

Territory Representation in the Commonwealth Parliament

- 2.1 When the colonies of Australia were federated in 1901, six Australian States were created. The provisions governing the representation of these original States in the Commonwealth Parliament are set out in parts II and III of the Constitution. Representation of the Territories is governed by section 122 of the Constitution.

The House of Representatives

- 2.2 Section 24 of the Constitution provides for the composition of the lower house of Parliament. It states that:

The House of Representatives shall be composed of Members directly chosen by the people of the Commonwealth, and the number of such Members shall be, as nearly as practicable, twice the number of the Senators.

The number of Members chosen in the several States shall be in proportion to the respective numbers of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner:-

- (i) A quota shall be ascertained by dividing the number of the people of the Commonwealth, by twice the number of the Senators.

(ii) The number of Members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more Member shall be chosen in the State.

But notwithstanding anything in this section, five Members at least shall be chosen in each Original State.

2.3 Paragraphs (i) and (ii) of section 24 prescribe the formula for determining State representation entitlements in the House of Representatives. This is discussed more fully in chapter three.

2.4 In 1975 the High Court, in the case of *McKinlay v Commonwealth (1975)*, considered the question of whether:

the relevant electoral provisions of the Constitution (Cth), more especially s.24 thereof, required that ... electoral districts should comprise equal or practically equal numbers of people or of electors.¹

2.5 The High Court held that section 24 of the Constitution does not guarantee that each House of Representatives division comprise an equal or practically equal number of electors or people:

The relevant provisions of the Constitution, in particular the provisions of s. 24 thereof, do not, upon their true construction, compel the conclusion that the electoral divisions... should comprise an equal number of people or an equal number of electors, or that there should be at least practical equality in the numbers of people or of electors comprised in electoral divisions so constituted, nor (per Barwick C.J.) do these provisions contain, as it were, a guarantee of equality in the voting value or weight of each vote cast in an election for the House of Representatives.²

2.6 The Constitutional guarantee of five Members for each original State qualifies the provision that State entitlements in the House of

1 Attorney-General for Australia (at the Relation of Brian John McKinlay) v. the Commonwealth of Australia and Another, the State of South Australia and Others v. the Commonwealth of Australia and Others, *Lawlor v. the Commonwealth of Australia and Another*, *Australian Law Journal Reports*, 1976, vol 50, p 279.

2 *Australian Law Journal Reports*, 1976, vol 50, p 280.

Representatives be proportional to the populations of the States. According to Quick and Garran³:

With fifty thousand as the quota, Tasmania and Western Australia would be entitled to only two or three members each in the National Chamber. This was considered such an insignificant representation that provision was made that there should be a minimum of five members in each State.

2.7 Western Australia (WA) was entitled to five Members of the House of Representatives as a result of the Constitutional guarantee until 1933. Since then its population has entitled it to at least five Members (currently its population entitles it to 15 Members). On the other hand, Tasmania has depended on the Constitutional guarantee for its five Members continuously since federation. Currently Tasmania's population would entitle it to four Members.

2.8 The number of seats in the House of Representatives is tied to that of the Senate through the provision that the number of lower house Members be, as nearly as practicable, twice the number of Senators. This provision was included in the Constitution to prevent disproportionate increases in the membership of the House of Representatives and to preserve the functions and powers of both Houses of Parliament. According to Quick and Garran⁴ the words "as nearly as practicable" are intended to:

provide for the slight variation that may be caused by the provision for the minimum representation of a State, and also by the provision for representing fractions of a quota.

2.9 In the 40th Parliament, there are 150 Members of the House of Representatives.

The Senate

2.10 The original States are each guaranteed a minimum of six Senators under section 7 of the Constitution. This section states that:

3 Quick, J and Garran, R (1976), *The Annotated Constitution of the Australian Commonwealth*, p 455.

4 Quick, J and Garran, R (1976), *The Annotated Constitution of the Australian Commonwealth*, p 450.

The Senate shall be composed of Senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate...

Until the Parliament otherwise provides there shall be six Senators for each Original State. The Parliament may make laws increasing or diminishing the number of Senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six Senators.

The Senators shall be chosen for a term of six years...

- 2.11 The Constitutional provisions governing the composition of the Senate are based largely on the Constitution of the United States which established a Senate composed of an equal number of representatives from each State. Guaranteeing the original States a minimum number of Senators each sought to alleviate the fears of the smaller colonies at the time – Tasmania, Queensland, SA and WA – that the Parliament would be dominated, to their detriment, by the more populous and wealthy colonies of New South Wales (NSW) and Victoria.⁵
- 2.12 Currently, each State elects 12 Senators.⁶

The Territories

- 2.13 Section 122 of the Constitution allows for the creation of Territories and for their representation in Parliament. Section 122 states that:
- The Parliament may make laws for the government of any Territory surrendered by any State to and accepted by the Commonwealth, or of any Territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such Territory in either House of the Parliament to the extent and on the terms which it thinks fit.
- 2.14 At the time of federation, the NT was a Territory annexed to SA. In April 1901, SA offered the NT to the new Commonwealth. The Territory was formally transferred to the Commonwealth on 1 January 1911 through the *Northern Territory Acceptance Act 1910*.

