106 and 107,[77] the historical reality was that their structures and sovereignty

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[68] Section 51, with similar in cl 5 and ss 73, 77, 118.

[69] Section 69, with similar in ss 84, 85, 89.

[70] Section 87, with similar in ss 105, 105A.

[71] Section 51 (xiii) and (xiv). Indeed, at Federation, many did not.

[72] Section 51 (xxxii), (xxxiii) and (xxxiv), and ss 98, 102, 104. Section 110 both contemplates and provides for the situation where a State does not have a Governor. A provision that "In each State of the Commonwealth there shall be a Governor", which stood as part of a number of the drafts of the Constitution, was expressly removed by the Adelaide Convention. *Official Report of the National Australasian Convention Debates* Adelaide, (1897) 992–1001. The history is given by J Quick and R R Garran *The Annotated Constitution of the Australian Commonwealth* (1901) 939–940.

[73] For a discussion of the meaning of the word "territories" in the clause *supra* text at n 17ff.

[74] Or equivalent — see s 110.

[75] This description is taken from the most appropriate definition of the word "State" given by the *Oxford English Dictionary*.

[76] "The Commonwealth, unlike the State, is the creature of the Constitution." *Queensland Electricity Commission* v *Commonwealth* (1985) 61 ALR 1, 41 *per* Deane J.

[77] Quick and Garran *supra* n 72, 930. *New South Wales* v *Commonwealth* (the *Seas and Submerged Lands* case) (1975) 135 CLR 337, 372 *per* Barwick CJ.

were carried over from the pre-existing colonies with no more than the necessary minor adjustments to accommodate them to the Federation.[78] They were, so to speak, constitutional givens. The historical similarity between the several colony-cum-States allowed those drafting the allocations of powers and responsibilities between the Commonwealth and the State to simply assume the existence of various State institutions. Much the same may be said of the State's legislative powers. They were preserved by ss 106 and 107 and beyond that required no specification. The only exception is s 9 which contains a direct grant of power.[79]

The possibility remains that some sections can only be construed as necessarily implying a requirement for the institutions to which they refer. This is clearly not true of those that merely state contingencies or give optional powers. Where such a section found no point of reference in a new State it would simply be wholly or partially inapplicable.[80] Some of the provisions relate to representation and are in the form "Until the Parliament otherwise provides" leaving the possibility of a vacuum if there were to be no such provision.[81] The answer to this is the same as in the case where the Commonwealth purported to erect a new State without referring to parliamentary representation at all. As such representation is necessary, a failure to provide adequately for it would be a failure to exercise the s 121 power. The entity purported to be created would simply not be a State. Other provisions relating to representation, however, confer power only upon State institutions. Who is to set the times and places of elections of senators if there is no Parliament of a State,[82] or cause writs to be issued for Senate elections if there is no State Governor?[83] How are Senate vacancies to be filled without the panoply of State institutions referred to by s 15?[84]

While it might be tempting to conclude that the Constitution compels the possession by new States of these various, familiar organs of government, if such an implication were made it would equally have to be applied to restrict the power possessed by the existing States to amend their constitutions. This has never been proposed. Indeed, State constitutions are viewed as substantially uncontrolled.[85] Only one State institution, the Crown, has been said to be beyond the legislative reach of its parliament, and the status of the assertion is quite

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[78] Quick and Garran *supra* n 72, 927–929. This is not to deny that, on a formal level, the Constitution can be said to have created the Original States as such. It was by its force alone that the colonies were changed into States. See Barwick CJ *ibid.*

[79] Section 112 can be similarly construed but is coupled with an express grant of power to the Commonwealth to annul any law passed by States by virtue of the facility granted to them. All discussion of the scope of the legislative power of new States that follows assumes the effect of s 9.

[80] For example ss 9, 25, 41, 51 (xxxvii).

[81] Sections 29, 30, 31.

[82] Section 9.

[83] Section 12. Or equivalent — see s 110.

[84] Outside the area of parliamentary representation, problems are also raised by those sections that provide for the alteration of State territory and boundaries. Sections 111, 123 and 124 could all be said to be inapplicable to a State without a Parliament as its consent is necessary to their operation. Indeed s 124 provides that a new State may be formed by separation of territory from a State "*only* with the consent of the Parliament thereof" (emphasis added), suggesting that such a State would be incapable of this type of subdivision.

[85] *McCawley* v *R* [1920] AC 691.

unclear.[86] If a State were radically to amend its constitution it would be competent for it to specify which new entitities were to succeed to those previously in existence. Despite the suggestion, cited above,[87] that the power s 121 gives over representation only goes to its extent, there seems no reason why it should not allow for provisions stating which bodies or individuals were to exercise functions for the purpose of the application of certain sections of the Constitution. The limit to such legislation would be found in the inability of either the States or the Commonwealth to effect an amendment of the Federal Constitution thereby. It might thus ultimately fall to the High Court to determine if the entity nominated was that referred to in the relevant section of the Constitution. It is suggested that the Court would be very reluctant to adopt a construction that would render a section inapplicable so as, for example, to deprive a State of the capacity to fill a casual Senate vacancy.[88]

The difficult question of whether State legislative power is sufficient to abolish the Crown in right of that State is beyond the scope of this discussion.[89] Some assertions can be made about the position of new States, however, with a measure of certainty. As the first words of the Commonwealth of Australia Constitution Act recite, Australia is "one indissoluble Federal Commonwealth under the Crown". Section 121 could not be used to constitute a new State a republic, free from allegiance to the Queen of Australia. However, while it seems clear that power exists so to do,[90] there is, equally, no necessity to constitute a Crown in right of the new State.[91] The words of s 7 of the Australia Act 1986 (Cth) which, via the definition of "State" are expressly applied to new States, might be thought to be relevant here. They provide, in part, that "Her Majesty's representative in each State shall be the Governor",[92] and that "all powers and functions of Her Majesty in respect of a State are exercisable only by

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[86] *Taylor* v *Attorney-General of Queensland* (1917) 23 CLR 457, 473–474 *per* Isaacs J. It might also be that reform of a State legislature is limited by its incapacity to abdicate its own powers: *In re The Initiative and Referendum Act* [1919] AC 935, 945 and *Commonwealth Aluminium Corporation* v *Attorney-General for Queensland* [1976] Qd R 231, 236–237. The scope of this proposition is also unclear.

