Redrawing the Federation:
Creating New States from
Australia’s Existing States

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Abstract

The Australian Constitution lays down a process for creating new states out of the existing states that form the Australian Federation. This article explores that process, in historical and political perspective. It examines the drafting of the relevant provisions of the Constitution, and legal uncertainties that arise from them, including as to what terms and conditions might be imposed by the Commonwealth, and whether a referendum is required to create a new state in this way. The article then examines attempts to bring about new states from Australia’s existing states, before considering proposals for constitutional reform. It demonstrates how an apparently dynamic set of constitutional provisions have given rise to a static Federation in which there is no realistic prospect that a new state will be formed out of an existing state in the near future. The article suggests, however, that in the longer term there is a better prospect that new states will be formed from existing states if proposals for constitutional reform are adopted.

I Introduction

The Australian states have taken on a rigid and unchanging character. Although the Australian Capital Territory and the Northern Territory were created, respectively, out of New South Wales in 1910,¹ and South Australia in 1911,² state boundaries have otherwise remained unchanged since Federation in 1901, and no new state has been added to the list.³ Yet, contrary to assumptions of stasis, the constitutional process for creating new states out of existing states is relatively straightforward and, for the most part, conducive to an evolving federal system. This is reflected in the fact that, following Federation, significant progress was made towards the creation of a new state in northern New South Wales, and there were ambitious

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¹ Seat of Government Surrender Act 1909 (NSW); Seat of Government Acceptance Act 1909 (Cth).
² The Northern Territory Surrender Act 1907 (SA); Northern Territory Acceptance Act 1910 (Cth).
new state movements in the Riverina and the Monaro in southern New South Wales, and in Queensland.

Recently, there has been renewed interest in the creation of new states out of the existing Australian states. In part, this has stemmed from preparations for the Reform of the Federation White Paper, set to be released in late 2015. The White Paper will be the culmination of a wide-ranging review directed to clarifying the roles and responsibilities of Commonwealth, state and territory governments. Its objectives include building ‘a more efficient and effective federation’.4

This renewed interest is also reflected in the statements of Australian politicians. In 2014, Barnaby Joyce, the Federal Minister for Agriculture and the Member for New England, sought support for the formation of a new state in northern New South Wales. Recalling the defeat of a referendum on the question of a new state in northern New South Wales in 1967, he highlighted ongoing concern that decisions made in Sydney were often not in the best interests of rural communities. Noting the large geographical area that the Australian states comprise and the arbitrariness of their boundaries, Joyce did not consider ‘in their maddest dreams … the founders of our federation would have believed that our progression to new states had stopped for eternity in 1901’.5 In making such statements, Joyce continues a tradition of Country Party and later National Party support for new states.6 Bob Katter, Federal Member for Kennedy, has also advocated the formation of new states in the north of Australia.7 Similarly, Clive Palmer, Federal Member for Fairfax, has supported the creation of a new state in northern Queensland.8

Support for the creation of new states has also come from other quarters. Historian Geoffrey Blainey suggested that for a country the size of Australia ‘we do not possess enough States’, and that each major region could form the basis of a state government.9 Academic and barrister Bryan Pape also put forward a federalist argument for the creation of new states, contending that this would foster growth outside existing state capitals, rebalance the allocation of power between different levels of government, increase public participation in democratic processes and

operate as a check on abuses of government power. Accordingly, he advocated the division of Australia into 20 states, each with its own government and about 40 Members of Parliament, and with Senate representation. Pape called for a royal commission or other inquiry to consider the potential boundaries of new states, and envisaged the division of New South Wales into five states; the division of Queensland into three states; the division of Victoria, South Australia and Western Australia each into several states; and the creation of a state in the Northern Territory.

The constitutional provisions concerning new states have been considered in connection with the question of Northern Territory statehood. These issues have also been analysed in the context of federal theory, and by way of proposing and assessing new models of federal reform. The focus of this article is different, and more specific. It examines the constitutional requirements for the creation of new states from the existing Australian states, in historical and political perspective. It explores the drafting of the relevant constitutional provisions in the 1890s and the attempts to apply them to create new states since Federation. These are matters that have received little recent attention. The recent rise in interest in the area invites a fresh examination.

Part II of this article surveys the debates from the constitutional conventions of the 1890s, suggesting that the framers of the Constitution contemplated the formation of new states as part of the development of the Australian system of government, particularly in Queensland. Part III outlines the process for creating new states after Federation in 1901 under the Constitution and examines uncertainties surrounding these provisions. Part IV then reviews the history of attempts to create new states out of the existing states since Federation, with a focus on the movement for a new state in New England, which led to three royal commissions and a defeated referendum. Part V analyses the recommendations of the three Commonwealth reviews that examined the new states provisions and suggests a basis for future constitutional reform.

Ultimately, this article contends that the Constitution is permissive of dynamism, insofar as it provides for the creation of new states out of existing

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12 Ibid; Pape, above n 10, 3, 20–1.
13 Gregory, above n 11.
states, if the consent of the Commonwealth Parliament and the relevant state parliament are attained. Political obstacles to the attainment of that consent have, however, proved to be insurmountable. Constitutional amendment could address this problem by enabling popular support for the change, manifested at a referendum, to be an alternative to gaining state parliament consent.

II Drafting of the New States Provisions

At the Australasian Federation Conference of 1890 and the National Australasian Conventions of 1891 and 1897–98, delegates anticipated the formation of new Australian states after Federation and determined a process by which this could occur. Attention was paid particularly to the idea that a new state would emerge from the area constituting the colony of Queensland. The issue also arose in the context of debating other concerns, such as state representation in the Commonwealth Parliament and the imperative of ensuring all of the existing colonies joined the Commonwealth at Federation. Delegates’ concern with a mechanism for the creation of new states was informed by the history of separation movements in the colonies since the mid-19th century.

A Australasian Federation Conference, 1890

The view that new states would be formed from existing states in an Australian Federation was evident at the Australasian Federation Conference held at Melbourne in 1890. This initial meeting, attended by representatives of the colonies, aimed to ‘test … the feeling of the Conference as to the time being ripe for Federation’. Sir Henry Parkes, Premier of New South Wales, prompted the formation of the Conference and served as its unofficial leader. In his first substantive address to the Conference, he quoted the 1857 Select Committee of the Victorian Legislative Assembly, stating 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’.

Parkes’ inclusion of new states in his vision of Federation suggests that, from the early stages of the formal federal movement, the creation of new states was seen by many as a natural step in the development of an Australian Federation.

Delegates also highlighted the desirability of the federal legislature having the power to create new states in the interests of improving governance. John Macrossan, Colonial Secretary and Member of the Queensland Legislative Assembly, argued that power should be given to the Federal Parliament to cut up, if thought necessary, the different existing colonies of Australia, and form them into smaller states … [because] the colonies of Australia are too large for good government. Some of the existing colonies, such as

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16 Official Record of the Proceedings and Debates of the Australasian Federation Conference, Melbourne, 6 February 1890, 15 (Sir Henry Parkes).
18 Official Record of the Proceedings and Debates of the Australasian Federation Conference, Melbourne, 10 February 1890, 36 (Sir Henry Parkes).
Queensland, South Australia, and Western Australia are far too large for good government.19 He argued that the Federal Parliament ought to have such a power just as the ‘Federal Government of America has cut up the larger states into smaller states when it has been deemed expedient and just to do so’.20 Hence, at least some delegates expected that new states would be formed from large Australian states. In Macrossan’s case, his opinions were based upon his strong support for the separatist movement in Queensland.21

B National Australasian Convention, 1891

Following the consensus reached in Melbourne that the colonies should federate,22 discussion of new states continued, although with less prominence, at the National Australasian Convention held at Sydney in 1891. Initially, delegates debated a series of resolutions proposed by Parkes. In response to Parkes’ first resolution ‘[t]hat the powers and privileges and territorial rights of the several existing colonies shall remain intact’,23 delegates highlighted the need for qualification to this principle in order to accommodate new states. They noted not only that the Constitution should allow the entry of colonies after Federation,24 but that it should also provide for the creation of new states out of the existing states.25 For example, in delivering the report of the Convention’s Constitutional Committee, Sir Samuel Griffith contemplated the division of Western Australia into two states and Queensland into three states, in the context of discussing the representation of new states in Commonwealth Parliament.26

