Creating new states from Australia's existing states

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OPINION: Anna Rienstra and Professor George Williams AO, Australian Public Law, 19 October 2016.

Should Australia have more states? This question has recently resurfaced in Queensland, where last week Robert Katter of Katter's Australia Party unsuccessfully moved a motion in the Parliament to create a new state in northern Queensland. The issue is not new in Queensland, with a similar push brought by three north Queensland MPs in March. In announcing his support for the proposal back in March, Rockhampton-based Nationals senator and now Minister for Resources and Northern Australia Matthew Canavan argued in an interview with Radio National that northern Queensland's interests are marginalised by the Brisbane-centric state government, particularly in relation to investment and infrastructure spending. According to Canavan, statehood for northern Queensland would enable government closer to the people and promote economic development in the region.

Alluding to the historical and constitutional context for the new states question, Canavan reflected 'I think if the founding fathers were still here, 115 years on from Federation, they'd be a bit surprised that we haven't created new states. There are provisions in the *Constitution* to do that – we haven't used those provisions though we've tried before'. Although the Australian states have taken on a rigid and unchanging character, Canavan is correct that the constitutional process for creating new states out of Australia's existing states provides a framework for an evolving federal system. This is the subject of a recent article in the Sydney Law Review by the authors.

History of the new states constitutional provisions

There was clear support for the creation of new Australian states at Federation. Against the background of separation movements in the colonies from the mid-19th century, the framers of the *Constitution* viewed new states as a natural step in Australia's development. For example, at the Australasian Federal Conference in 1890, Sir Henry Parkes, Premier of New South Wales and unofficial leader of the Conference, stated that a federal legislature would 'possess the power of more promptly calling new states into existence throughout their immense territory, as the spread of population required it'. This sentiment continued throughout the constitutional conventions of the 1890s, with delegates envisaging the division of Queensland into two or three states and Western Australia into two states.

The framers' anticipation that new states would be created translated into ss 121 and 124 of the *Constitution*. Section 121 confers on the Commonwealth Parliament the power to make new states and to impose terms and conditions on their admission or establishment:

121. New States may be admitted or established
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.

Section 124 imposes an additional requirement on certain exercises of power under s 121, namely, the consent of the relevant state Parliament or Parliaments:

124. Formation of new States
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.

Creating new states
Sections 121 and 124 prescribe the mechanics of new state formation and appear to outline a relatively straightforward process for the creation of new states from existing states. However, three key uncertainties remain as to their application.

Formation of new states

Under ss 121 and 124, the formation of a new state requires the consent of both the Commonwealth Parliament and the affected state Parliaments. A question has arisen as to whether this process could be affected by s 123 of the *Constitution*. Section 123 provides that the Commonwealth Parliament, with the consent of the affected state Parliament and the approval of the majority of electors of the state, may increase, diminish or alter the limits of the state.

The formation of a new state from an existing state would necessarily diminish or alter the territory of the existing state. If this attracts the operation of s 123, a successful referendum would be an additional prerequisite to the creation of a new state from an existing state. The matter has not been judicially considered, but the preferable view is that s 123 does not impose a condition on the formation of new states additional to those contained in ss 121 and 124. Textual considerations (in s 123 the word 'may' grants an additional power rather than limiting an existing power, and there is no reference to ss 121 or 124) along with case law on the relationship between s 123 and other sections of the Constitution (such as *Paterson v O'Brien* on s 111 dealing with states' surrender of territory to the Commonwealth) support this conclusion.

Representation of new states

In creating new states, the Commonwealth Parliament may impose such terms and conditions as it thinks fit in respect of the representation of the new state in either house of the Commonwealth Parliament. Although original states have a right to equal representation and a minimum of six representatives in the Senate pursuant to s 7 of the *Constitution*, covering clause 6 distinguishes between 'Original States' and 'States'. As new states are 'States' but not 'Original States', new states are not entitled to equal representation or a minimum of six representatives in the Senate. Their representation in the Senate is subject to the discretion of the Commonwealth Parliament. Theoretically at least, there is no upper limit on how many senators may represent a new state. However, this is not a politically plausible outcome given that it would require the consent of both houses of the existing Parliament.