[87] *Supra* text at n 54.

[88] One of the assumptions of those drafting the Constitution was that State Parliaments would consist of an upper and a lower house. Before the 1977 constitutional amendments, s 15 required that casual senate vacancies be filled by the "Houses of Parliament of the State . . . sitting and voting together". Since 1922 the Queensland Parliament has been unicameral and yet on a number of occasions, prior to 1977, it filled casual Senate vacancies. Odgers, in his *Senate Practice*, suggested that the absence of any challenge on these occasions was a good indication of a general view that a unicameral legislature was capable of complying with s 15 in its unamended form. See J R Odgers *Australian Senate Practice* (5th ed 1976) 105.

[89] The Australia Act could have considerable bearing on this matter. It has already been suggested that s 7 entrenches the position of the existing State Governors. (*Senate: Weekly Hansard* No 19 1985, 2 December, 2688.) Removal of the application of the Colonial Laws Validity Act 1865 (UK) by s 3(1) — combined with recent statements that the Crown is divisible (*R* v *Secretary of State for Foreign Affairs, Ex parte Indian Association of Alberta* [1982] QB 892) — may tend to the opposite conclusion.

[90] If s 122 is sufficient for this purpose then so also is s 121. See G R Nicholson "The Constitutional Status of the Self-Governing Northern Territory" (1985) 59 ALJ 698, 701–704.

[91] C Howard "Statehood on Conditions: Federal Representation and Residual Links" an unpublished paper delivered at the Law Society of the Northern Territory Conference *The Northern Territory of Australia and Statehood* Darwin 2 October 1986, 15–17.

[92] Sub-section (1).

the Governor of the State."[93] There is, however, no requirement that Her Majesty have any functions in a new State or that She be represented there.

References to the word "State" in the Constitution serve to specify the relationship between its provisions and new States. With few exceptions it is the same as the relationship with the Original States.[94] They do not, however, define a comprehensive notion of statehood. The various provisions do not require a new State to have any particular internal structure. Neither can they be construed as requiring it to be endowed with any particular legislative capacity. Section 106[95] will do no more than preserve whatever capacity is placed in the new State constitution by the Parliament. If limitations on Commonwealth power in relation to these matters are to be found, they must be in implications that can be said to arise from the Constitution as a whole.

4 STATEHOOD PART 2: FEDERAL IMPLICATIONS

In the context of discussing federal implications it is useful to mention the Canadian and United States decisions with regard to their "new State" provisions. Neither are directly applicable, but they serve to position the Australian approach to constitutional implications. The United States provision was undoubtedly influential in the drafting of Chapter VI of the Australian document and its legacy is clearest in s 124. Article IV Section 3, of the Constitution of the United States of America, as far as it is relevant, reads:

> New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

Its history evidences an interesting parallel with the evolution of s 121. Wording that would have ensured that "new States shall be admitted on the same terms with the original States" was struck from the draft clause at the Constitutional Convention.[96] This proceeding has not determined the attitude of the Supreme

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[93] Sub-section (2).

[94] This may have some consequences for the imposition of particular transitional provisions. Section 90 would, for instance, prevent a period during which a new State might continue to impose and collect its own duties of customs and excise. Compare the situation of Western Australia during the first years of Federation as provided for in s 95. If certain transitional provisions were imposed as part of the Act admitting or establishing the new State, then sections such as 84 and 85 might be applicable. This could generally be avoided by the expedient of providing for a period, however brief, during which the potential new State became a Commonwealth territory with the necessary transitions taking place at that time, prior to its becoming a State. On the specific question of the transfer of departments of the public service, those provided for in s 69 would probably have to be effected although the section itself does not apply with any elegance to new States. With reference to transitional provisions note the effect of s 105A outlined in Toohey, *supra* n 61, 15–16.

[95] And s 107 if it can be construed so as to apply.

[96] The vote against the guarantee of equality was a convincing nine States to two despite the urgings of delegate Mason that "the best policy is to treat them with that equality which will make them friends not enemies". E Dumbauld *The Constitution of the United States* (1964) 422–426; United States Senate *The Constitution of the United States of America: Analysis and Interpretation* L S Jayson *et al* (eds) (1973) 842–845. Compare cl 113 as presented to the Adelaide session of the Australasian Convention and ensuing debate. Also the attempted amendment by Western Australia at Melbourne. *Official Report of the National Australasian Convention Debates* Adelaide, (1897) 1007ff *Official Record of the Debates of the Australasian Federal Convention* Melbourne, (1898) 694.