Three provisions governing the creation of new states from existing states were included in ch VI of the draft Constitution presented by the Drafting Committee.27 Clause 1 provided that any of the existing colonies could be admitted to the Commonwealth as a state on its adoption of the Constitution. Clause 2 empowered the Commonwealth Parliament to establish and admit new states, subject to conditions as to parliamentary representation or otherwise, that the Commonwealth Parliament may impose. Clause 5 required the consent of the

19 Official Record of the Proceedings and Debates of the Australasian Federation Conference, Melbourne, 12 February 1890, 196 (John Macrossan).
20 Ibid 197 (John Macrossan).
21 Macrossan conceded that ‘[t]his may be an extreme opinion’: ibid. For an overview of Macrossan’s involvement in the separation movement in northern Queensland in the 1880s, see U R Ellis, New Australian States (Endeavour Press, 1933) 97–104.
22 Official Record of the Proceedings and Debates of the Australasian Federation Conference, Melbourne, 14 February 1890, 281.
25 Ibid 313 (Sir Samuel Griffith).
26 Williams, above n 17, 336–7.
affected state parliament to the formation of a new state from an existing state.\textsuperscript{28} While cls 2 and 5 were not debated, delegates suggested in relation to cl 1 that the Commonwealth Parliament should have the power to set the conditions on which any colonies joined the Commonwealth after Federation.\textsuperscript{29} However, this discussion was cursory,\textsuperscript{30} and each provision was accepted without amendment in the draft Constitution that emerged from the Convention.\textsuperscript{31}

As Macrossan advocated during debate,\textsuperscript{32} the new states provisions in the 1891 draft Constitution were modelled on similar provisions from the United States and Canada. In particular, art IV § 3 of the \textit{United States Constitution} 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.\textsuperscript{33}

This provided the core elements of the Australian new states provisions: that new states from outside of the territory of the Federation may be admitted by the federal legislature, and that states may be formed from within the existing territory of the Federation with the consent of the federal and state legislatures. The additional provision for the admission of the existing colonies in cl 1 reflected the influence of s 146 of the \textit{Canadian Constitution}, which provides for the admission of the colonies or provinces of Newfoundland, Prince Edward Island and British Columbia into the Canadian Union.\textsuperscript{34}

\begin{itemize}
\item \textsuperscript{28} Ibid 456–7.
\item \textsuperscript{29} Official Report of the National Australasian Convention Debates, Sydney, 8 April 1891, 883 (William Smith).
\item \textsuperscript{30} Discussion of ch VI cl 5 occupied less than one page of some 960 pages of the \textit{Official Report}.
\item \textsuperscript{31} Williams, above n 17, 456–7.
\item \textsuperscript{32} Official Report of the National Australasian Convention Debates, Sydney, 13 March 1891, 326 (John Macrossan). U R Ellis notes that Macrossan would not have supported the adoption of the American provision had he foreseen its constraining effect on the formation of new states: Ellis, above n 21, 118.
\item \textsuperscript{34} \textit{Constitution Act 1867} (Imp) 30 & 31 Vict, c 3, s 146 (‘Constitution Act 1867’). See also Quick and Garran, above n 33, 967.
\end{itemize}
National Australasian Convention, 1897–98

First Session

The non-attendance of Queensland at the 1897–98 National Australasian Convention provided an important context for consideration of the draft new states provisions. At this time, the regions of southern Queensland, central Queensland and northern Queensland were deeply divided over a range of matters, including the desirability of Queensland separating into a number of smaller colonies before Federation, or forming a number of states after Federation.\(^{35}\) Members from central Queensland and northern Queensland voted against the Federal Enabling Bill, which would have empowered representatives from the colony of Queensland to attend the National Australasian Convention, as they feared that their interests would not be sufficiently advocated by members from southern Queensland.\(^{36}\) It was anticipated that members from southern Queensland would have comprised the majority of delegates to the Convention.\(^{37}\)

Against this background, debate at the first session held at Adelaide in 1897 focused on the question of whether conditions should be imposed on the entry of colonies into the Commonwealth after Federation. To address concerns that allowing colonies to enter the Commonwealth without conditions after Federation would discourage colonies from entering the Commonwealth at the time of Federation,\(^{38}\) the Convention struck out cl 1 of ch VI and amended cl 2 to read:

> The Parliament may from time to time admit to the Commonwealth any of the existing colonies of \[[name the existing colonies which have not adopted the Constitution]\] and may from time to time establish new States, and may upon such admission or establishment make and impose such terms and conditions, including the extent of representation in either House of The Parliament, as it thinks fit.\(^{39}\)

The language of this provision reflected the anticipation of delegates that new states would be created out of the existing states. Hence, the provision provided

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35 Ellis, above n 21, 114.
36 Ibid 119.
37 Ibid.
39 See Williams, above n 17, 608 (emphasis in original).
both that Commonwealth Parliament could ‘admit’ an existing colony to the Federation, as well as ‘establish’ new states. Edmund Barton, subsequently the first Prime Minister of Australia and then a Justice of the High Court, insisted at the Convention that both paths to statehood be retained. This reflected his view that in most cases new states would be ‘carved out of the limits of the Commonwealth’.  

2 Second Session

Delegates did not examine the draft new states provisions at the National Australasian Convention session held at Sydney in 1897. However, discussion of a proposed covering clause drawing a distinction between ‘Original States’ and ‘New States’ prompted consideration of the prospect of new states in Queensland. Throughout this debate, the division of Queensland after Federation was used as an example by many delegates to support arguments in favour of granting equal parliamentary representation only to original states. For example, Henry Higgins, later a Federal Attorney-General and Justice of the High Court, voiced the concern that

the members in the federal parliament for New South Wales, Victoria, and the other colonies will be bound to throw their full weight against the subdivision of Queensland into two or three states if they find it necessarily means six senators to each part of Queensland.  

Higgins further argued that ‘[t]here is no doubt that in the course of time the subdivision of some of these large colonies will be desirable’ and that delegates did not want ‘a subdivision which is a normal and proper one interfered with by any rigid clause in this Constitution’. The covering clause with its distinction between original states and new states was adopted. Like Parkes in 1890, the framers in 1897 viewed the formation of new states as part of the development of Australia, and were reluctant to draft a constitution that would make this difficult to achieve.

3 Third Session

Consideration of the new states provisions at the final National Australasian Convention session held in Melbourne in 1898 was again premised on the assumption that new states might be created from Queensland. This informed proposed amendments to the provision empowering the Commonwealth Parliament to create new states, now numbered as cl 114. In the context of a suggestion that the Commonwealth’s power should be only to ‘admit’ new states, rather than to also ‘establish’ new states, delegates entertained the division of

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42 Ibid 403.
43 Ibid. In addition, delegates were concerned not to ‘prevent the subdivision of … colonies in the near future’ and not to ‘continue the large and unwieldy [sic] character of these colonies’: at 405 (William McMillan).
44 Ibid 415; see Williams, above n 17, 766.
Queensland into three parts prior to Federation, and its entry into the
Commonwealth as three separate states. Higgins supported the amendment in
saying that ‘if Queensland were divided into three colonies before the people …
applied for admission to the Federation, it would be quite a false statement to say
that the Federal Commonwealth establishes those three colonies’.45

The division of Queensland prior to Federation was again adverted to
during discussion of a proposal to remove from cl 114 the Commonwealth’s power
to determine the extent of representation of a new state in the Commonwealth
Parliament. Advocating a principle of equal state representation in the Senate, John
Cockburn, Member of the South Australian House of Assembly, argued that ‘if
Queensland enters the Federation as a whole, or as more than one state, each new
state should enter upon the same terms in respect of representation’.46 Later, in
connection with the same amendment, the question ‘is it intended … to allow the
Parliament of the Commonwealth to carve new states out of existing states?’47 was
met with the affirmation ‘that must be the intention’.48 Although these proposed
amendments to cl 114 were defeated,49 the debate provides a further example of
how the framers of the Constitution expected the creation of new states out of the
existing Australian states.

