

# NORTH QUEENSLAND A NEW STATE? HOW THE VOICE OF THE COLLECTIVE CAN BE HEARD!

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## I INTRODUCTION

There has been no new State created in Australia since federation, despite a number of attempts to do so. Formal attempts include the referendum for a new state of New England in New South Wales in 1967 and the referendum in the Northern Territory in 1998. In Queensland, there were a number of attempts prior to federation for north Queensland to be a separate colony, and in the post-federation period there have been no less than four calls in the Queensland Parliament for a process to be initiated to separate the north from the south. Despite the parliamentary initiatives and repeated calls by people in the north for a referendum to be held, no choice has ever been given to the people of the north by the Queensland government.

Given the repeated refusal by the Queensland government to give the people in the north their choice, the question becomes whether there is an alternate way for the north to have its say on the question. This paper argues that an alternative way is for (i) a plebiscite to be conducted by the Australian Electoral Commission; or (ii) a survey to be conducted by the Australian Bureau of Statistics in the form considered by the High Court in *Wilkie v The Commonwealth; Australian Marriage Equality Ltd v Cormann* ('*Wilkie*').<sup>1</sup>

Before reviewing the plebiscite option and the decision in *Wilkie*, the paper discusses the recent e-petitions in Queensland for a referendum on separation to be held and the respective responses by Queensland Premiers.

## II REFERENDUM PETITIONS FOR NORTH QUEENSLAND TO SEPARATE AS A NEW STATE

There have been a number of unsuccessful parliamentary appeals in either the Queensland or the Australian Federal Parliament for north Queensland to separate.<sup>2</sup> In more recent years, agitation for separation has also taken the form of citizen-initiated Parliamentary e-petitions.

On 8 July 2013, an e-petition was lodged with the Queensland Parliament in the following terms:

Queensland Citizens draws to the attention of the House the desire of the people of North Queensland to be recognised as a separate and distinct community with its own regional character and identity.

Your petitioners, therefore, request the House to: conduct a referendum at the next State election regarding the formation of a North Queensland State with the question to be asked of the people being as follows: "Should North Queensland become a separate State?"<sup>3</sup>

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<sup>1</sup>[2017] HCA 40.

<sup>2</sup> See Peter Raffles, 'The Formation of a New North Queensland State: The Constitutional Issues and Procedural Pathway' (2016-2017) 22 *James Cook University Law Review* 41.

<sup>3</sup> Queensland Parliament, E-petition no. 3137-13 < <https://www.parliament.qld.gov.au/work-of-assembly/petitions/closed-e-petitions>>

On 12 March 2014, the Acting Premier of Queensland, Jeff Seeney, wrote to the Clerk of the Parliament stating that the Government did not support the holding of a referendum:

We would lose part of our identity and our combined strength by splitting this great state and, as a Government for all of Queensland, we will continue to work every day to deliver better government for the whole of the State.<sup>4</sup>

In 2017 another e-petition in the Queensland Parliament titled ‘Formation of a new state from part of the territory of the State of Queensland’ was lodged. After setting out relevant background, the petition requested:

[T]he House to make the immediate provisions to initiate a State Referendum to allow the people of Queensland living north of the Latitude 26.00 South to vote on the creation of a new North Eastern State of Australia.<sup>5</sup>

This petition was tabled in the Queensland Parliament on 15 February 2018. On 15 March 2018, in responding to the Petition, Premier Anastacia Palaszczuk, wrote to the Clerk of the Parliament, saying:

As all Queensland communities benefit from a strong, unified state, the Queensland Government is focused on uniting our State, not dividing it. Therefore, the Queensland Government does not support any proposal to split Queensland into separate states.<sup>6</sup>

The response from Premier Palaszczuk to this e-petition raises a point of interest for the people of north Queensland and their ability to choose to become a new State in the federation: to wit, the petition requested a ‘referendum’ for the people to ‘vote’ on the creation of a new State. The Premier’s response, however, made no reference to a referendum or to people having a vote. Instead, the response was framed as a refusal to support a ‘proposal to split Queensland into separate states’. Simply put, there is a clear disjunct between what was requested and the Premier’s response – namely, Bates’ petition was not to split the state; it was a petition about choice.

### III VOTE OF THE PEOPLE — REFERENDUM OR PLEBISCITE?

Before examining the option on how the people’s choice might occur, it is first relevant to reflect on what is required for the creation of a new State by separation of territory from an existing State.

The Australian Constitution, Chapter VI — New States, includes four sections dealing with the creation of new states in the Australian federation. In respect to the creation of a new state from the partitioning of territory from an existing state, s 124 relevantly provides: ‘A new State may be formed by separation of territory from a State, but only with the consent of the Parliament thereof ...’<sup>7</sup>

It has been argued that, based on the reasoning in *Paterson v. O’Brien*,<sup>8</sup> s 124 is a ‘separate and substantive source of power to initiate the formation of a new State from an area within an existing State’, and, accordingly, that it is a matter for the Parliament of an existing State and no referendum under either s 123 or s 128 is required.<sup>9</sup>

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<sup>4</sup><<https://www.parliament.qld.gov.au/apps/Epetitions/responses/2137-13.pdf>>.