Court, however, which has uniformly applied the proposition that "Equality of constitutional right and power is the condition of all the States of the Union, old and new."[97]

The thrust of the decisions has been to nullify any conditions purported to be imposed upon new States on their admission to the Union that would diminish their power *vis-a-vis* the original States. The reasoning is revealed in the leading authority *Coyle* v *Oklahoma*.[98] It is, in essence, that to hold otherwise would be to define the powers of the Congress and the States by reference to other than the Constitution.[99] But this in turn depends upon the finding that "The definition of 'a State' is found in the powers possessed by the original States which adopted the Constitution".[100] The United States constitution contains no explicit definition to this effect but the willingness to draw the implication has a ready explanation. It is usefully given, for present purposes, in Professor Sawer's discussion of why the High Court is unlikely to follow American reasoning on this question.[101] He points to the fundamentally different constitutional assumptions that underlie the two systems and particularly to the fact that, while the Australian system is based upon parliamentary sovereignty, that of the United States is founded on the sovereignty of the people. The consequence is that each new American State is in substance an autochthony[102] and, although congressional approval and legislation is required for it to join the Union, both theory and past practice confirm that the role of the Congress is limited to its admission as an entity into the existing constitutional framework.[103] As a legislature of enumerated powers it simply has no capacity to "establish".[104]

In contrasting the Australian provision, Professor Sawer points to the different wording and to the fact that, where the power to impose terms and conditions in the Australian case is explicit, to the extent an equivalent exists in the United States it is implied and thus more susceptible to judicial control. It is also to be noted that the countervailing Australian assumptions find expression in its

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[97] *Escanaba Co* v *Chicago* 107 US 678, 689 (1882).

[98] Also cited as *Coyle* v *Smith* 221 US 559 (1911).

[99] "The power is to admit 'new States into *this* Union.' 'This Union' was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of the Congress to admit new States, might come to be a union of States unequal in power, as including States whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result . . . that the powers of Congress would not be defined by the Constitution alone, but in respect to new States, enlarged or restricted by the conditions imposed upon new States by its own legislation admitting them into the Union". *Ibid* 567 *per* Lurton J.

[100] *Ibid* 566.

[101] "The Northern Territory: Constitutional Status Present and Future" in R Herr and P Loveday (eds) *Small is Beautiful: Parliament in the Northern Territory* Canberra, Australasian Study of Parliament Group and the North Australia Research Unit of the Australian National University (1981), 95–98.

[102] Although in practice the process of constitution making has often been facilitated by Congressional legislation. See L N Park "Admission of States and the Declaration of Independence" (1960) 33 Temple LQ 403, 404–407.

[103] The various Enabling Acts have regularly employed phraseology importing the equality of the new State. See *Coyle* v *Oklahoma*, *supra* n 98, 566–567.

[104] For an ebullient exposition of popular sovereignty, its embodiment in the United States Constitution and the consequences for the formation of new States, see: "The Formation and Admission of New States into the Union" (1857) 40 Democratic Review 413.

Constitution, for, as pointed out previously, the constitution of a new State will achieve its existence for the purposes of the Federal Constitution by virtue only of the operation of s 106, and that through the vehicle of Commonwealth legislation that either admits or establishes the new entity.

The decisions on the Canadian provisions, one of the Canadian Supreme Court and the other of the Privy Council,[105] explicitly reject any implication equating new and original Provinces and do so principally by reference to the words employed in relevant sections. In the later of the two cases the Board did refer to a number of reasons. It was pointed out that there was "no complete equality of powers between the four original Provinces" to start with.[106] The absence of any relevant definition of the expression "Province" was referred to and their Lordships would give it no greater content than to say, "Every Province created or to be created must, of course, be a Province in the Dominion of Canada".[107] Of overriding significance, however, were the terms of the British North America Act 1871 (UK), which clarified the Dominion's capacity to create new Provinces. Section 2 not only gave a capacity to make provision for "the constitution and administration of any such Province" but also "for the passing of laws for the peace, order, and good government of such Province, and for its representation in the said Parliament". The addition of these particular "words of general import" was seen as determinative.[108]

With regard to the drawing of implications, as Professor Sawer points out,[109] the Australian High Court pays more attention to the language in which the Australian union is expressed than does the American Supreme Court to the wording of its basic instrument. By the same token, while Australian judges might feel more comfortable with the Privy Council's form of legal reasoning, s 121 does not contain the express language of the Canadian provisions which puts the equality issue beyond doubt. Australian constitutional theory now clearly allows some limited resort to implication and so it is necessary to consider whether the Constitution, as a whole, reveals any general and controlling notion of statehood.[110]

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[105] *In the Matter of a Reference as to the Constitutional Validity of Section 17 of the Alberta Act* [1927] SCR 364; *Attorney-General for Saskatchewan* v *Canadian Pacific Railway Co* [1953] AC 594.

[106] *Canadian Pacific, ibid* 614.

[107] *Id.*

[108] *Ibid* 613–614.

[109] *Supra* n 101, 96.

[110] It has been suggested that, particularly following the passage of the Australia Act, the fundamental authority that supports the Australian Constitution is to be found other than in its characterisation as an enactment of the Parliament of the United Kingdom, and perhaps in the "consent and authority of the Australian people". J A Thomson "The Australian Constitution: Statute, Fundamental Document or Compact?" (1985) 59 L Inst J 1199. Does this open the way for a greater willingness to resort to implications in general, and to the possible application to the new States provision of the type of reasoning evident in the United States cases in particular? It has certainly been suggested that a new *grundnorm* may have important implications for constitutional interpretation. (*Ibid* 1199–1201) A cogent case has been made that this consequence is neither necessary nor likely. G J Lindell "Why is Australia's Constitution Binding? — the Reason in 1900 and Now, and the Effect of Independence" (1986) 16 FL Rev 29. The changes that have seen the achievement by Australia of its independence have been both slow and evolutionary in nature. There is no reason to think that any consequent changes in the High Court's approach to constitutional construction will be otherwise.