The delegates also debated for the first time a provision (cl 117) requiring
the consent of state parliaments for the formation of a new state from their
territory. James Walker, a New South Wales delegate and former resident of
Queensland, argued that any requirement of state parliament consent was an
obstacle to Queensland’s entry into the Federation, stating that:

at the present time the colony may be sub-divided upon petition to Her
Majesty the Queen, and a large proportion of the people there are afraid to
come under a Constitution which might take away Her Majesty’s
prerogative in this respect, and prevent any division of the colony without
the consent of the state Parliament. That was really the reason why the
Queensland Federal Bill was not passed.50

He proposed an additional provision modifying the requirement of state parliament
consent by way of preserving the Monarch’s power of subdivision in the case of
Queensland.51 However, delegates were unwilling to alienate the majority of
electors in southern Queensland, who were opposed to separatism,52 and so the

45 Official Record of the Debates of the Australasian Federal Convention, Melbourne, 8 February
1898, 696 (Henry Higgins). See also the suggestion that ‘instead of the colony of Queensland, three
other colonies, although embracing the same territorial area as Queensland … can be admitted to
the Federation under the provision allowing the Parliament to establish new states’: at 694–5
(Edmund Barton).
46 Ibid 696 (John Cockburn).
48 Ibid 697 (Edmund Barton).
49 Ibid 696, 698.
50 Ibid 697 (James Walker).
51 Official Record of the Debates of the Australasian Federal Convention, Melbourne, 1 March 1898,
1690 (James Walker).
52 Ibid 1697, 1699 (Edmund Barton), 1701 (Richard O'Connor), 1702 (Henry Dobson).
resolution was withdrawn and later negatived.\textsuperscript{53} Suggestions that such a provision be made to apply to all colonies entering into the Federation were also dismissed.\textsuperscript{54} Nonetheless, the lengthy consideration the proposal was given highlights the seriousness with which the delegates viewed the possibility that new states would be carved out of Queensland.\textsuperscript{55} More generally, delegates envisaged the formation of new states out of existing states as a natural step in the development of the Commonwealth. From this it is clear that the new states provisions of the \textit{Constitution} were not intended as contingency provisions, but as mechanisms for dealing with anticipated changes to the structure of the Federation.

\section*{III Creation of New States from the Existing States}

In the \textit{Constitution} that came into force in 1901, the creation of new states from the existing Australian states is governed by ss 121 and 124. These provisions were formulated early in the series of constitutional conventions. Chapter VI cls 1 and 2 of the draft Constitution from the 1891 National Australasian Convention, amended and reduced to a single clause at the first session of the 1897–98 National Australasian Convention, form s 121.\textsuperscript{56} Chapter VI cl 5 of the draft Constitution from the 1891 National Australasian Convention forms s 124.\textsuperscript{57}

Section 121 confers on the Commonwealth Parliament the power to make new states and to impose terms and conditions on their admission or establishment:

\begin{center}
\textbf{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.
\end{center}

Section 124 does not constitute a fresh grant of power, but imposes an additional requirement on certain exercises of power under s 121,\textsuperscript{58} namely, the consent of the relevant state parliament or parliaments:

\begin{center}
\textbf{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
\end{center}

\textsuperscript{53} Ibid 1702 (James Walker); \textit{Official Record of the Debates of the Australasian Federal Convention}, Melbourne, 11 March 1898, 2400.

\textsuperscript{54} \textit{Official Record of the Debates of the Australasian Federal Convention}, Melbourne, 1 March 1898, 1692 (Charles Kingston), 1692 (Alfred Deakin).

\textsuperscript{55} Discussion occupied some 15 pages over several days.

\textsuperscript{56} Quick and Garran, above n 33, 967–8. In the draft Constitution from the first session of the 1897–98 National Australasian Convention ch VI cl 2 was renumbered cl 114. In the draft Constitution from the third session of the 1897–98 National Australasian Convention cl 114 was renumbered cl 120 and minor modifications were made to its phrasing: Williams, above n 17, 608, 791, 1139.

\textsuperscript{57} Quick and Garran, above n 33, 976. In the draft Constitution from the first session of the 1897–98 National Australasian Convention ch VI cl 5 was renumbered cl 117. In the draft Constitution from the third session of the 1897–98 National Australasian Convention, cl 117 was renumbered cl 123 and minor modifications were also made to its phrasing: Williams, above n 17, 609, 791, 1140.

\textsuperscript{58} Quick and Garran, above n 33, 976–7.
by the union of two or more States or parts of States, but only with the consent of the Parliaments of the States affected.

Sections 121 and 124 prescribe the mechanics of new state formation and apparently outline a relatively straightforward process for the creation of new states from the existing Australian states.\(^\text{59}\) Despite this, the 1988 Constitutional Commission criticised these provisions, suggesting that ‘[t]he wording of [ss 121 and 124] has given rise to considerable doubt and difficulty both as to their precise meaning, and as to their application to the various ways in which potential new States may originate.’\(^\text{60}\) In particular, s 121 does not detail the extent of the Commonwealth Parliament’s power to impose terms and conditions on the formation of a new state. Consequently, there is uncertainty as to the scope for the Commonwealth Parliament to determine the representation and structure of a new state.

A Formation of New States

Under ss 121 and 124 of the Constitution, the formation of a new state requires the consent of both the Commonwealth Parliament and the affected state parliaments. In practical terms, the consent of the affected state parliaments would be set out in legislation, after which the Commonwealth Parliament would pass legislation creating the new state and imposing any terms and conditions.\(^\text{61}\)

A question has arisen as to whether this process could be affected by the terms of s 123 of the Constitution.\(^\text{62}\) It provides:

123. Alteration of limits of States

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

The formation of a new state from an existing state would necessarily diminish or alter the territory of the existing state. If such a diminution or alteration 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

\(^\text{59}\) It has been suggested, rhetorically, that the constitutional mechanics of state formation are so straightforward that a new state in New England could be created by the New South Wales Premier and Prime Minister ‘over coffee tomorrow morning’: Ian Johnston quoted in Lewis, above n 9; and that if the New South Wales and Commonwealth governments ‘agreed one afternoon that there be new states, it could happen the next day’: Bryan Pape quoted in Gregory, above n 11.


\(^\text{62}\) Quick and Garran, above n 33, 975.
those contained in ss 121 and 124. The word ‘may’ in the opening phrase of s 123 shows that the provision grants an additional power, rather than limiting any existing power. The lack of reference to ss 121 and 124 also suggests that s 123 does not qualify their operation. Additionally, s 123 is best considered as being directed at modifying state boundaries, rather than creating new states.

The chapter heading ‘New States’ might imply that each section in ch VI concerns new states, and that each section in ch VI is applicable to new states. However, the presence of s 122, which covers only the government of territories, makes it clear that the sections in ch VI affect matters outside of the formation of new states. It follows that s 123 does not constrain the operation of ss 121 and 124.

This conclusion is consistent with the case law on the relationship between s 123 and other sections of the Constitution. In *Paterson v O’Brien*, the High Court examined the nexus between ss 123 and 111 — the latter section allowing a state parliament to surrender state territory to the Commonwealth. The High Court held unanimously that the surrender of state territory under s 111 was not affected by s 123, and that a referendum was therefore not necessary. The reasoning in *Paterson v O’Brien* is equally applicable to the relationship between ss 123 and 124, thereby providing strong support for the view that a referendum is not a constitutional requirement for the formation of a new state out of the territory of an existing state.

**B  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 extent of 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 cl 6 distinguishes between ‘Original States’, which are ‘such States as are parts of the Commonwealth at its establishment’, and ‘States’, which are ‘parts of the Commonwealth, and such colonies or territories as may be admitted into or established by the Commonwealth as States’. As a result, 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.

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63 Ibid.
64 Ibid.
66 Tappere, above n 61, 226–7.
68 111. States may surrender territory

The Parliament of a State may surrender any part of the State to the Commonwealth; and upon such surrender, and the acceptance thereof by the Commonwealth, such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth.