<sup>5</sup><<https://www.parliament.qld.gov.au/work-of-assembly/petitions/petition-details?id=2773>>.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Australian Constitution*, s 124.

<sup>8</sup> (1978) 138 CLR 276.

<sup>9</sup> Raffles, above n 2, 47.

Since there is no requirement for a referendum where a new State is to be created by a separation of territory from an existing State under the Commonwealth Constitution, the question arises whether a referendum is required under the State Constitution. Relevantly, there is no provision in the Queensland constitution for separation of part of the State to become a new State. Moreover, there are only six provisions in the State Constitution that cannot be changed without a referendum, and none of those provisions relate to the separation of territory to become another State.<sup>10</sup>

Without a constitutional requirement for people to vote on separation where does the authority to hold a referendum lie? The experience of the referendum in NSW in 1967 for the new State of New England is instructive. In that case, a referendum was conducted pursuant to the *New State Referendum Act 1966* (NSW). The commissioning of the referendum, however, was not compelled by any overarching constitutional or legislative requirement. It was held as a matter of prerogative of the then Government and held only for the people in the area proposed to be separated.

The unlikelihood of a government in Queensland exercising its prerogative to hold a referendum of the people of north Queensland has been illustrated, and is compounded by the diluted doctrine of responsible government applying in the single house Queensland Parliament.

Against the above background the question becomes: is there another way for the voice of the people to be heard?

In considering this problem, it is germane to consider the difference between a referendum and a plebiscite. Relevantly, s 128 of the *Commonwealth Constitution* provides that any proposed amendment can only be made with the approval of Australian voters.<sup>11</sup> Any proposed alteration must therefore be put to the vote at a referendum. Commonwealth referenda are conducted pursuant to the *Referendum (Machinery Provisions) Act 1984* (Cth). Under this legislation voting in a referendum is compulsory, and the voter must answer the question on the ballot paper with either a 'Yes' or 'No' answer.<sup>12</sup> In Queensland, referenda on State issues are conducted pursuant to the *Referendums Act 1997* (Qld), and voting is compulsory and voters must vote 'Yes' or 'No'.<sup>13</sup>

Unlike referenda, plebiscites are not compulsory and governments can hold plebiscites to test whether people either support or oppose a proposed action on an issue. Importantly, the government holding the plebiscite is not bound by the result, as is the case with a referendum. Historically, both federal and state governments have held plebiscites on various issues.

In terms of conducting a plebiscite, the Australian Electoral Commission notes the following:

Under s 7A of the Electoral Act, the AEC can conduct a plebiscite as a fee-for-service election, with the AEC entering into 'an agreement, on behalf of the Commonwealth, for the supply of goods or services to a person or body'. The rules for a plebiscite or fee-for-

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<sup>10</sup> See s 53 *Constitution Act 1867* (Qld).

<sup>11</sup> The *Australian Constitution* as promulgated under s 9 of the *Commonwealth of Australia Constitution Act 1900* (Imp).

<sup>12</sup> See ss 45 and 24 respectively of the *Referendum (Machinery Provisions) Act 1984* (Cth).

<sup>13</sup> See ss 75 and 33 respectively of the *Referendums Act 1997* (Qld).

service election are normally contained in the terms of the agreement between the AEC and the person funding the election.<sup>14</sup>

The AEC also notes that it has conducted plebiscites on a number of occasions, including, nationally, for military conscription in 1916-17, and for the Queensland Government in 2007 for the amalgamation of Councils.<sup>15</sup>

Another example of an alternative to a referendum was recently observed in the conduct of a survey by the Australian Bureau of Statistics — namely, the Australian Marriage Law Postal Survey (the Survey) conducted between the 12 September and 7 November 2017.<sup>16</sup> In the 2016 election campaign, the Liberal-National Party coalition committed to holding a plebiscite on same-sex marriage. Following the election, on 14 September 2016, the Plebiscite (Same-sex) Marriage Bill 2016 (Cth) was introduced onto the House of Representatives by the then Prime Minister, Malcolm Turnbull. Whilst the Bill was passed in the House of Representative, it was ‘defeated at the second reading stage in the Senate on 7 November 2016’.<sup>17</sup> Following that defeat, in August 2017 the Government directed the Australian Bureau of Statistics (ABS) survey of ‘all Australians on the electoral roll as to their views on whether or not the law in relation to same-sex marriage should be changed to allow same-sex couples to marry’.<sup>18</sup>

Interestingly, the validity of the survey conducted by the ABS was challenged in *Wilkie*.<sup>19</sup> A number of observations by the High Court in that case are possibly relevant to a ‘survey’ that might be undertaken in north Queensland to ascertain support for a new State.

