BALANCE

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State of Mind

...one indissoluble Federal Commonwealth... under the Constitution hereby established...

Matthew Storey,
Law Society President

Many of you will have seen the Statehood Steering Committee's "State 7" campaign recently broadcast on the television and other media. The campaign is primarily aimed at advertising a series of forums held across the Territory. The forums are intended to present information on Statehood for the Territory and discuss participant's views on the form and content of a state constitution for the Territory. The forums are a lead up to a Constitutional Convention planned to be held in 2011. 2011 is of course the centenary of the Territory ceasing to be a Territory of South Australia and becoming a Territory of the Commonwealth pursuant to s 122 of *The Constitution*. I have an involvement in the process through my membership of the Statehood Steering Committee.

A number of the colleagues that I work with have described the State 7 campaign as, frankly, quixotic. There are two main reasons suggested for this view. The first is that the instability within the Legislative Assembly last year is a clear indication of the lack of political maturity within the Territory and this lack of political maturity indicates that the Territory is not ready for Statehood. The second reason put forward by my colleagues is the attitude of the Commonwealth Government. In this column I want to consider particularly this last point. First though I should deal with the "political maturity" issue.

The resignation of a Government MLA in 2009 to sit as an independent, coinciding with the decision of a another MLA who had previously resigned from the Government to rejoin that Government followed shortly by the decision of an Independent MLA to enter into a "parliamentary agreement" to support the Government and thus ensure Government's ability to deliver supply was certainly an exciting time for parliament watchers. Did it though indicate a lack of political maturity? To me it did not.

Outside of the Territory there are two recent examples to support my view. In Tasmania it appears we are about to witness the (to me) extraordinary situation where the Liberal/National coalition will enter into a further Coalition with the Greens in order to form government in that state. There is no suggestion that this possible green–conservative coalition indicates a lack of political maturity. Indeed many would suggest that the fact that two apparently ideologically opposed political groups could combine in the interests of the "peace, order and good government" of their state indicated the contrary. In the Commonwealth Parliament the current composition of the Senate (as Commonwealth Ministers will tell one on almost a nightly basis) means that the Commonwealth Government is unable to pass its legislative program without the support of either the opposition and/or a diverse range of independents and minor parties. Again this situation is not suggested as an indication of a lack of political maturity but rather "condition normal" in one of the most stable democracies in modern history.

Despite these examples, last year's goings on in the Legislative Assembly would be of great concern if in fact they indicated that one of the Territory's two major parties lacked internal cohesion such that even if in Government it could not effectively govern. Again I don't think they do. Both major parties have demonstrated an ability to deliver effective government over extensive periods of years. The fact that some MLAs may use the situation of a finely balanced government to attempt to wrest the greatest advantage for advancing particular constituent or policy issues does not indicate a lack of political maturity; just ask Senator Xenophon, or before him Senator Harradine. In fact there is a certain irony here. Commonwealth politicians are frequently criticised for not being sufficiently responsive to their electorates (states in the case of senators) but rather bowing to the dictates of party discipline. It is perhaps then unjust that where a politician sees the potential in a particular political juncture to advance constituent concerns, the allegation of immaturity is put. It's not immaturity; its politics, whether it is played out in or out of the party room. Politics of this nature is played out not just in the Territory but also the states and at the Commonwealth level, and has been for over a century in this country. There is nothing in this issue that

should militate against the Territory achieving statehood.

However, the issue of political maturity was not the major point I wanted to discuss. Rather, I want to focus on the attitude of the Commonwealth to Australian federalism generally and how this may affect the Territory's statehood ambitions.

After Prime Minister Rudd won the last federal election he stated in his 24 November 2007 victory speech:

> *"I want to put aside the old battles of the past… the old and tired battles between federal and state… it's time for a new page to be written in our nation's history."*

Of course it is the winners that write history and the Prime Minister was speaking from the perspective of the leader of a Commonwealth that had enjoyed years of successes in the High Court culminating in the *Workplace Relations Case* (*NSW v The Commonwealth* [2006] HCA 52). Mr Rudd's version of cooperative federalism appears to employ two main vehicles. The first is what seems to be known as National Partnership Agreements. Essentially, these are funding agreements where a state will agree to implement Commonwealth policy in a range of policy areas, and the Commonwealth will agree to pay the state to do it. There is nothing particularly new about this approach. Commonwealth governments have been using "tied funding" to implement policy using state governments as their operational agent since at least the Whitlam Government. Of course the branding of this approach has changed. "National Partnership Agreement" sounds much better than "s 96 grant".

The second vehicle in common use by the Commonwealth Government is the COAG (Council of Australian Governments) legislative reform process. Using this process the Commonwealth has convinced the states to agree to national uniform legislation in a vast range of areas including: National Consumer Credit legislation, Trade Measurement, Business Names, National Personal Property Securities Register and National Consumer Law (to replace the local CAFTA). Of course the COAG process can't of itself amend the Constitution. The Commonwealth can still only legislate in areas where it has constitutional power to do so. However, a century of jurisprudence from the High Court means that this is quite an expansive playing field. Other techniques can be employed as well. The proposed model for legislation arising from the National Legal Profession Reform project is for one state to pass the substantive legislation and the other jurisdictions to pass legislation applying that Act locally. The mechanism has been successfully used many times.