70 Moens and Trone, above n 65, 467–8 [834].
72 Quick and Garran, above n 33, 970; Moens and Trone, above n 65, 458 [822]; 1988 Constitutional Commission Report, above n 60, 190 [4.321].
Theoretically at least, there is no upper limit on how many senators may represent a new state. Indeed, new states might be given significantly greater representation than the original states. However, this is not a politically plausible outcome given that it would require the consent of both houses of the existing Parliament. As Mason J stated in *Western Australia v Commonwealth*, in dismissing ‘the grim spectre … of a Parliament swamping the Senate with senators from the Territories’, the significance of this concern is:

diminished when it is appreciated that the Constitution provides no safeguard against the pursuit by Parliament of a similar course at the expense of the original States in allowing for the representation of new States in the Senate. Although s 7 provides that equal representation of the original States shall be maintained in that chamber, neither the section nor the remaining provisions of Pt II of Ch I place any restriction on the number of senators which Parliament may accord to a new State as its representation in the Senate … [T]he assumption is that Parliament will act responsibly.

When it comes to the House of Representatives, s 24 of the Constitution provides that the House of Representatives 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.

The High Court held in the *First Territories Representation Case* and *Queensland v Commonwealth* that the Commonwealth Parliament’s power to make laws for the territories and to allow the representation of territories as it sees fit, pursuant to s 122, qualifies the operation of s 24. It might be argued that s 121 also qualifies the operation of s 24 so that the principle of proportional representation in the lower house does not apply in the case of new states.

However, differences in the wording of ss 121 and 122 suggest that the decisions in the *First* and *Second Territories Representation Cases* would not be followed in the case of new states. Section 121 allows the Commonwealth to ‘impose terms and conditions, including as to the extent of representation, as it thinks fit’ on new states, while s 122 enables the Commonwealth to ‘allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit’. The Commonwealth’s power to determine the representation of new states is thus narrower than its power in relation to territories (in that the former implies that there will be representation, and only allows the Commonwealth to

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73 (1975) 134 CLR 201 (‘First Territories Representation Case’).
74 Ibid 271.
75 Quick and Garran, above n 33, 970.
76 *Australian Constitution* s 24.
77 Ibid; Quick and Garran cited in Moens and Trone, above n 65, 458 [822]. See also 1988 *Constitutional Commission Report*, above n 60, 433 [7.23].
78 (1975) 134 CLR 201.
79 (1977) 139 CLR 585 (‘Second Territories Representation Case’).
80 Quick and Garran, above n 33, 970.
determine its extent). This difference provides one basis upon which to distinguish the High Court’s decisions in regard to the territories and s 24.81

Additionally, if proportional representation was not 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 new states are entitled to proportional representation in the House of Representatives.

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 Territories Representation Case, Barwick CJ contrasted the Commonwealth’s capacity to determine the ‘extent of representation’ or the ‘numerical strength of the representation’ pursuant to s 121, with the fact that some form of representation must occur.82 Echoing Barwick CJ’s reasoning, Aicken J in the Second Territories Representation Case noted that the Commonwealth Parliament could not establish a new state without any senators or members of the House of Representatives.83 His assertion that according to s 121, ‘it is only the “extent”, and not the fact or mode, of representation which is committed to the Parliament’84 makes clear that the Commonwealth could not make it a condition of the admission or establishment of a new state that its representation be set at zero.85

C  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.86 Indeed, the power in s 121 is apparently unfettered in stating that the Commonwealth may ‘make or impose such terms and conditions … as it thinks fit’. These terms and conditions are most likely to be expressed in the new state’s constitution, such as in relation to the protection of minorities, the extent of its franchise and the process of amendment of the constitution. Ultimately, the terms and conditions imposed on the formation of a new state will be a political matter, determined through negotiations between the Commonwealth Parliament, representatives of the new state and the existing state from which it has been drawn.87

82 (1975) 134 CLR 201, 229.
83 (1977) 139 CLR 585, 617.
84 Ibid.
85 See Tappere, above n 61, 232.
86 Quick and Garran, above n 33, 970; 1988 Constitutional Commission Report, above n 60, 433 [7.25].
The Commonwealth’s power to impose conditions may appear to be unlimited, but this does not bear up under scrutiny. If nothing else, this power may only be exercised under s 121 ‘upon such admission or establishment’ of the new state, and so may only be used to impose terms and conditions at that time.88 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.89 Hence, no condition could amount to a breach of the requirement in s 92 of the Constitution that interstate trade and commerce shall be ‘absolutely free’, or in s 117 that 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. This reflects the fact that the Commonwealth is unable to alter the fundamental constitutional concept of a ‘state’ in s 121. It may only admit or establish entities that answer that description.

The idea that the Constitution mandates certain immutable constitutional concepts is evident in a number of recent High Court decisions. For example, in Kirk v Industrial Court of New South Wales, the High Court recognised that each state must possess a body fitting the description of a Supreme Court.90 Based on the mention of the ‘Supreme Court of a State’ in s 73 of the Constitution, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ found that ‘[i]t is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description’.91 It was stated that the constitutional description of a state Supreme Court includes its supervisory jurisdiction to grant relief on the ground of jurisdictional error in respect of a decision by an inferior court or tribunal.92 As a result, a privative clause was ineffective to prevent review of a decision of the Industrial Court by the Supreme Court of New South Wales.

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.93 The High Court has not been called upon to consider what the word ‘state’ means in this context, nor what are its essential characteristics. One aspect, though, that is clear is that a new state could not be created unless it possessed a judicial system that complied with the Constitution. Kirk v Industrial Relations Commission shows that any attempt to create a state, whether by way of a Commonwealth condition or otherwise, requiring the absence of a judiciary would be ineffective due to the constitutional requirement that the state at least possess a Supreme Court in conformity with s 73 of the Constitution.

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88 Tappere, above n 61, 233.
89 Moens and Trone, above n 65, 458 [822].
91 Ibid 566.
92 Ibid.
93 See Tappere, above n 61, 237.
Is it also questionable whether a new state could be created without a parliament. It is likely to be implicit in the concept of statehood that the entity possesses self-government, and hence a legislature of some kind. The capacity of every state to make laws is reflected in a number of sections in the Constitution, such as s 109 dealing with inconsistency between state and federal laws. As a result, a new entity that possessed no lawmaking capacity, and instead perhaps was subject to the condition that all laws for the state to were to be made for it by the Commonwealth, would likely not answer the description of a ‘state’.

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. It might be that the Constitution not only entails that the states are self-governing, but that they possess a level of autonomy from the Commonwealth. This is consistent with the obiter dicta of members of the High Court in other contexts, such as in developing an implied immunity of the states from certain federal laws. For example, in Melbourne Corporation v Commonwealth, Dixon J said ‘[t]he foundation of the Constitution is the conception of a central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities’. If obiter dicta such as this were applied and extended, it might give rise to a significant limit on s 121.

IV Attempts to Create New States from the Existing States

In the period since Federation, there has been strong support for the creation of new states in the New England, Riverina and Monaro regions of New South Wales, and in Queensland. These movements echo pre-Federation calls for the formation of separate colonies in northern New South Wales from the 1840s, and the Riverina and Queensland from the 1850s. The movement in New England made the most progress towards achieving a new state when a referendum in 1967 asking electors whether they supported the creation of a new state in northern New South Wales was narrowly defeated. The history of such attempts reveals that political factors can be a significant barrier to the attainment of parliamentary consent required by ss 121 and 124 of the Constitution. For example, although a successful referendum is not a constitutional requirement for the formation of a new state, the history of new state movements reveals that parliaments are unlikely to support the creation of a new state in the absence of a clear political mandate provided by a referendum. The history also demonstrates that sufficient popular support for this purpose can be difficult to attain.