Those who drafted the Australian Constitution had before them a number of models and much learned writing.[111] As Quick and Garran say of the final result, "its language and ideas are drawn, partly from the model of all modern governments, the British Constitution itself; partly from the colonial Constitutions based on the British model; partly from the Federal Constitution of the United States of America; and partly from the semi-federal Constitution of the Dominion of Canada".[112] Those paradigms of federalism and statehood that were available were undoubtedly both useful and inspiring.[113] However, the Australian form and idea of statehood sprang, not so much from abstract contemplation, as from the, "exhaustive debates, heated controversies, and careful compromises" that "occupied the best energies of the statesmen and the people of Australia for many years".[114] The shape of Australian Federation was the result of the opposition between, and the bringing into equilibrium of, two contradictory forces. The first can be characterised as "parochialism" although, to be appropriately applied, the term must shed some of its usual pejorative connotations. The various Australian settlements grew up in substantial isolation with the inevitable maturing of established local interests and of strong and distinct colonial identities. The second force was a fusion of all those factors that favoured unity: common cultural and political origins; common defence needs; and the advantages of economic co-operation.[115] The situation was stated with great clarity by Richard Chaffey Baker in 1891:

> We wish for many purposes to form an Australian Nation, but we wish for other purposes to remain independent colonies, and we desire to form a Government which will reconcile these two wishes. To do this our delegates are asked to frame a Constitution welding Australia into one nation so far as our common interests are concerned, and leaving us all our present powers of Home Rule so far as regards all matters which cannot be better dealt with by the Union or Federal Government.[116]

The abiding theme was that federation was to involve the minimum disturbance of the existing colonies necessary to achieve the advantages of unity. Even the "bellicose" J D Lang, who as early as 1850 was calling, not only for union, but

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[111] One of the more remarkable contributions was that of The Honourable Richard Chaffey Baker. His three-hundred-page work, *A Manual of Reference to Authorities for the use of the Members of the National Australasian Convention which will Assemble at Sydney on March 2, 1891, for the Purpose of Drafting a Constitution for the Dominion of Australia*, as its title suggests, was produced specifically and solely for convention delegates. It was only subsequently reprinted, for a more widespread distribution, in Adelaide by W K Thomas & Co in 1891. His "Schedule of Books Cited" appears at pp 7–8. The main text is a detailed consideration of the issues facing the Convention in light of overseas experience; that of the United States and Canada in particular. The volume's *Schedules* reproduce the Constitutions of those countries, the resolutions of the Quebec Convention and the South Africa Union Act, 1877. Other contemporary references are listed in J A La Nauze *The Making of the Australian Constitution* (1972) 358–359; and J Quick and R R Garran *The Annotated Constitution of the Australian Commonwealth* (1901) ix.

[112] *Ibid*, vii.

[113] E M Hunt *American Precedents in Australian Federation* (1930). R D Lumb *Australasian Constitutionalism* (1983) ch 5. J Reynolds "A I Clark's American Sympathies and His Influence on Australian Federation" (1958) 32 ALJ 62.

[114] Quick and Garran *supra* n 111, vii.

[115] In chronicling the interaction of these "centripetal" and "centrifugal" forces, Ronald Norris concludes that "To the extent that fear wrought federation, the fear was less of yellow hordes — warlike or peaceful — and more of the economic consequences of separation or isolation." "Towards a Federal Union" in B W Hodgins *et al* (eds) *Federalism in Canada and Australia: The Early Years* Canberra, (1978) 173–193. Quotation at 192–193.

[116] *Supra* n 111, 30.

also for separation from the mother-country, was at pains to emphasise that this would involve the colonies in no more than, "delegating to a central and federal authority certain well-defined powers, the exercise of which would in no way affect the internal government of each province or in any way compromise their individual sovereignty and independence."[117]

The concept of statehood that evolved in the ten years leading to Federation[118] was thus overwhelmingly conditioned by Australia's colonial history. When the word "State" was used it connoted one of the Australasian colonies as it would continue to exist under the federal compact. The position that actually pertained at federation is described by Quick and Garran thus:

> The States do not derive their governing powers and institutions from the Federal Government, in the way that municipalities derive their powers from the Parliament of their country. The State Governments were not established by the Federal Government, nor are they in any way dependent upon the Federal Government, except by the special provisions of sec. 119. The States existed as colonies prior to the passing of the Federal Constitution, and possessed their own charters of government, in the shape of the Constitutions granted to them by the Imperial Parliament. Those charters have been confirmed and continued by the Federal Constitution, not created thereby. Hence, though the powers reserved to the States are not wide, general, and national, no badge of inferiority or subordination can be associated with those powers, or with the State institutions through which they are exercised.[119]

Professor Sawer recounts that "At least since the time of Bryce,[120] it has commonly been asserted that federalism is a particularly unstable political form".[121] While Australia has, since Federation, shown few signs of political instability, the nature of its federation has undoubtedly changed.[122] There have been corresponding shifts in public and judicial views of both nationalism and statehood. These are conveniently reflected, for present purposes, in the changing approaches to, and results of, constitutional interpretation in the High Court.

Interpretation of the Australian Constitution has, since the first major constitutional case,[123] been concerned — one might even say obsessed — with what implications, if any, are properly to be drawn from its federal nature.[124] There are two distinct uses to which federal implications have been put. The first is in the definition of federal power. Its initial historic form attracted the description, "the doctrine of reserved powers". It operated upon the premiss that in defining the powers of the Commonwealth in each enumerated subject area,

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[117] *The Coming Event; or, The United Provinces of Australia. Two lectures Delivered in the City Theatre and School of Arts, Sydney* (1850), 14. The adjective is Quick and Garran's, *supra* n 111, 92.