In challenging the validity of the survey in *Wilkie*, the plaintiffs argued that the Statistics Direction made by the Minister exceeded the power granted to the Minister under s 9(1)(b) of the *Census and Statistics Act 1905* (Cth) (the ‘*Statistics Act*’).

Relevantly, s 9 of the *Statistics Act* provided:

Statistical information to be collected

(1) The Statistician:

- (a) may from time to time collect such statistical information in relation to the matters prescribed for the purposes of this section as he or she considers appropriate; and
- (b) shall, if the Minister so directs by notice in writing, collect such statistical information in relation to the matters so prescribed as is specified in the notice. ...

The High Court’s reasoning in refusing the challenge to the survey is edifying:

[I]t was said that the information to be collected did not truly answer the statutory description of statistical information. Next, it was said that the information to be collected was not truly ‘in relation to’ specified matters prescribed in specified items in the table in s 13 of the *Statistics Regulation*. Lastly, it was said that the power to direct the Australian Statistician to collect such statistical information in relation to prescribed matters as is

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<sup>14</sup> Australian Electoral Commission, *What are Referendums and Plebiscites* <<https://www.aec.gov.au/Elections/referendums/types.htm>>.

<sup>15</sup> *Ibid.*

<sup>16</sup> <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/1800.0>>

<sup>17</sup> Deidre McKeown, *Chronology of same-sex marriage bills introduced into the federal parliament: a quick guide* (15 February 2018) Australian Parliament [https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1718/Quick\\_Guides/SSMarriageBills](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1718/Quick_Guides/SSMarriageBills).

<sup>18</sup> *Ibid.*

<sup>19</sup> [2017] HCA 40.

specified in a notice did not permit the Treasurer to specify from whom the information was to be collected.

The first of those arguments itself had two quite distinct strands. One strand of the argument sought to draw a dichotomy between a ‘vote’ or a ‘plebiscite’, on the one hand, and the collection of ‘statistical information’, on the other. The dichotomy is false. The only legally relevant question is whether the Statistics Direction directed the collection of “statistical information”. What it directed might well also be described as a “vote” or a “plebiscite”. That, or any other, alternative characterisation is irrelevant to its validity.

The other strand of the first argument was refined in oral submissions to gossamer. That remaining strand sought to confine the reference to ‘statistical information’ in the Statistics Act so as to exclude information about personal opinion or belief. It was not put, nor could it realistically be put, that the exclusion was by reason of some limitation inherent in the term ‘statistics’ as understood in 1905, when the Statistics Act was enacted, or as understood now.

...

As to the remaining argument concerning the validity of the Statistics Direction, it is sufficient to state that there is nothing in the subject-matter, scope or purpose of the Treasurer’s power of direction under s 9(1)(b) of the Statistics Act to exclude specification of a target population.<sup>20</sup>

In light of the High Court’s reasoning in *Wilkie*, it is strongly arguable that it would be within power of the Minister to give a direction to the ABS to conduct a survey, in the form of a vote, in a federal electorate seat, or a number of seats, in north Queensland on registered voters’ preference for north Queensland to be a separate State.

In which federal electorates should the survey be held? Gussen has discussed the historical evolution of the Australian Federation, the desirability of new States and the difficulties of establishing boundaries of the same — including some of the historical arguments surrounding the southern border of a possible new north Queensland state.<sup>21</sup> Relevantly, the Australian Government’s White Paper on developing Northern Australia depicts the Tropic of Capricorn as a divide between north and south.<sup>22</sup> In Queensland, if that depiction was accepted for the purposes of a new State Survey, then five federal electoral seats would be identified: Leichardt, Kennedy, Herbert, Dawson and Capricornia.

#### IV CONCLUSION

The history of petitions in north Queensland for separation as a new State began before federation and has continued into the 20<sup>th</sup> and 21<sup>st</sup> centuries. Despite all those petitions the one hurdle that has proved insuperable is the granting of a referendum to the people of the north by the Queensland government. This paper proposes two alternative pathways: (a) a voluntary plebiscite to be conducted by the AEC on a fee-for-service basis; or (b) a survey to be conducted by the ABS in an area determined by the relevant Minister. Should that vote result in a majority of electors entitled to vote saying ‘Yes’ to the separation, that would not mandate that separation would occur. However,

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<sup>20</sup> Ibid [141] to [148].

<sup>21</sup> Benjamin Franklen Gussen, ‘On the Territorial Evolution of the Australian Federation in the 21<sup>st</sup> Century’ (2016-2017) 22 *James Cook University Law Review* 15.

<sup>22</sup> Australian Government, *Northern Australia: Emerging Opportunities in an Advanced Economy* (2015) <<https://www.industry.gov.au/sites/g/files/net3906/f/June%202018/document/pdf/nawp-fullreport.pdf>>.

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politically, it would be a difficult proposition for any subsequent Queensland government to ignore.