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94 (1947) 74 CLR 31, 82.
95 For a comprehensive history of separation movements prior to Federation, see Ellis, above n 21.
97 Ibid 233. The Monaro movement was an outgrowth of the Riverina movement so its origins are also traceable to the 1850s.
98 Ibid 260.
A  New England

1  Origins of the Post-Federation New State Movement, 1915–25

Support for the creation of a new state in northern New South Wales following Federation originated in rural discontent, manifested in 1915 in Grafton, in response to the cutting of ferry services.99 Concern at the cessation of public transport reflected the perception that the interests of rural communities were marginalised by government decisions made in the interests of Sydney and other urban areas.100 The post-Federation movement for a new state in New England began in earnest in early 1920 in Tamworth when proponents of the Grafton separation movement encouraged the editor of a local newspaper, Victor Thompson, to publish a series of editorials advocating the formation of a new state.101 Thompson’s newspaper campaign promoted the establishment of a new state as a solution to depopulation and decline in rural areas.102 Subsequently, Thompson and other newspaper proprietors in New England formed a New State Press League and a Press Propaganda Executive, which sought to raise the profile of the issue.103

Momentum for new states came also from outside the local press, when ‘New State Leagues’ and a Central Executive formed in late 1920.104 Representatives of the various New State Leagues attended conventions coordinated by the Central Executive. The inaugural convention in 1921 comprised 220 delegates from 124 New State Leagues,105 highlighting the grassroots character of the movement. The Convention’s aim was to work towards the formation of an independent state in northern New South Wales.106 A proposal to determine the boundaries of the new state was abandoned in the interests of avoiding disagreement.107 However, the Convention resolved to gain the New South Wales Parliament’s consent to separation, pursuant to s 121 of the Australian Constitution, through presentation of a petition following a procession through Sydney.108 The Convention also affirmed the desirability of holding a federal convention aimed at amending s 124 of the Australian Constitution to remove the requirement of state parliament consent to the formation of a new state.109 In this way, the movement adopted a two-pronged strategy, aimed at the state parliament on one hand, and the Australian Constitution on the other.110

100 Ibid.  
101 Taylor, above n 96, 253.  
102 Ibid.  
103 Ibid 254.  
104 Ibid.  
105 Ibid; Ellis, above n 21, 154.  
106 Taylor, above n 96, 254.  
107 Ellis, above n 21, 154.  
109 Ellis, above n 21, 155.  
110 John Farrell, ‘Amending “the Lion in the Path”: The Hurdles, Thrusts and Ploys of the New State Movement in Northern NSW 1920–30’ (2011) 97(1) Journal of the Royal Australian Historical Society 44. Farrell argues that the ‘principal thrust’ of the new state movement was securing
Members of the new state movement travelled to Sydney where they addressed meetings and precipitated the formation of a further, Sydney-based New State League. In response to public opinion, and after persistent lobbying, the New South Wales Legislative Assembly passed a motion in 1922 calling for the establishment of a federal convention to consider the question of a separate state in northern New South Wales. At the time, George Fuller’s Nationalist Government was in power in the state, though the resolution itself was introduced as a private member’s bill. On receiving the resolution, Prime Minister Stanley Bruce instructed that the New South Wales Parliament first affirm the desirability of a new state, the terms of separation, and the allocation of debts and assets between the existing state and the new state. Only then, and with the consent of the Federal Parliament, would the Commonwealth Government, ‘take whatever steps are necessary to give effect to the wishes of the Parliament and the people of New South Wales’.

Subsequently, in 1923, the New South Wales Legislative Assembly passed a resolution creating a royal commission to consider the formation new states in New England, the Riverina and the Monaro. The Commission was established with broad terms of reference and collected evidence from over 500 witnesses in the course of a year. In 1925, the Commission reported that it was:

unanimously of opinion that in its original form the proposal for the creation of a new State in the northern part of New South Wales is neither practicable nor desirable. With the exception of Mr Commissioner Sinclair [a New England grazier], we are also of opinion that in any amended form a proposal for the creation of a new State is neither practicable nor desirable … We are also unanimously of opinion that the proposals for the creation of new States in the Riverina and the Monaro, in either their original or in any amended form, are neither practicable nor desirable.

The proposed new states were considered unsuitable primarily for economic reasons. The Commission found that forming new states would increase the costs of government and taxation rates, while the regions would not operate as economic

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111 Taylor, above n 96, 254–5.
113 Farrell, above n 110, 54.
115 Ibid.
116 Twomey, above n 99, 45; Farrell, above n 110, 55–6.
117 New South Wales, 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, Report (1925) v (‘1925 Royal Commission Report’). Also known as the Cohen Royal Commission.
118 Taylor, above n 96, 272.
119 1925 Royal Commission Report, above n 117, 149.
units.120 Political disagreements between proponents of the movement121 and deep disputes over state boundaries were also put forward as obstacles to the formation of a new state in New England.122 As a result, the Commission instead recommended that increased administrative efficiency and powers of self-government ‘can be adequately secured by the adoption of the scheme for the extension of Local Government’.123 The conclusions of the Commission were criticised as understating the widespread support for the new states movement and as being ‘contrary to fact and evidence’.124 Unsurprisingly, the Commission’s recommendations stalled the movement for a new state in New England.125

2  **Gaining Momentum, 1925–35**

After the Commission’s findings, the new state movement then shifted its focus to the Commonwealth, urging an amendment to s 124 of the Constitution that would allow the formation of new states without state parliament consent. After Thompson had made unsuccessful deputations to Prime Minister Bruce, and after two motions calling for a referendum to change s 124 had been defeated in the Commonwealth Parliament, the Bruce–Page Government appointed a royal commission in 1927 to inquire into a range of proposed constitutional amendments.126 When this royal commission reported in 1929, the majority recommended that the Constitution be amended to provide a means for the formation of new states based on popular support as an alternative to the requirement of state parliament consent in s 124. However, this recommendation fell by the wayside after the Bruce–Page Government lost power later in 1929.127

Returning to the state sphere, in 1933 the New South Wales Government appointed a further royal commission to inquire into areas suitable for self-government as states.128 The Commission was appointed to fulfil an election promise made by United Australia Party Premier Sir Bertram Stevens and Michael Bruxner, the leader of his Country Party coalition partner.129 Unlike the 1925 Royal Commission, it was not asked to consider the desirability of the formation of

120 Ibid 125–8, 139. See also Taylor, above n 96, 256; ‘New States of Australia?: A Movement of Decentralization’, above n 112, 356; 1929 Royal Commission Report, above n 114, 219. It is significant that the proposed region for the new state in northern New South Wales considered by the Commission did not include Newcastle: Farrell, above n 110, 49.

121 Taylor, above n 96, 256.

122 The Commission recorded ‘considerable difference of opinion between the witnesses’ as to the appropriate boundaries of a new state: 1925 Royal Commission Report, above n 117, 10. See also Twomey, above n 15, 471.

123 1925 Royal Commission Report, above n 117, 149.

124 Ellis, above n 21, 195. See also Taylor, above n 96, 272.

125 Taylor, above n 96, 273.


127 Ibid 265. The recommendations of the 1929 Royal Commission are detailed in Part V below.

128 New South Wales, Royal Commission of Inquiry Respecting Areas in the State of New South Wales Suitable for Self-Government as States in the Commonwealth of Australia, and as to the Areas in the Said State in which Referenda Should Be Taken to Ascertain the Opinions of the Electors on Any Question in Connection with the Establishment of New States, Together with Maps, Report (1935) 1 (‘1935 Royal Commission Report’). Also known as the Nicholas Royal Commission.

129 Taylor, above n 96, 275.
new states, but only the suitability of areas in New South Wales for this purpose. Reporting in 1935, the Commission found two areas suitable for self-government. The first was a triangular area in northern New South Wales bounded by the Queensland border in the north, Lake Macquarie in the south-east and the north-western corner of New South Wales. The second was comprised of central, western and southern regions of New South Wales.

The Commission recommended that a referendum be held in each proposed new state, starting with the area in northern New South Wales, after electors had been informed of the advantages and disadvantages of the creation of a new state. The attainment of some level of consensus on the new state issue was significant, and indicates that consensus can be achieved. Despite the Commission’s findings, there was no immediate move to hold a referendum in either location. This hiatus reflected the poor economic conditions of the Great Depression and the onset of the Second World War.

3 Representation and Referendum, 1948–67

Following a period of inactivity, the New England new state movement revived in 1948, seeking self-government in the area of northern New South Wales pronounced suitable by the 1935 Royal Commission. The new state movement persistently lobbied the New South Wales Legislative Council from 1949 by petition and deputation, but without success. During this time, the representative character of the movement strengthened. This was reflected in the unofficial new state poll conducted by 21 councils, concurrently with local government elections in 1953, in which 77% of electors supported the formation of a New England state.

