



RESEARCH NOTE

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Territory Representation in the Commonwealth Parliament

The six States federating in 1901 comprised the entire continent of Australia and the island of Tasmania. The Northern Territory and the Australian Capital Territory were detached from their States after federation. Their existence and political representation was contemplated by section 122 of the Constitution, which empowers the Commonwealth to allow the representation of any territory in either House of the Parliament 'to the extent and on the terms which it thinks fit'.

The Northern Territory, originally part of New South Wales, was annexed to South Australia by Letters Patent in 1863. In April 1901, because of the heavy financial costs, South Australia offered the Northern Territory to the new Commonwealth government. On 1 January 1911 the Northern Territory was formally transferred to the Commonwealth under the *Northern Territory Acceptance Act 1910*.

The Australian Capital Territory was created as a result of the disagreement between the colonies of New South Wales and Victoria about which city should become the national capital. Colonial rivalries were intense. New South Wales would not agree to federation unless the capital was located within its borders. Victoria stipulated that it must not be within 100 miles of Sydney. The compromise finally adopted is set out in section 125 of the *Constitution*, which states:

The seat of Government of the Commonwealth shall be determined by the Parliament, and shall be within Territory which shall have been granted to or acquired by the Commonwealth, and shall be vested in and belong to the Commonwealth, and shall be in the State of New South Wales, and shall be distant not less than 100 miles from Sydney.

After the site of Canberra was chosen, the Australian Capital Territory was transferred from New South Wales to the Commonwealth on 1 January 1911 by the *Seat of Government Acceptance Act 1909*.

As a result of these transfers, residents of both territories lost all political representation. They had none in the Commonwealth Parliament, and neither was there any form of 'state' or local government. Under section 127 of the Constitution (repealed by the 1967 referendum), aboriginal natives were not counted as people of the Commonwealth, State or part of the Commonwealth and the *Franchise Act 1902* excluded them from voting. The white population of the Territories was very small—less than 4000 people—and legal opinion was that it could not be included in a State electorate. The racially based exclusions from the franchise combined with political circumstances and geographical accident combined to deprive Australians living in the territories of their political rights. Territory residents additionally lacked any vote in constitutional referenda until this was granted by a referendum in 1977. Their votes count only to the overall majority.

House of Representatives

The Northern Territory was first granted a member of the House of Representatives by the *Northern Territory Representation Act 1922*. The parliamentary rights of the Northern Territory member were severely restricted: the member was prohibited from voting on any question, was excluded from being counted in any situation where numbers mattered, such as a quorum or an absolute majority, and could not hold the office of Speaker or Chairman of Committees. These arrangements were partly based on the model of limited representation adopted by the USA for its territories of Hawaii and Alaska. In 1936 the member was permitted to vote on the question of the disallowance of any ordinance of the Northern Territory. In 1959 the voting right was extended to any issue relating solely to the Northern Territory. Full voting rights

were finally bestowed by the *Northern Territory Representation Act 1968*.

The Australian Capital Territory was granted a Member by the *Australian Capital Territory Representation Act 1948*. As with the Northern Territory, voting and other rights were circumscribed. In 1959 the ACT MP achieved the right to vote on all issues relating solely to the ACT (the *Australian Capital Territory Representation Act 1959*). With the enactment of the *Australian Capital Territory Representation Act 1966*, all disabilities were removed and full voting rights in Parliament were achieved.

The ACT gained a second seat in 1974, and a third seat at the 1996 election, which was abolished before the 1998 election because of a fall in population. In the 2000 redistribution the Northern Territory gained its second seat.

The number of Territory members is now determined in the same way as for the States, according to population, the establishment of a quota, with an additional member resulting from more than half a quota. All legislative provisions relating to territorial representation are now contained in the *Commonwealth Electoral Act 1918*. Section 48(2B) specifies that the Australian Capital Territory and the Northern Territory shall each have at least one MP. A by-election is held to fill any vacancy.