The foregoing is not to completely condemn the Commonwealth's projects. There are many areas where greater national uniformity and coordination is a desirable objective. I was interested to learn recently that it was only in exceptional circumstances that an ambulance from NSW could cross the Murray River to collect a patient from Victoria and take them to the nearest hospital. Access to dialysis services in Central Australia seems to involve similar cross-jurisdictional conundrums. Similarly, the Northern Territory Law Society has supported those aspects of the National Legal Profession Reform project that result in a reduction of duplication of regulation and facilitate national legal practice; but not where such moves lead to an increase in costs or a reduction of service to Territory lawyers and their clients.

However, while the current directions in Commonwealth-State relation makes interesting stuff for political discussion, does it impact upon the Territory's statehood ambitions? In my view it doesn't. While the rise of a centralist Commonwealth Government may lead to the diminishment of the independent power of the states, only the most extreme centralist would suggest the total abolition of states; former Chief Minister, Paul Everingham, is apparently one of these. The Territory participates in COAG and enters into National Partnership Agreements as do the states. The Territory's status as s 121 "New State" or s 122 "Territory" is really irrelevant to the development of Commonwealth-State relations.

There is though one further

matter relating to Commonwealth "attitude" that may affect statehood. This matter is illustrated by both the *Northern Territory National Emergency Response Act 2007* (Cth) and the *Nuclear Waste Transport, Storage and Disposal (Prohibition) Act 2005* (Cth). Both these pieces of legislation had two distinct constitutional foundations. Clearly one of these is the Commonwealth's s 122 power. However, the *Emergency Response Act* is also clearly supported by s 51 (xxvi) (the "Race Power"). Similarly, the *Nuclear Waste Dump* legislation is supported by the combination of heads of power which support Commonwealth regulation of nuclear activities elsewhere in the country (e.g. the *Australian Nuclear Science and Technology Organisation Act 1987* – which authorises ANSTO to operate a nuclear waste facility anywhere in the country). The decision in *South Australia v Slipper* [2004] FCAFC 164] which dealt with the "best science" location of a nuclear waste dump in South Australia did not turn on any constitutional incompetence on the part of the Commonwealth but on technical adherence to the requirements of the *Lands Acquisition Act 1989* (Cth.). The point to be noted is that from a constitutional perspective "territory status" was not a basis for either the Indigenous Policy Intervention or the Waste Dump proposal.

What then motivated the Commonwealth to single out the Territory in relation to the Intervention when Indigenous communities in Western Australia and Queensland suffer the same deplorable living conditions and social indicators? Similarly, why was the Territory singled out for the Nuclear Waste Dump when (as *SA v Slipper* shows) the science points towards SA? To me the short answer is politics; but it has two dimensions.

The first is simply arithmetic. There are two senators from the Territory and politically they will always balance each other out. The ALP will always hold Lingiarri no matter what it or the Coalition does. Thus even the most brutish behaviour by the Commonwealth will only ever have an impact on one seat. Statehood will not necessarily alter this arithmetic. There will be no change to representation in the House of Representatives and the number of "new state" Territory senators is a matter at the discretion of the Commonwealth under the "terms and conditions" of any s 121 legislation.

The second dimension is perhaps more significant. The second political dimension is that the Commonwealth can justify its actions in the Territory because it *is* a territory. Politically it is more acceptable for the Commonwealth to intervene in a Commonwealth Territory than it is for it to intervene in a state. Revelations of serious deficiencies in the Child Protection regime in Victoria were seen as matter for resolution within the political processes of that state, not a basis for Commonwealth intervention (or even a National Partnership Agreement). It is at this level that Statehood can make a difference. It is also of course why the Commonwealth may be reluctant to engage with the idea. A territory where intervention involves little (arithmetic) political cost and appears constitutionally defensible can be very useful. It provides a place for a nuclear waste dump that none of the states want and creates a vehicle to be seen to be *doing something* in the lead up to tight elections.

Achieving statehood may do little more than ensuring the new state Territory can stand as an equal partner against the "imperial march" of cooperative federalism and a new state Territory will remain the smallest and easiest to target of those states. It would though mean that when the Commonwealth did its political arithmetic prior to taking an interventionist action it, and the other states, would have to accept that the proposed action was a further erosion of constitutional federalism. To that extent statehood may be nothing more than a state of mind, but then again so is the rule of law.

One last point; on my last count there were nine governments in Australia (ten including Norfolk Island). The Executive power of the Commonwealth is surely exercised by the Commonwealth Government. I refuse to use the term "Australian Government" when referring to the Commonwealth Government and I would urge you to do the same.