The movement also established representative institutions for a New England state in 1954, and in 1955 a representative assembly — the New England Constituent Assembly — first sat at Armidale. Modified parliamentary processes were adopted and the Assembly had self-conferred powers to conduct a referendum, organise an election and pass its own Acts. Although the Assembly lacked the legal authority to enforce its decisions, its processes enabled it to

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132 Ibid 62.
133 New South Wales, Parliamentary Debates, Legislative Assembly, 6 December 1966, 3217 (Eric Willis). Although the Great Depression reduced the resources available to governments and proponents of new states, it is thought that in-principle support for a new state in northern New South Wales increased during the Great Depression parallel to escalating levels of rural discontent: Jim Hagan (ed), People and Politics in Regional New South Wales (Federation Press, 2006) vol 1, 152–3.
134 Taylor, above n 96, 257.
135 Ibid.
137 Taylor, above n 96, 258.
138 Ibid.
request that an Act be given effect by the New South Wales Parliament. The Assembly passed bills calling for the formation of a new state in New England and the creation of a development corporation to promote industries and investment. The former was referred to the Premier of New South Wales for introduction into the New South Wales Parliament.

Subsequently, the New South Wales Parliament, headed by Liberal Premier Robert Askin, passed the *New States Referendum Act 1966 (NSW)*, authorising a referendum in the area in northern New South Wales identified by the 1935 Royal Commission. As in 1922–23 and 1933, support for a new state in northern New South Wales came from the conservative side of politics. The referendum aimed ‘to find out whether the people in this particular part of New South Wales wish to have a separate State government of their own’. It was anticipated that if the referendum was successful, the government would assist the people of northern New South Wales to form a new state. However, a new state would be conditional on the resolution of ‘constitutional and economic questions involved between the new State, the State of New South Wales and the Commonwealth of Australia’ after a process of detailed and thorough investigation. Thus, a successful referendum was considered not to be determinative, but a preliminary step in the creation of a new state and a basis for further investigation.

On 29 April 1967, electors in the proposed northern state were asked ‘[a]re you in favour of the establishment of a new State in north-east New South Wales as described in Schedule One to the *New State Referendum Act, 1966*?’ The referendum was defeated with 168 103 votes in favour of the proposal, or 46%, and 198 812 votes against, or 54%. The failure of the referendum has been attributed to its reliance on the area selected by the 1935 Royal Commission, in particular, the inclusion of Newcastle. The inclusion of Newcastle in the boundaries of the proposed new state contributed to the defeat of the referendum in two ways. First, it created a ‘no’ vote outside of Newcastle associated with concerns that Newcastle would dominate the new state, and that a state centred on Newcastle would not accord sufficient weight to the interests of northern, rural regions. Second, Newcastle and its surrounds returned a high ‘no’ vote. Where in northern electorates the ‘yes’ vote amounted to 66.6%, it was as low as 28% in Newcastle. Support for a new state in the nearby Gloucester and Manning dairying districts, where farmers relied on Sydney markets, was also low at 34%.

139 Ibid.
140 Ibid.
141 Ibid.
142 Ibid 259.
143 *New South Wales, Parliamentary Debates*, Legislative Assembly, 6 December 1966, 3218 (Eric Willis).
144 Ibid.
145 Ibid.
146 *New State Referendum Act 1966 (NSW)* sch 2.
147 Taylor, above n 96, 259.
148 Twomey, above n 15, 471 n 18. In a recent media release Barnaby Joyce, Federal Member for New England, stated that the referendum was ‘los[t] by the tactical move to include Newcastle’: Joyce, above n 5, 1.
149 Farrell, above n 110, 62.
In the weeks following the unsuccessful referendum, the New England new state movement adopted a revised proposal for boundaries of a new state that excluded areas returning a majority ‘no’ vote. The movement in northern New South Wales then disbanded. As anticipated in the second reading speech for the New States Referendum Act 1966 (NSW), the failure of the referendum led to the new state proposal being shelved. This decline coincided with weakening support for the new states movement from the Country Party, formerly its greatest advocate in the political sphere. Although the Askin–Cutler Government secured a referendum, they anticipated that it would fail due to the inclusion of Newcastle in the proposed state and did little to further the cause. They also declined to consider the New England new state movement’s proposal with revised boundaries. More broadly, the trend towards economic and political centralisation in the ‘era of development’ of the 1950s and 1960s was inimical to decentralising reforms such as the formation of new states.

Since, there have been occasional echoes of the long-running campaign in Northern New South Wales, most recently, Joyce’s calls for a new state in New England as a component of National Party policy. In doing so, Joyce recalled that ‘[g]rowing up … I was acutely aware of the 1967 referendum for a new state’.

B Other New State Movements

1 Riverina

As in New England, calls for the creation of a new state in the Riverina in south-western New South Wales resurfaced in the decades following Federation. Inhabitants of the Riverina sought to redress the neglect of country areas that had followed the centralisation of government services. There were also concerns that revenue generated by the Riverina was spent elsewhere, and that freight charges for the Riverina were unfair. While the Riverina initially sought union with Victoria, at a conference at Albury in 1921 it resolved to focus its energies on separation from New South Wales. Under the leadership of E J Gorman, the Riverina New State League was formed, comprised of committees at Narrandera and Wagga, along with 13 groups focused on towns in the Riverina.

The Riverina New State League intersected with other new state movements through its participation at the All-Australia Convention at Albury in

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150 Taylor, above n 96, 259.
151 New South Wales, Parliamentary Debates, Legislative Assembly, 6 December 1966, 3218 (Eric Willis).
152 Brown and Gray, above n 6, 145.
153 Ibid.
154 Joyce, above n 5, 1.
157 Ibid; Twomey, above n 99, 45.
1922. The Convention, attended by representatives from new state movements in New South Wales, Queensland, Victoria and Western Australia, was a forum for discussion of constitutional reforms including the provision of a simplified process for the division of existing states. The Riverina New State League also adopted a proposal for state boundaries at Wagga in 1923, and many of its members gave evidence to the 1925 Royal Commission. The Commission’s recommendation against the creation of a new state in the Riverina brought an end to the campaign of the Riverina New State League.

Agitation for a new state in the Riverina resurfaced in 1931 as the Riverina Movement, headed by Charles Hardy Junior. This second stage of the movement for separation from New South Wales was more loosely organised. Notable achievements included a rally on the riverbank of Wagga attended by 10,000 supporters and the presentation of a petition with 30,000 signatures to the Commonwealth Government in 1931. However, the Riverina Movement was short-lived, ending in 1935. Unlike the New England movement, advocates of a new state in the Riverina never introduced institutions for self-government or attained a referendum.

2 Monaro

Support for the creation of a new state in the Monaro in south-eastern New South Wales developed as an offshoot of the Riverina New States League. At the All-Australia Convention in 1922, the South Coast League began its own movement for the creation of a new state. While the movement was geographically focused on the Monaro, it advocated the need for subdivision, not only in the Monaro, but also in other areas of Australia, through its propaganda published in the Goulburn Penny Post. Like the New England new state movement and the Riverina New States League, the Monaro new state movement was organised in leagues in prominent towns, namely Goulburn and Bombala. The Monaro movement was dissolved following the unfavourable conclusions of the 1925 Royal Commission.
3 Queensland

Interest in the subdivision of Queensland was strong prior to Federation.170 However, the push for change failed to generate significant momentum after that time, at least as compared to the long-running movements in New South Wales. The Queensland new state movements were driven by concerns that Queensland’s northern regions could not be governed effectively from Brisbane on the southern boundary, and a desire for an expansion of local autonomy in the northern and central areas of Queensland.171 In 1910, the Queensland Legislative Assembly passed a resolution that Queensland be divided into Northern Queensland centred on Townsville, Central Queensland centred on Rockhampton and Southern Queensland centred on Brisbane.172 However, no further action was taken,173 in part reflecting the disorganised approach of the Queensland Country Party, which championed the issue at this time.174

Parallel to the resurgence of the new state movement in New England, the Queensland Governor stated at the opening of the Queensland Parliament in 1948 that new states might be formed when they had a ‘reasonable degree of financial and economic stability’.175 A new state movement gained pace in Queensland in 1955,176 with the New State for North Queensland Movement launched at a popular convention at Mareeba, near Cairns that year. Although a Country Party-led coalition sympathetic to the new states cause gained power in Queensland in 1957, Frank Nicklin, the head of government, declared the formation of new states too difficult.177 Supporters of a new state continued to push for a referendum until the 1970s, when the movement faded from view,178 much as it had in New South Wales.