Senate Representation

Senate representation for the Australian Capital Territory and the Northern Territory was enacted by the *Senate (Representation of Territories) Act 1973* as part of Whitlam ALP Government's electoral reform measures. The bill was one of the six which formed the basis for the 1974 double dissolution. After the re-election of the Whitlam Government a joint sitting of the House of Representatives and the Senate was held in August 1974, which passed all the double dissolution bills. On

10 October 1975 the High Court upheld the validity of the legislation.¹ Territory Senators were first elected at the 1975 election. The Act was again unsuccessfully challenged in 1977.²

The legislation provided that the Northern Territory and the Australian Capital Territory should be each represented by two Senators directly chosen by the people of each Territory voting as one electorate. These senators have all the powers, privileges and immunities of the senators for the States, are included in ascertaining the numbers of the Senate necessary to constitute meetings of the Senate and for constituting a quorum, and have a vote on all questions arising in the Senate.

The number of Senate representatives for each Territory was set at two on the basis that the quota required for election would result in the major parties (i.e. the Liberal/Country Party or the ALP) winning one seat each. Thus the political composition of the Senate would not normally be affected by the creation of Territory Senators, and neither side could gain an advantage. The length of term was fixed to the election cycle of the House of Representatives. Since 1975 the ACT has been represented by one Liberal and one ALP Senator, and the Northern Territory by one Country Liberal Party and one ALP Senator.

The *Representation Act 1973*, another 1974 double dissolution bill, ensured that the basis of representation remains 'the people of the States' only. In order to preserve the federal compact set up by the Constitution, neither the populations of the Territories, nor the Territory Senators, may be counted in the complex formula of section 24 of the Constitution determining the representational entitlements of the six States in the House of Representatives.

In 1990 the *Commonwealth Electoral Act 1918* was amended to provide for the possibility of increased Senate representation. Once a Territory

representation entitlement in the House of Representatives reaches six seats, it would be entitled to one Senator for every two MHRs.

Casual vacancies in Territory Senate representation were originally filled by direct election, but the procedure was subsequently changed. Any vacancy is now filled by the Legislative Assembly of the Territory. Should the vacancy occur while the Assembly is not sitting, it is filled temporarily by the Chief Minister until the Assembly meets again. Vacancies must be filled by a member of the same party, (in line with section 15 of the Constitution dealing with casual Senate vacancies from the States).

General issues

The Northern Territory has had self-government since 1978,³ and the ACT since 1989.⁴ In 1998 the Governments of the Northern Territory and the Commonwealth put forward a proposal for the Territory to become Australia's seventh State by the year 2001. The Northern Territory voted against the proposition at a referendum held conjointly with the 1998 election on 3 October 1998.

The number of Senators any new state should have is problematical. There is no requirement that any new state should have the same Senate numbers as the original States: but neither is there any prohibition. Section 121 of the Constitution provides:

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 such representation in either House of the Parliament as it thinks fit.

Should the Northern Territory, with a population of less than 200 000, or two thirds of that of the ACT, gain more than two Senators by virtue of statehood, this would add substantially to the representational inequality and distortion caused by the equal representation of the States in the Senate. There has generally been a parity in territorial representation and

an avoidance of establishing any political advantage.

Moreover, the loss of the third ACT seat, and the addition of a second Northern Territory seat has caused a considerable disparity between the number of voters per seat in the two Territories, which is also the case with enrolments in the States. The average divisional enrolments calculated on 31 July 2000 were: New South Wales 83 836, Victoria 85 277, Queensland 82 957, WA 83 571, SA 85 953, Tasmania 64 976, ACT 107 876, and Northern Territory 107 111 (the quota for the two seats is 54 989). As ACT seats now contain far more voters than seats in the rest of Australia, ACT votes count for much less.

Hon. Bob McMullan, MP for Fraser, ACT, recently raised the possibility of a future ALP government giving the ACT a guaranteed number of seats, pointing out that section 24 of the Constitution guarantees Tasmania, as an original State, a minimum of five seats in the House of Representatives. This is the major and continued reason for disparities in enrolments. If there were to be another instance of a guaranteed number of seats, care would be needed to ensure a linkage to population, so as not to cause a significant departure from principles of representational equality.

Margaret Healy Politics and Public Administration Group Information and Research Services

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1. *Western Australia v. Commonwealth* (1975) 134 CLR 201.
2. *Queensland v. Commonwealth*, (1977) 139 CLR 585.
3. *Northern Territory (Self-Government) Act 1978*.
4. *Australian Capital Territory (Self-Government) Act 1988*.