For the House of Representatives, s 24 of the *Constitution* provides that it must include at least five members chosen in each 'Original State', meaning that there is no guarantee of minimum representation in respect of new states. That section also provides that the 'number of members chosen in the several States shall be in proportion to the respective numbers of their people'. This part of the section, which does not refer specifically to the original states, has not been the subject of interpretation by the High Court, and there is no analogous case law. If proportional representation was not to be the applicable formula for new states in the House of Representatives, then s 24 could have provided for this by stating that '[t]he number of members chosen in the several *Original* States shall be in proportion to the respective numbers of their people'. Expecting such an explicit reference is reasonable given that s 24 elsewhere refers to the Original States in the context of their minimum representation in the House of Representatives. All this suggests that in the House of Representatives new states are entitled to proportional representation.

While the Commonwealth Parliament exercises power over the representation of a new state, especially in the Senate, it could not deny a new state representation. Members of the High Court have emphasised the constitutional requirement that all states have some form of representation in both houses of Parliament in the *First* and *Second Territories Representation Cases*, as the Commonwealth Parliament can determine the extent but not the fact of representation.

Extent of Commonwealth power

The Commonwealth Parliament has a wide power to impose terms and conditions on the formation of new states relating to subjects other than representation. However, this power is not unfettered. It may only be exercised under s 121 'upon such admission or establishment' of the new state, so no further conditions may be imposed once a new state has joined the Federation. Additionally, it is axiomatic that any terms and conditions must not be incompatible with the Constitution itself. Hence, no condition could amount to a breach of the requirement ins 92 of the Constitution that interstate trade and commerce shall be 'absolutely free', or in s 117that people not be subject to a disability or discrimination on the basis of their state residence.

Moreover, s 121 only enables the Commonwealth to admit or establish a 'state', so if the terms and conditions imposed take the entity beyond that definition, the terms and conditions will be ineffective. The idea that the Constitution mandates certain immutable constitutional concepts is evident in recent High Court decisions such as *Kirk v Industrial Relations Commission of New South Wales*. Here, the High Court recognised that each state must possess a body fitting the description of a Supreme Court based in the mention of 'Supreme Court of a State' in s 73of the *Constitution*. By parity of reasoning, since the power conferred on the Commonwealth Parliament by s 121 only relates to 'states', the purported creation of a political entity that departed from the constitutional concept of a 'state' could not be effective under that section.

While the High Court has not considered the meaning of 'state' in this context, it follows from *Kirk v Industrial Relations Commission of New South Wales* that a new state could not be created unless it possessed a judicial system that complied with the *Constitution*. It is also questionable whether a new state could be created without a Parliament, as the capacity of every state to make laws is reflected in a number of sections in the *Constitution*, such as in s 109 in dealing with inconsistency between state and federal laws. Similarly, a condition imposing a federal veto over all laws made by the new state Parliament may not comply with the terms of s 121. The principle enunciated by Dixon J in *Melbourne Corporation v Commonwealth*, that the Constitution predicates the continued

existence of states as independent entities, if extended, could require that states possess a level of autonomy from the Commonwealth.

Attempts to create new states

In the period since Federation there have been attempts to use the constitutional framework to create new states in the New England, Riverina and Monaro regions of New South Wales, and in Queensland. Of these movements, the campaign in New England was the most successful.

Support for a new state in New England emerged in 1915 in response to discontent at the cutting of transport services. Similarly to the current interest in statehood for northern Queensland, support for a new state in New England stemmed from perceptions that the needs of rural communities were not adequately met by the Sydney-based government. New State Leagues and a Central Executive subsequently formed to work towards the creation of an independent state in northern New South Wales. In response to lobbying and delegations from these groups, the New South Wales Parliament created two royal commissions. The 1923 royal commission found that new states in northern New South Wales, the Riverina and the Monaro were neither practicable nor desirable, primarily for economic reasons. The 1935 royal commission concluded that an area in northern New South Wales and another area comprising the central, western and southern regions of New South Wales were suitable for self-government, and recommended that referenda be held in these areas to gauge public opinion. However, there was no immediate move to hold referenda, perhaps due to the Great Depression and the onset of the Second World War.