V Reform Proposals

Parallel to the history of attempts to create new states from the existing states, the new states provisions of the Constitution have been examined by three Commonwealth reviews. They have produced recommendations for amending the Constitution so that a new state can be formed without the consent of the relevant state parliament or parliaments when there are high levels of popular support in the proposed state and the affected state or states as a whole. Such recommendations recognise the difficulty of securing the consent of state parliaments and reflect the framers’ intention that the Constitution provide an effective and workable mechanism for the formation of new states. No recommendation of this kind has been put to a referendum.

171 Ibid 263.
172 1988 Constitutional Commission Report, above n 60, 430 [7.6].
173 Ibid.
174 Brown and Gray, above n 6, 144.
175 See Queensland, Parliamentary Debates, Legislative Assembly, 7 October 1948, 640 (Frank Nicklin). See also Taylor, above n 96, 270; Pape, above n 10, 24.
177 Brown and Gray, above n 6, 144.
178 Taylor, above n 96, 270.
A Commonwealth Royal Commission on the Constitution, 1929

The first Commonwealth review to consider the new states provisions was the Royal Commission on the Constitution, reporting in 1929. The Commission was charged with inquiring into Commonwealth power under the Constitution and the workings of the Constitution since Federation, with a view to recommending desirable constitutional changes. It recommended ‘that an alternative method of creating new States should be provided in the Constitution so that in a proper case a new State may be created out of an existing State without the consent of the State Parliament’.179

The Commission viewed popular support as an appropriate alternative basis for the creation of a new state. It emphasised that a proposal for a new state should attract popular support not only in the area of the new state, but also in the affected state as a whole, as people in the proposed new state and the state as a whole are ‘vitaliy interested’.181 As such, the Commission suggested that a new s 124A be inserted in the Constitution, providing for the formation of a new state from an existing state where a majority of electors in the territory of the new state and in the existing state approve the proposed establishment of the new state.182 Recognising the difficulty of attaining majority support for the proposal in the existing state, s 124A would also allow the formation of a new state where the proposal was supported by three-fifths of the electors in the territory of the new state and two-fifths of electors in the existing state.183

Additionally, s 124A set out the process that would lead to the two referendums. A proposal for the establishment of a new state would be initiated by a petition to the Commonwealth Parliament signed by one-fifth of the electors in the territory of the proposed new state, provided the territory of the proposed new state was not smaller than that of Tasmania. The Commonwealth Parliament would have the power to appoint a commission to determine the boundaries of the proposed new state, having regard to ‘the boundaries mentioned in the petition, community of interest, physical features, existing boundaries of States, and other relevant matters’.184 A convention of elected representatives from the territory of the new state would then approve the state boundaries and frame a constitution. An inquiry would also be held into matters such as the circumstances of the new state and the value of assets to be transferred to it.185

The section would empower the Commonwealth Parliament: to determine the manner in which the petition would be presented; to define the limits of the new state; to prescribe the terms and conditions on which the new state would be established; to provide for a convention; to prescribe the manner

179 1929 Royal Commission Report, above n 114.
180 Ibid 256.
181 Ibid.
182 Ibid 256–9. Section 124A would also apply to the creation of a new state out of two or more parts of existing states: at 257.
183 Ibid 258.
184 Ibid.
185 Ibid 258–9.
in which the new state questions would be presented to electors; and to establish the new state if the establishment of the state is approved. It also required that the new state be proclaimed within two years after a successful referendum is held.\textsuperscript{186} Section 124 would be retained, with minor amendments for consistency with the new s 124A.\textsuperscript{187}

The seven members of the Commission agreed with the central recommendation that the Constitution should provide for a new state to be created, on the basis of popular support, without the consent of the state parliament.\textsuperscript{188} However, there was some discord as to the detail of the proposed s 124A. The Chairman, John Peden, and Sir Hal Colebatch rejected the recommendation that the Commonwealth Parliament have the power to create a new state,\textsuperscript{189} despite a majority of electors in the whole state voting against the proposal. Mr Duffy and Mr McNamara viewed the specification on the minimum area of a state as too restrictive.\textsuperscript{190}

**B Commonwealth Joint Committee on Constitutional Review, 1959**

Thirty years later, the Commonwealth Joint Committee on Constitutional Review considered the new states provisions, in the context of a broad review of the Constitution. Like the 1929 Royal Commission, the Joint Committee saw the requirement of state parliament consent in s 124 as ‘a barrier to the formation of new States from the territory of an existing State’.\textsuperscript{191} It noted that although parliaments represent democracy in Australia, ‘it is no less consistent with democracy that the people of a State should be able to express themselves directly on such questions as the formation of a new area of government’.\textsuperscript{192} Accordingly, it recommended amending the Constitution so that the Commonwealth Parliament would have the power to form a new state by the separation of territory from a state or the union of two or more states or parts of states ‘if a majority of electors in the area of the proposed State and a majority of electors in the whole State … vote in favour of the formation of the proposed State’.\textsuperscript{193} As with the 1929 recommendation, this would provide an alternative to the requirement of the consent of the affected state parliament in s 124.

This recommendation did not go as far as that of the 1929 Royal Commission. Rather, the Joint Committee criticised the 1929 Royal Commission’s support for the creation of a new state in circumstances where the proposal did not attain the approval of the majority of electors in the state as a whole, adopting the minority view of Peden and Colebatch.\textsuperscript{194}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{186} Ibid.
\item \textsuperscript{187} Ibid 258.
\item \textsuperscript{188} Ibid 259.
\item \textsuperscript{189} Ibid.
\item \textsuperscript{190} Ibid.
\item \textsuperscript{191} \textit{1959 Joint Committee Report, above n 33, 158 [1,215].}
\item \textsuperscript{192} Ibid 168 [1,279].
\item \textsuperscript{193} Ibid 169 [1,284].
\item \textsuperscript{194} Ibid 166 [1,266]–[1,267].
\end{itemize}
\end{footnotesize}
Committee considered the approval of the majority of electors in the state as a whole as necessary to give effect to the legitimate interest of electors outside the boundaries of the proposed new state, who would be nonetheless affected by its creation. This was especially the case since the vote in the state as a whole would include the votes of electors in the new state area. It pointed to the establishment of a new state in an area of particularly rich natural resources or in an area including an existing capital city as examples of circumstances that would have significant implications for the entire state.

Although the Joint Committee conceded the difficulty of attaining support for the creation of a new state even by two-fifths of electors in the whole of the existing state, it regarded the requirement of majority support appropriate. As the Joint Committee stated, it ‘doubts whether the formation of a new State, contrary to the wishes of majority of electors in the State affected, would afford sufficient recognition of the interests of the exiting State’, and further, that ‘no proposed constitutional alteration should tolerate the abrogation of the interests of an existing State’.

The Joint Committee envisaged the expansion of the powers of the Commonwealth Parliament to allow it to deal effectively with matters related to the formation of a new state by popular approval. As such, the Joint Committee recommended that the Commonwealth Parliament ‘should have the power to make such laws as are necessary to deal with all matters in connexion with the formation of a new State’. It viewed the ‘detail[ing] of constitutional rules’ inadvisable, preferring the maintenance of ‘flexibility’ in view of the uncertainty and lack of past experience relating to the formation of new states.

C Commonwealth Constitutional Commission, 1988

The new states provisions were again considered by the Commonwealth Constitutional Commission, which reported in 1988. The Commission did not consider amending s 124. Rather, it focused on clarifying the operation of s 121 and its application to the territories, in light of the growing interest surrounding Northern Territory statehood. Its recommendations were limited to ‘clarify[ing] the ways in which new States may come into existence’ and ‘establish[ing]’ the entitlement of a new State to membership of the House of Representatives and the Senate.