[118] The term "States" was adopted in 1891. La Nauze *supra* n 111, vii, 57.

[119] *Supra* n 111, 928.

[120] James Bryce, author of *The American Commonwealth* (1888), an authority of considerable influence with those who drafted the Constitution.

[121] *Modern Federalism* (1976) 51.

[122] *Ibid* ch 5.

[123] *D'Emden* v *Pedder* (1904) 1 CLR 91.

[124] They have been recently discussed in the following: N Douglas " 'Federal' Implications in the Construction of Commonwealth Legislative Power: A Legal Analysis of their Use" (1985) 16 UWALR 105, R D Lumb "Problems of Characterization of Federal Powers in the High Court" (1982) 45; L Zines *The High Court and the Constitution* (2nd ed 1987) particularly chs 1 and 14; L Zines "The State of Constitutional Interpretation" (1984) 14 FL Rev 277.

the Constitution reserved to the States any residue of power over that subject not thereby granted to the Commonwealth. In consequence other Commonwealth powers were to be construed as not extending into those reserved areas unless the contrary were expressed in "clear and unequivocal words".[125] Formally this position rested upon an application of the rule *expressio unius exclusio alterius* to the relevant grant of power[126] combined with the effect of s 107 which specifically preserved pre-Federation powers not removed by the Constitution.[127]

The other use of federal implication was to erect the "immunity of instrumentalities" or "inter-governmental immunities" doctrine. As applied to Commonwealth capacity,[128] it did not go to the general extent of its power but, rather, operated to exempt from the application of admitted powers, States and State instrumentalities.[129]

Both doctrines rested upon a particular view of the Federation prevalent at Australia's inception. As propounded by Sir Samuel Griffith, a principal constitutional draftsman and foundation Chief Justice, it stressed that each of the Commonwealth and the several States was "within the ambit of its authority, a sovereign State"[130] and thus, in its proper sphere, independent and not susceptible to interference or hindrance. The view that emphasised State sovereignty under the Constitution was also liable to favour constructions of it that maximised State power for, as has been indicated, Federation was much promoted as involving the minimum necessary disturbance to both the sovereignty and powers of the pre-existing colonies.[131]

Had s 121 been exercised before 1920 there are powerful reasons to believe that a new State would have been admitted on the basis of equality on the assumption this was required or, had the question come before the Court, that an implication of equality would have been made. The only realistic candidate would have been New Zealand and it not only possessed an existing colonial sovereignty to be preserved by s 106, but already was mentioned in the cl 6 definition of "The States". Further, the high regard paid during the period to United States' decisions would have rendered the doctrine so authoritatively reaffirmed in *Coyle* v *Oklahoma* in 1911[132] greatly influential. These reasons

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[125] *Attorney-General for New South Wales* v *Brewery Employers Union* (the *Union Label* case) (1908) 6 CLR 469, 503 *per* Griffith CJ.

[126] Thus, in the case of s 51(i), power over intra-State trade and commerce not being explicitly granted to the Commonwealth was reserved to the States.

[127] The *Union Label* case, *supra* n 125, 503 *per* Griffith CJ. For a list of cases applying this rule and their effect see L Zines *The High Court and the Constitution, supra* n 124, 5.

[128] The doctrine was held to be of reciprocal effect and was first applied in protection of the Commonwealth. *D'Emden* v *Pedder, supra* n 123.

[129] To take an example from the case that established the reciprocal nature of the principle, (*Federated Amalgamated Government Railway and Tramway Service Association* v *NSW Railway Traffic Employees Association* (the *Railway Servants'* case) (1906) 4 CLR 488.) Commonwealth legislation under the conciliation and arbitration power (s 51 (xxxv)) could not apply to disputes between State railways and their employees and so an organisation of such employees could not be registered under the Commonwealth Conciliation and Arbitration Act.

[130] *D'Emden* v *Pedder, supra* n 123, 109.

[131] This was certainly Griffith CJ's view of "his" 1891 draft. See *Official Report of the National Australasian Convention Debates* Sydney, (1891) 523. The implied immunities doctrine, it has been pointed out, was based on a general concept of the nature of federalism while it was the particular manifestation of federalism in the Australian Constitution that was seen as requiring the doctrine of reserved powers. L Zines *The High Court and the Constitution, supra* n 124, 5.

[132] *Supra* n 98.

would, however, have been ancillary. The prevailing view of Australia as a "co-ordinate" federation[133] would have compelled the conclusion.

In 1920, with Griffith CJ no longer on the bench, the High Court decided "probably the most important case in Australian constitutional law",[134] *Amalgamated Society of Engineers* v *Adelaide Steamship Co.*[135] It overthrew the doctrines of inter-governmental immunity and reserved powers and contained a vigorous attack on the reasoning that had supported them. In emphasising the need for a legalistic approach to constitutional interpretation that gave primacy to the express terms employed, (the "golden" or "universal" rule[136]), the "necessity" that had been said to require the implied doctrines was characterised, not as legal, but political in nature[137] and founded on "a vague, individual conception of the spirit of the (federal) compact".[138] However justified, the *Engineers'* decision gave effect to a very different view of that compact. It was no mere chance that it coincided with one long advanced by the author of the joint judgment, Isaacs J.[139] To do the reasoning justice, however, it may be said that a literalistic interpretation of a federal constitution that allocates power by the expedient of express grants to the central power is liable to favour a nationalist and centralist view of that federation.