5 *The Origins of the Senate*, Senate Brief No. 9, March 1998. Parliament of Australia.

6 *Representation Act 1983*

- 2.15 The ACT was created to house the nation's capital city. Section 125 of the Constitution sets out the conditions governing the location of a Territory created for this purpose. The ACT was transferred from NSW to the Commonwealth on 1 January 1911 by the *Seat of Government Acceptance Act 1909*.

Legislative provisions governing the representation of the NT and the ACT in the Commonwealth Parliament

The House of Representatives

- 2.16 The NT was granted one Member of the House of Representatives in 1922 by the *Northern Territory Representation Act 1922*. The voting and participatory rights of this Member were restricted. The NT Member could not:
- vote on any question;
 - be counted in any situation where numbers mattered (eg, a quorum or absolute majority); or
 - hold office as Speaker of the House of Representatives or as a Chair of a House of Representatives committee.⁷
- 2.17 In 1936, the NT Member was granted the right to vote on any motion to disallow any NT ordinance, and on any amendment to such a motion. In 1959 the right to vote was extended to the right to vote on any question concerning a proposed law relating solely to the NT. Only in 1968 was the Member for the NT afforded the same rights, privileges and immunities as Members for the States.⁸
- 2.18 The ACT was granted representation by one Member in the House of Representatives by the *Australian Capital Territory Representation Act 1948*. This provided for the Member to exercise similar rights to those exercised by the Member for the NT at that time. In 1966, full voting rights were conferred on the Member for the ACT by the *Australian Capital Territory Representation Act 1966*.
- 2.19 In 1973, all legislation relating to the representation of the ACT in the House of Representatives was replaced by the *Australian Capital Territory (House of Representatives) Act 1973*, which provided for two Members with full voting rights. This Act was repealed in 1990 when

⁷ See section 5 of the *Northern Territory Representation Act 1922*.

⁸ See the *Northern Territory Representation Act 1936*; the *Northern Territory Representation Act 1959*; and the *Northern Territory Representation Act 1968*.

all provisions pertaining to the representation of the Territories in the Commonwealth Parliament were incorporated in the *Commonwealth Electoral Act 1918*.

- 2.20 Residents of the NT and the ACT could not participate in Constitutional referenda until the right to do so was achieved by a successful referendum to amend section 128 of the Constitution in 1977.

The Senate

- 2.21 The NT and the ACT were first granted Senate representation by the enactment of the *Senate (Representation of the Territories) Act 1973*. The Act provided that the NT and the ACT should each be represented by two Senators directly chosen by the people of the respective Territory voting as one electorate. This is the current entitlement of the Territories.⁹
- 2.22 Territory Senators have the same Parliamentary rights, privileges, and immunities as State Senators.¹⁰ Unlike State Senators, however, who are elected for six-year terms, Territory Senators are elected for a term concurrent with that of Members of the House of Representatives. Elections for all Territory Senators are held at the same time as each general election.¹¹
- 2.23 Under section 40 of the Electoral Act, the ACT and the NT are entitled to elect one Senator for every two House of Representatives Members when the number of House of Representatives Members to be chosen for that Territory reaches six or more.

High Court decisions concerning Territory representation

- 2.24 A number of cases brought before the High Court of Australia have considered the validity of legislation governing representation of the Territories in the Commonwealth Parliament.
- 2.25 The first “Territories case” - *Western Australia v Commonwealth (1975) 134 CLR 201* - challenged the validity of the *Senate (Representation of the Territories) Act 1973*. It was argued that the Act, which provided for the election of two Senators from the ACT and from the NT, was invalid on the grounds that section 7 of the Constitution states that

9 Sub-section 40(1), *Commonwealth Electoral Act 1918*.

10 Sub-section 41(1), *Commonwealth Electoral Act 1918*.

11 Section 43, *Commonwealth Electoral Act 1918*.

the Senate shall be composed of Senators from each State, thereby precluding the election of any Senators from the Territories.