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195 Ibid.
196 Ibid 168 [1,281].
197 Ibid 166 [1,267].
198 Ibid.
199 Ibid 164 [1,261].
200 Ibid 169 [1,284].
201 Ibid 168 [1,283].
D Future Reform

Amending the *Constitution* in accordance with the key recommendations of the 1929 Royal Commission and the 1959 Joint Committee would assist in smoothing the way for the creation of new states from existing states. The insertion of a new provision allowing the creation of new states from existing states where popular support is manifested by referenda — in the proposed new state and in the existing state as a whole — would complement the requirement for state parliament consent in s 124. Such a provision would appropriately widen the circumstances in which a new state could be formed. As the 1959 Joint Committee suggested, the democratic principle that informs s 124 can be given effect through the decisions of elected representatives in a state parliament or directly through the vote of their constituents. Arguably, the latter serves as a better reflection of popular will as it is unimpeded by political contingencies. And, as the history of attempts to create new states indicates, state government disinterest in, or opposition to, proposals to create new states can be a significant obstacle.

Whether the level of popular approval required is a majority of electors in the proposed new state and in the existing state as a whole, or some other formula, would need to be carefully considered. The recommendations of the 1929 Royal Commission and the 1959 Joint Committee offer some guidance, highlighting that the interests of electors in the area of a proposed new state would need to be weighed against the legitimate interests of the electors in the state as a whole.

In terms of other aspects of a new provision, the bypass of the state parliament would necessitate an expansion of the powers of the Commonwealth in relation to the creation of a new state. It remains to be seen whether this would pose new challenges for attempts to form new states. A detailed provision like the proposed s 124A would provide certainty as to the process for the creation of a new state, which may assist with planning by popular movements and by governments. However, as the 1959 Joint Committee suggested, a flexible approach is preferable given that the formation of new states from existing states is, as yet, untested in Australia. The process set out in s 124A nonetheless points to important issues to be considered in connection with the formation of a new state from an existing state: how such a proposal is to be initiated, how the boundaries of the new state will be determined, how its constitution will be drafted and how assets will be allocated.

Such a provision would facilitate the creation of new states from existing states in situations in which popular support is not matched by political will. For example, in discussions prior to the passage of the *New States Referendum Act 1966* (NSW), the New South Wales Government made no commitment to create the proposed new state in northern New South Wales in the event that the referendum was successful. If the *Constitution* provided for popular support as an alternative basis for new state formation, and the referendum in northern New South Wales and a subsequent referendum in the whole of New South Wales were successful, the absence of state parliament consent would not have prevented the formation of the new state. The long history of delegations to parliament, presentations of bills to parliament, and lobbying of parliament for inquiries and
referenda, demonstrates that the support of state parliaments can be difficult to attain. 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 a new provision would have effect, it does not appear that such a change would to this point have led to the creation of a new state. The referendum held in northern New South Wales in 1967, the pinnacle of new state movements in Australia since Federation, was unsuccessful as only 46% of electors supported the formation of a new state. Levels of popular support for the creation of new states in the Riverina, the Monaro and Queensland — where new state movements were smaller in scale and shorter-lived — would almost certainly have been even lower.

It is also doubtful that inserting an alternative basis for creating a new state from an existing state based on popular support would lead to the creation of a new state in the near future. No effective, organised movement for the creation of a new state from an existing state has emerged since the defeat of the referendum in northern New South Wales nearly half a century ago. Certainly, there is now only limited popular support for the creation of new states. The 2014 Australian Constitutional Values Survey reveals that while 71.6% of respondents were in favour of reforming the federal system, only 12.4% preferred a system with more states. The prospects of creating regional governments, abolishing local governments or abolishing state governments gained far greater support. 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.

VI Conclusion

The prospect of creating new states out of existing Australian states has a complex and dynamic history. The constitutional convention debates of the 1890s reveal that the framers of the Constitution viewed the formation of new states in this way as being a natural part of the development of the Federation, particularly in the case of Queensland. It is therefore unsurprising that the Constitution provides a relatively straightforward legal process for the formation of new states. In accordance with s 121, new states can be created by the Commonwealth Parliament, subject to its broad power to impose terms and conditions including as

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203 A J Brown, ‘Australian Constitutional Values Survey 2014: Results Release 1’ (Survey, Griffith University, 2014) 14 <www.griffith.edu.au/__data/assets/pdf_file/0015/653100/Constitutional-Values-Survey-Oct-2014Results-2.pdf>. The highest level of support for the creation of new states was 17.6% in Western Australia, followed by 15.2% in Queensland, 14.8% in Tasmania, 14.5% in Victoria, 12.3% in South Australia, 9.6% in the Northern Territory and 8% in the Australia Capital Territory. The lowest level of support for the creation of new states was 7.5% in New South Wales.

204 Ibid. The creation of regional government was supported by 41.2% of respondents, the abolition of local governments was supported by 35.9% of respondents and the abolition of state governments was supported by 25.1% of respondents.

205 See George Williams and David Hume, People Power: The History and Future of the Referendum in Australia (UNSW Press, 2010).
to the extent of its representation in the Commonwealth Parliament. Under s 124, consent to the formation of the new state must be given by the relevant state parliament or parliaments. The mechanics of the formation of a new state aside, there remains some uncertainty as to the extent of the Commonwealth’s power to impose terms and conditions on the representation of new states, and whether a purported new state that differed from the existing Australian states in important respects would satisfy the constitutional concept of statehood.

Despite the mostly clear legal path to creating a new state from existing states, attempts to bring this about have met with formidable political obstacles. Although there is no constitutional requirement for a successful referendum in an existing state prior to the creation of a new state from its territory, state parliaments are ultimately accountable to their constituents at the ballot box, and are unlikely to endorse the creation of a new state unless there is clear evidence that the move has broad popular support. Holding a referendum is the most obvious way of determining this. However, a referendum can be problematic. As the New England referendum of 1967 shows, extending the referendum over an area that exceeds the heartland of the popular movement can lead to defeat. Conversely, it is questionable whether New England, or similar rural regions, would be self-supporting if industrial and metropolitan centres were excluded from the proposed new state.

The difficulties in creating new states from existing states reflects a disjunction between the views of the framers of the Constitution in the 1890s, and the views of Australian politicians and electors after Federation. While ch VI of the Constitution was drafted on the assumption that the creation of new states was appropriate and likely, since Federation this view has not been as widely held. Contrary to the expectations of its framers, the Australian Federation is often perceived to be fixed and unchanging.

The Constitution should be amended so that popular support for the creation of a new state from an existing state, manifested in referenda, provides an additional means of forming a new state. This amendment would circumvent the problem of political will at the state level that can make s 124 unusable. In light of the practical challenges that have emerged, such a change would better reflect the framers’ intentions by allowing for the creation of new states when the view that a new state is appropriate is held by the public, if not by state parliaments.

In the short term, the prospect of a popular movement garnering sufficient support for the creation of a new state from an existing state is remote. Contemporary calls for new states by politicians are not comparable to the strong grassroots movements of the 20th century that generated substantial public support and collectively gave rise to three royal commissions and a referendum, and were still unsuccessful.

Yet, there is evidence that interest in new states is increasing. The level of support for new states recorded in the 2014 Australian Constitutional Values
Survey was low, but still at its highest since the survey commenced in 2008,²⁰⁶ perhaps reflecting public statements made in favour of the idea. In the longer term, levels of support for new states may increase substantially. The history of attempts to create new states indicates that rural discontent arising from changes such as the cutting of transport services, the centralisation of other services and economic decline can precipitate grassroots support for change. Amending the Constitution to provide an additional path to creating new states could also act as a catalyst for new or reinvigorated popular movements of this kind.

²⁰⁶ Brown, above n 203, 15. More states were considered a major preference for Australia’s system of government in 20 years by 7.8% of respondents in 2014, 5.4% in 2012, 5.7% in 2010 and 6% in 2008.