If Australia's sense of nationhood was born in the First World War then the *Engineers'* decision was in step with, and appropriate to, its time.[140] It established, in the judicial sphere, the basis, not only for a strengthening of national power, but also for the progressive, vertical integration of central and regional government.[141] While many decisions have confirmed this continuing trend, none have been more dramatic in their effect than the *Uniform Tax* cases.[142] The Commonwealth not only controls, in gross, most of the finances of the States but is popularly believed to be the captain of the economic Ship of State. This is an outcome that would have greatly surprised the Founding Fathers

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[133] Sawer *supra* n 121, ch 5 and *passim*.

[134] Douglas *supra* n 124, 106. Zines *The High Court and the Constitution, supra* n 124, 7.

[135] *Amalgamated Society of Engineers* v *Adelaide Steamship* (the *Engineers* case) (1920) 28 CLR 129.

[136] *Ibid* 148.

[137] *Ibid* 151.

[138] *Ibid* 145.

[139] Isaacs J's conception of federation as expressed during the Convention debates of 1897–1898 might well have been characterised by the majority of delegates as "individual". It, along with his manner, forced on him the role of vigorous dissenter, a role that equally had to content him, on major constitutional issues, for his first fourteen years as a Justice of the High Court. (La Nauze *supra* n 111, 123, 129; Z Cowen *Isaac Isaacs* (1967) chs 4, 7.) In characterising Isaacs J as an interpreter of the Constitution, Cowen chooses the words "the flame of an aggressive nationalism" and "the theme of an expanding national power". *Ibid* 149. See also L F Crisp *The Unrelenting Penance of Federalist Isaac Isaacs* (1981).

[140] See Windeyer J in *Victoria* v *Commonwealth* (the *Payroll Tax* case) (1971) 122 CLR 353, 396. The relevant passage is quoted at length in Zines *The High Court and the Constitution, supra* n 124, 15.

[141] Sawer *supra* n 121, ch 5.

[142] *South Australia* v *Commonwealth* (1942) 65 CLR 373. *Victoria* v *Commonwealth* (1957) 99 CLR 575.

in their struggles to fine-tune the formula by which *surplus* Commonwealth revenues would be returned to the States.[143]

The States are, of course, not eclipsed and if they continue with what, in an oxymoronic phrase, is an imperfect sovereignty, it is a type of sovereignty nevertheless. This is nowhere clearer than in the post 1920 history of federal implications. If the *Engineers'* case ever intended to exclude implication from constitutional interpretation,[144] this doubtful proposition received contradiction, firstly in *obiter*[145] and subsequently in decisions that resurrected inter-governmental immunities,[146] albeit in a form more suited to modern views of the Australian Federation.

No judge has attempted an explicit revival of the doctrine of reserved powers but its logic has eked out a shadowy existence. It has appeared in recent years in the not infrequently asserted imperative of preserving the "federal balance". It has shown itself mostly in minority and dissenting positions but has evidenced some real vigour in ascertaining the incidental area of Commonwealth power.[147] The scope of the new doctrine, if it can be so dignified, is quite without definition because of the failure of its proponents to rationalise it with, or differentiate it from, discredited, pre-*Engineers'* positions or answer criticisms of it.[148] All that can be said is that some judges see as a concomitant of statehood some irreducible core of legislative power.

The new immunities doctrine, on the other hand, is generally accepted and has recently been unanimously applied.[149] It is now recongised as comprising a pair of distinct rules based on the same fundamental proposition. Implicit in the Constitution as a whole, and s 106 in particular, is the essential indestructibility of the States. Two prohibitions are thus placed on the exercise by the Commonwealth of its power, however ample it might otherwise be. They can be stated with epigrammatic simplicity as: "(1) the prohibition against discrimination which involves the placing on the States of special burdens or disabilities; and (2) the prohibition against laws of general application which operate to destroy or curtail the continued existence of the States or their capacity to function as governments".[150] The second rule is carefully expressed to stress one fundamental aspect. It does not immunise functions undertaken by a State

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[143] Although perhaps it would not have surprised all. One is driven to wonder just how far Alfred Deakin's pre-Federation views had been altered by fifteen months of hindsight when he wrote of the States being "legally free, but financially bound to the chariot wheels of the central Government". *Federated Australia* (1968) 97.

[144] The inconsistency between this and aspects of the decision itself has frequently been pointed out. See Douglas *supra* n 124, 108 and references he cites there in n 16.

[145] Particularly those of Dixon J: *Australian Railways Union* v *Victorian Railways Commissioners* (1930) 44 CLR 319 by implication at 390; *West* v *The Commissioner of Taxation* (1937) 56 CLR 657, 681–683; *Essendon Corporation* v *Criterion Theatres* (1947) 74 CLR 1, 22–23.

[146] *Melbourne Corporation* v *Commonwealth* (the *State Banking* case) (1947) 74 CLR 31; The *Payroll Tax* case *supra* n 140; *Queensland Electricity Commission* v *Commonwealth* (1985) 159 CLR 192.

[147] See Douglas *supra* n 124, 114–134; Zines *The High Court and the Constitution*, *supra* n 124, 39–40, 61, 77–78, 251–252, 304 and his "The State of Constitutional Interpretation" *supra* n 124, 280–282 and passim.

[148] Douglas *supra* n 124 and Zines *supra* n 124 discuss the criticisms that can be, and are, made. See also "The Concept of the 'Federal Balance' " in *Current Notes* (1986) 60 ALJ 653.

[149] The *Electricity Commission* case, supra n 146.

[150] *Ibid* 19 *per* Mason J.