The new state movement in New England revived in the late 1940s, seeking self-government in the area pronounced suitable by the 1935 royal commission, through persistently lobbying the New South Wales Parliament. The representative character of the movement at this time is reflected in an unofficial poll conducted by local councils in 1953, in which 77 per cent of respondents indicated their support for a new state. In 1955 the movement established a representative assembly with self-conferred powers to conduct a referendum, organise an election and pass its own legislation. The representative assembly referred a bill calling for a new state in New England to the New South Wales Parliament, after which in 1966 the New South Wales Parliament authorised a referendum in the area in northern New South Wales identified by the 1935 royal commission. It was envisaged that a successful referendum would be a first step, and that the creation of the new state would be conditional upon the resolution of constitutional and economic questions. The 1967 referendum was narrowly defeated, with 46 per cent of votes against and 54 per cent of votes in favour of the proposed new state. Subsequently, the new state movement disbanded. Since, there have been occasional echoes of the long-running campaign, most recently in 2014, with federal member for New England and Minister for Agriculture Barnaby Joyce calling for a new state in New England. This history reveals that political factors can be a significant barrier to the attainment of state Parliament consent required by s 124 of the *Constitution*. For example, although a successful referendum is not a constitutional requirement for the formation of a new state, the New South Wales government viewed a clear political mandate in the form of a successful referendum as an essential preliminary to its consent to the creation of a new state. The history also demonstrates that sufficient popular support for this purpose can be difficult to attain.

Constitutional reform proposals

The new states movement in New England did not only seek the consent of the New South Wales Parliament to the creation of a new state in accordance with s 124 of the *Constitution*. It also sought

to amend s 124 to remove the need for state Parliament consent. Such an amendment to s 124 was considered by Commonwealth inquiries in 1929 and 1959, both of which recommended amending s 124 so that a new state could be formed without the consent of the relevant state Parliament where there are high levels of popular support. No such recommendation has yet been put to a referendum under s 128 of the *Constitution*.
Amending s 124 in this way would appropriately widen the circumstances in which a new state could be formed. As the 1929 inquiry highlighted, although legislatures are democratic institutions, 'it is no less consistent with democracy that the people of a State should be able to express themselves directly', through referenda. Arguably, the latter is a better reflection of popular will as it is unimpeded by political contingencies. An important consideration would be the level of popular approval required for the referendum to succeed. The 1929 inquiry suggested a majority of electors in the territory of the new state and the existing state, or alternately, three-fifths of electors in the territory of the new state and two-fifths of electors in the existing state. By contrast, the 1959 inquiry took the view that only a majority of electors in the territory of the new state and a majority of electors in the existing state would constitute sufficient popular support, given that electors outside the boundaries of a new state would be affected by its creation. These divergent recommendations suggest that the interests of electors in a proposed new state would need to be weighed against the legitimate interests of the electors in the state as a whole.

Such a provision would facilitate the creation of new states in situations in which popular support is not matched by political will. As such, it would better realise the framers' anticipation of an evolving Federation. This is not to say that attaining broad popular support would be any easier, only that it could rightly provide an alternative avenue to the same outcome. Given the circumstances in which an amended s 124 would have effect, it does not appear that such a change would to have this point led to the creation of a new state. The 1967 referendum in northern New South Wales, the pinnacle of the new states movement since Federation, was unsuccessful as only 46 per cent of electors supported a new state. Levels of support in the Riverina, the Monaro and Queensland would almost certainly have been even lower.

It is also doubtful that amending s 124 would lead to the creation of a new state in the near future. No effective, organised movement for the creation of a new state has emerged since the defeat of the referendum in northern New South Wales nearly half a century ago. Certainly, Canavan's enthusiasm for a new state in northern Queensland is not yet attracting widespread support, if political opinion is indicative of popular opinion in this case. Queensland Labor Premier Annastacia Palaszczuk countered that 'Queensland would stay stronger as a whole'. Even Liberal MP and Minster for Resources, Energy and Northern Australia Josh Frydenberg rejected the proposal, noting only that Canavan was 'entitled to his view'. There is a further question as to whether a referendum to change the *Constitution* to insert a new provision would succeed, considering the current limited interest in new states and the history of unsuccessful attempts at constitutional reform in Australia.
Nonetheless, the *Constitution* should be amended so that popular support for the creation of an existing state from a new state, manifested in referenda, provides an additional means of forming a new state. Amending the Constitution to provide an additional path to creating new states could also act as a catalyst for new or reinvigorated popular movements, like the budding interest in a new state in northern Queensland.