- 2.26 The majority of the High Court held that section 7 of the Constitution does not restrict the wider power afforded to Parliament by section 122 to provide for the representation of the Territories “to the extent and on the terms which it thinks fit”, and that the Parliament is within its authority to grant the Territories Senate representation.
- 2.27 This decision was upheld in the second Territories case - *Queensland v Commonwealth (1977) 139 CLR 585* - which also challenged the validity of the *Senate (Representation of the Territories) Act 1973*, on the grounds that it was beyond the power of the Commonwealth Parliament to allow the ACT and the NT to be represented in the Senate by two Senators each.¹²
- 2.28 In *McKellar v Commonwealth (1977) 139 CLR 527*, sections of the *Representation Act 1905* that gave effect to the formula set out in section 24 of the Constitution for determining representation entitlements in the House of Representatives were challenged. It was argued that section 24 of the Constitution did not require:
- that the people of the Commonwealth should include only the people of the States, or
 - that the number of Senators should include only Senators chosen for the States.

Instead it was submitted that the people of the Commonwealth should include the people of the States and of the Territories, and that the number of Senators should include the Senators chosen for the States and for the Territories.¹³

- 2.29 The High Court confirmed the validity of excluding the people of the Territories and the Territory Senators from the formula set out in section 24 of the Constitution.
- 2.30 The High Court in these cases has confirmed the right of the Commonwealth to determine: the number of Senators and Members

12 *State of Queensland and Attorney-General of Queensland v. Commonwealth of Australia, State of Western Australia and Attorney-General of Western Australia v. Commonwealth of Australia, Australian Law Journal Reports, 1978, vol 52, p 100.* Also see Joint Select Committee on Electoral Reform, *Report No 1: Determining the Entitlements of Federal Territories and New States to Representation in the Commonwealth Parliament, November 1985, p 7.*

13 *Attorney-General (NSW) (at the Relation of Roderick Duncan McKellar) v. the Commonwealth of Australia and Others. Australian Law Journal Reports, 1977, vol 51, p 328.*

for the Territories; the method for electing or appointing Parliamentary representatives for the Territories; and the rights afforded to each Territory Senator and Member. It also confirmed that different sections of the Constitution apply to the representation of the States and Territories in the Commonwealth Parliament.

The Joint Select Committee on Electoral Reform

- 2.31 In 1985, a predecessor of this Committee, the Joint Select Committee on Electoral Reform (JSCER), examined whether a fixed formula should be established for determining the number of Senators and House of Representatives Members for the ACT and NT. In 1983, the *First Report* of the JSCER had noted that future governments might seek to abuse the discretion given to the Parliament to make laws governing the representation of the Territories.¹⁴
- 2.32 In its report, *Determining the Entitlement of Federal Territories and New States to Representation in the Commonwealth Parliament*, the JSCER noted that the High Court had held, in a series of cases, that section 122 of the Constitution confers on the Commonwealth a virtually unqualified power to make laws for the representation of the Territories in the federal Parliament.¹⁵ The Committee concluded:
- It is not satisfactory for the entitlement to representation of the original States to be rigidly controlled by the nexus provision in Section 24 [of the Constitution], while the entitlement of Federal Territories is completely open-ended and subject to arbitrary determination by the Parliament. It is also disquieting that the Parliament can apply different standards for representatives of Territories to those which the Constitution prescribes for representatives of the original States.¹⁶
- 2.33 The Committee recommended that the ACT and the NT be entitled to representation in the House of Representatives of at least one Member each, and that representation after that be determined by dividing the

14 JSCER, *First Report*, September 1983, p 73.

15 JSCER, *Report No 1: Determining the Entitlements of Federal Territories and New States to Representation in the Commonwealth Parliament*, November 1985, p 4.

16 JSCER, *Determining the Entitlement of Federal Territories and New States to Representation in the Commonwealth Parliament*, 1985, p 49.

population of each Territory by the quota used to determine the representation entitlements of the States.¹⁷

- 2.34 The Committee's recommendations were adopted, and the Electoral Act was amended accordingly in January 1990. The Committee stated that its proposed formula for the Territories should initially be implemented via the Electoral Act, with possible Constitutional amendments to follow. To date Constitutional amendments have not been pursued.

The *Commonwealth Electoral Act 1918*

- 2.35 The Constitutional provisions governing the representation of the Territories in the Commonwealth Parliament are contained in section 122 of the Constitution. All legislative provisions are contained in the *Commonwealth Electoral Act 1918*.
- 2.36 Section 48 (2A) of the Act prescribes the process for determining Territory entitlements in the House of Representatives, and section 53 provides that Territory Members have the same rights as all other Members of the House of Representatives. Representation of the Territories in the Senate is governed by division 2, sections 40 – 44, of the Act.
- 2.37 The formula for determining the number of House of Representatives Members to be chosen in each of the States and Territories is discussed in the following chapter.

17 JSCER, *Determining the Entitlement of Federal Territories and New States to Representation in the Commonwealth Parliament*, 1985, p vii.