Government but, rather, its capacity to function as a government.[151] It is concerned with institutions not activities. As Stephen J put it in a much quoted passage: it serves to protect "the structural integrity of the State components of the federal framework, State legislatures and State executives".[152] There is no reservation of powers lurking in this doctrine.

To the extent that these implied limitations define the irreducible nub of Australian statehood, and they are the only substantial guidance to be had from the decided cases, they reveal it to be of meagre substance. It consists in the formal existence of a governmental machinery with no particular fixed or inviolable corpus of attendant power.[153] This, in theory at least, leaves open the possibility that, unless some notion of reserved powers is revived, the States could be shorn of all exclusive power — and, indeed, through the operation of s 109, of the totality of their legislative capacity.[154] What then would constitute equality for a new State in Australia? It would have to possess some kind of government capable of an unrestricted exercise of such powers as are, from time to time, not exclusive to the Commonwealth. While the initial structure of that government need have no definite form, it would also have to possess the same, largely unfettered, capacity to effect internal constitutional change enjoyed by the existing States. Is there anything to require that a new State share even these minimal attributes?

It must be concluded that the existing federal implications that limit Commonwealth power have no direct application to s 121. The States, for instance, have no legislative capacity in the area of new States and it is hard to envisage Commonwealth uses of the section that would infringe other "traditional" areas of State power. The fundamental reason they are inapplicable, however, is to be found in the nature of s 121. It clearly empowers the Commonwealth to legislate with respect to the government of a new State in the process of admitting or establishing it as such. If any such legislation could be said to be discrimination aimed at a State then the descrimination is authorised by the section.[155] So is the creation of the new State's structure. Until the power has operated there is no "structural integrity" to protect. The established implied limitations are conservative in nature[156] and apply to existing States. It is only once a new State is constituted that it will fall within their protection.

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[151] *Id.*

[152] *Koowarta* v *Bjelke-Petersen* (1982) 153 CLR 168, 216.

[153] "The foundation of the Constitution is the conception of a central government and a number of State governments separately organised. The Constitution predicates their continued existence as independent entities. Among them it distributes powers of governing the country. The framers of the Constitution do not appear to have considered that power itself forms part of the conception of a government. They appear rather to have conceived the States as bodies politic whose existence and nature are independent of the powers allocated to them." This is Dixon J's concise summation in the *State Banking* case, *supra* n 146, 82.

[154] Whether this is a practical possibility is another question. As has been pointed out, even the most expansive of Commonwealth powers, the external affairs power (s 51 (xxix)), is not without its limits. Zines "The State of Constitutional Interpretation" *supra* n 124, 286.

[155] That certain Commonwealth powers of their nature include a capacity to discriminate against States was widely recognised in the *Electricity Commission* case, *supra* n 146. See particularly Deane J, 44–45.

[156] The implication that prevents the placing on the States of special burdens is aimed, not at preventing differential treatment as such, but, at such burdens being applied to strike *de facto* at the existence or functional integrity of the State components of the Federation. The *State Banking* case, *supra* n 146, 81–82 *per* Dixon J.

This being so, are there any necessities related to new States that might be seen to compel other implications restrictive of the scope of s 121? The foregoing discussion reveals many indications, aside from the inapplicability of United States' precedent, contrary to an implication of equality. There cannot, today, be any presumption of a pre-existing equality. The historical situation is irrevocably changed and no entity can now occupy the position of one of the Australasian colonies immediately prior to 1901.[157] Further, any candidate for statehood has to make its compact, not with the several colonies-cum-States, but with the Commonwealth. This would always have been the case but the consequences have changed with the nature of the Federation. The Commonwealth will not in any sense be "representing the States" for this purpose,[158] rather it will be the central authority of the Australian nation, exercising its full power in the matter. It is with the requirements of that nation that the applicant will have to come to terms.

There are some inescapable fundamentals. However else it may be denuded of meaning, the term "State" in the context of a constitution refers to a unit of government. Further, Australia is a federal nation, or commonwealth,[159] and it is of the essence of a federation that the regional components are independent and autonomous to the extent of their powers. A State must therefore have its own government and the Commonwealth could not retain to itself the actual or potential capacity to exercise that government. This implication is distinct from, but rests on the same basis as, that which protects the structural integrity of existing States and is reinforced by the conclusion that s 121 cannot be used to rewrite the distribution of powers effected by the Constitution in the case of a new State.

On the borderline of this requirement is the question whether the Commonwealth has the capacity to impose on a new State the condition that laws might be subject to disallowance by the Governor-General. Much might depend on the terms of such a condition but it is to be noted that, in the British imperial tradition, such requirements have not been seen as incompatible with self-government and substantial independence.

The one remaining question is as to the scope of a new State's legislative power. The reason there is any question is the absence of an express provision, such as the United States' tenth amendment, allocating to the States the residue of powers not otherwise granted. That was undoubtedly the intended distribution and it was effectively achieved in the case of the Original States by ss 106 and 107. But, as has already been demonstrated, the mere preservation of a new State's constitution and powers brings with it no guarantees as they have no predetermined form.

If the Commonwealth were to seek to deny to a new State legislature capacity over certain topics, condition its exercise, or entrench a government structure, it would need to place such provisions beyond the State's power of constitutional

[157] However analogous the present position of the Northern Territory, there is a crucial distinction. It is not a self-governing colony of the Imperial Crown, it is a territory of the Commonwealth under its unfettered control.

[158] The role envisaged by Sir George Turner, at the Adelaide session of the Convention, in the context of urging that any existing colony that did not immediately join the Federation should equally be subject to terms and conditions. *Debates*, *supra* n 96, 1007.

[159] Depending on whether the recitals in the Constitution or the Australia Act are preferred.

amendment. To be effective, those provisions would require protection beyond that provided by ordinary manner and form requirements which might be expected in such a context. Equality for a new State, in a very real sense, comes down to being endowed with an unfettered power to amend its constitution. If the Commonwealth can determine the content of the new constitution there seems to be no theoretical objections to its creating provisions that are unamendable by the entity being constituted. As Commonwealth legislative power over the constitution ceases once the new State has been admitted or established, there is the prospect of it becoming absolutely immutable.[160] Some degree of flexibility could be retained if it were possible to subject a power of constitutional change, granted to a new State, to the requirement that any bills be reserved for the concurrence of the Governor-General.

The federal nature of Australia, of itself, seems insufficient to raise an implication limiting the Commonwealth's ability to restrict the legislative power of new States. As has been demonstrated, it appears not even to guarantee Original States any particular residuum of power. This certainly has some surprising results. It leaves open the possibility that a new State might be created without any power to make laws at all. Further, there exists the potential for legislative vacuums. If a new State's competency were restricted to a set of enumerated powers and if these did not include power, say, over intra-State trade and commerce, then no legislature could make laws with respect to that subject matter.

There are, however, strong policy arguments favouring an unfettered Commonwealth discretion in this matter. If a potential new State were to comprise or contain people with political and social traditions substantially divergent from those prevalent in Australia, it might be necessary, both for the maintenance of their integrity and for the protection of the interests of the wider national community, to enact a rigid constitution. There is no reason why a State itself might not be a mini-federation. Conditioning the exercise of legislative power with, for instance, bill of rights style provisions could be desirable, on the one hand, to produce a degree of harmony with the expectations of Australians generally or, on the other, to protect a minority within the new entity.[161] This can well be said to be another area in which the prevalent political realities and the good sense of the Parliament should be relied on to define the boundaries of Commonwealth power.

5 CONCLUSION

When examined in the context of the Constitution, s 121 proves far from sphinx-like. It reveals the Parliament to be in possession of a wide-ranging power over the subject matter of the section. The Commonwealth has an optional and exclusive power to create new States and from any territory, subject only to s 124. It is unrestricted in the mode of constitution-making it chooses to recognise or adopt and in its control of the structure of government thereby created. It may, in general, specify such transitional provisions as are required.

[160] The possibility would always remain of amendment via the ponderous machinery of s 128. That depends on the new State constitution being viewed as a part of the Federal Constitution. See Quick and Garran *supra* n 111, 930.

[161] For a discussion of these types of procedure and their problems see: C Palley "Constitutional Devices in Multi-Racial and Multi-Religious Societies" (1968) 19 NILQ 377.

Further, if it so chooses, it can entrench aspects of the new State constitution and withdraw from its legislature areas of legislative power. Those restrictions that emerge reflect the federal nature of the Nation. The new entity must be a State. As such it is required to have an autonomous government and some representation in both the Federal Houses. It is also a "State" for most purposes where that term is used in the Constitution and is therefore subject to the distribution of powers and responsibilities therein, much as are the Original States.

If the proffered analysis is accepted, it will be of concern to some that the Constitution provides no guarantee of "equality" to the citizens of new States. One's attitude to this will depend to a great degree on whether one looks primarily to the Constitution or Parliament as the appropriate guardian of rights. The present discussion is not intended to suggest, however, that, because it is constitutionally possible to provide otherwise, the people of a potential new State should not have a major role in determining its structure in conformity with Australia's democratic traditions or that the Commonwealth should set about sanguinely establishing a "second class" State. Section 121 is not an appropriate or adequate vehicle for revolutionary change in the pattern of Australian Government. The extreme possibilities canvassed here should remain merely theoretical. That they exist is a concomitant of the appropriate power in the Commonwealth to fine-tune the relationship between the Nation and a new State as the particular circumstances require.

In the present constitutional context major amendment of s 121 is not called for. Some infelicities in its wording could, however, profitably be remedied. The false dichotomy between "admit" and "establish" should be eliminated. The Adelaide Convention version, "may . . . establish and admit" would state the true position with clarity. The misleading impression of an additional "terms and conditions" power should also be removed. Unadorned words to the effect that the Parliament may set the level of representation in either House of the Parliament, as it thinks fit, should not be capable of being read as other than enhancing the power the section grants.

Given the very real rigidity of Australia's rigid, federal Constitution, the approach to any opportunity of clarifying s 121 either by amendment or interpretation should, as far as possible, be conditioned by the need for flexibility and a preparedness to expect the unexpected.[162]

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[162] In the *First Report of the Constitutional Commission* (1988) the Commission addressess the question of new States (see Vol 2, 559–569). Properly, it desires clarification in the area of Parliamentary representation. It recommends amendments to "establish the entitlement of a new State to membership of the House of Representatives and the Senate" by means of "firm formulas for the extent of representation". On section 121, it recommends amendments to make it clear that the Federal Parliament has power:

(a) to create or establish a constitution for a new State:
  (i) established from a Territory;
  (ii) formed by separation of a territory from a State or by the union of two or more States, or parts of States; or
  (iii) formed by the union of a part or parts of a State and a Territory, and
(b) to make its approval of the Constitution of an independent body politic a condition of the admission of that body politic as a new State.

Significantly, the Commision has not proposed a preferred wording. Great care will be required to ensure that such "clarifications" do not curtail the power granted by the section. On the interpretation proffered here, for example, the Commonwealth already has the power to *rewrite* the constitution of an incoming independent body politic.