

**AUSTRALIAN ELECTORAL COMMISSION**

**SUPPLEMENTARY SUBMISSION**

**TO THE JOINT STANDING COMMITTEE ON ELECTORAL  
MATTERS' INQUIRY INTO REPRESENTATION OF THE  
TERRITORIES IN THE HOUSE OF REPRESENTATIVES**

**Canberra**

**02 September 2003**

## **1. Introduction**

1.1 This supplementary submission by the Australian Electoral Commission (AEC) is presented to the Joint Standing Committee on Electoral Matters (JSCEM) in response to a number of matters discussed at the inquiry's Darwin public hearing on 29 August 2003.

1.2 The AEC understands that, at the Darwin public hearing, members of the JSCEM expressed some concerns about the process undertaken to obtain the latest statistics of the Commonwealth for the 19 February 2003 Determination under section 48 of the *Commonwealth Electoral Act 1918* (the Electoral Act).

1.3 The AEC believes that these expressions of concern may give the impression that the AEC did not follow the correct procedure. Given that these statements were made in a public forum, the AEC is keen to ensure that accurate information is placed before the JSCEM at the earliest possible opportunity. On that basis, the AEC is making a submission to the JSCEM before the scheduled release of the transcript of the Darwin hearing on 5 September 2003.

1.4 The AEC's first submission to the inquiry provided a detailed explanation of the process for making a determination under section 48 of the Electoral Act. This submission provides additional information on aspects of that process, and should be read in conjunction with that submission. This submission:

- details the legislative and legal basis for what constitutes the latest statistics of the Commonwealth;
- describes the process used to obtain the latest statistics of the Commonwealth from the Australian Statistician; and
- describes the process for obtaining the latest statistics of the Commonwealth in relation to the 19 February 2003 section 48 Determination.

## **2. Latest statistics of the Commonwealth**

2.1 Section 46 of the Electoral Act requires the Electoral Commissioner to ascertain the population of the States and Territories using the latest statistics of the Commonwealth in the 13<sup>th</sup> month after the first sitting of the House of Representatives in each Parliament. Section 48 of the Electoral Act then requires the Electoral Commissioner to strike a quota using the latest statistics of the Commonwealth to determine each State and Territory's entitlement to members in the House of Representatives. This process is discussed in detail in the AEC's first submission.

2.2 The current basis for determining the latest statistics of the Commonwealth is a result of the outcome of two High Court cases in the 1970s, the McKellar and McKinley cases.

2.3 Sections 46 and 48 of the Electoral Act give effect to section 24 of the Constitution, which requires:

- the House of Representatives shall be composed of members directly chosen by the people of the Commonwealth;
- the number of members shall be, as nearly as practicable, twice the number of Senators;
- the number of members chosen in the several States shall be in proportion to the respective numbers of their people, also that the number of members chosen in the several States shall (until Parliament otherwise provides) be determined, wherever necessary in the manner set out in the second paragraph of section 24; and that
- five Members at least shall be chosen in each Original State<sup>1</sup>.

2.4 The second paragraph of section 24 requires a quota to be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of the Senators. It provides that 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.

2.5 The method set out in section 24 of the Constitution was followed from the first determination in the early 1900s to the 1960s and the process set out in the Constitution was reflected in provisions of the *Representation Act 1905* (Representation Act) as amended from time to time. Those determinations were based on statistics developed from each Census.

2.6 In 1964 the Parliament inserted an amendment in the Representation Act that removed the words 'greater than one-half of the quota' and therefore provided that an extra seat would be obtained where there was any remainder after dividing the quota into the population of the State. The legislation also set aside the determination made in December 1961.

2.7 The McKinley case in 1975 (135 CLR 1) was a challenge to the 1974 election. It was argued that the election was based on a disproportionate electoral distribution. The question before the Full Bench of the High Court was whether the Constitution required adherence to the principle of 'one vote, one value' because section 24 required the numbers of Members in the several States to be in proportion to the respective numbers of their people. The combination of the process set out in the Representation Act for determining the numbers of members, and in the Electoral Act for drawing the boundaries, was argued not to satisfy the strict requirements of the Constitution<sup>2</sup>.

2.8 The High Court dismissed the challenge, but the judges made comments on what section 24 of the Constitution required. Relevant comments related firstly to whether it was satisfactory to use Census data that might be up to

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<sup>1</sup> Lindell G., "Proportionate representation of states in the House of Representatives and associated issues – some recent developments in Australia and the United States" in the UNSW Law Journal, Volume 11, page 102. Description of constitutional requirements attributed to Gibbs J in the McKellar case

<sup>2</sup> Blackshield and Williams "Australian Constitutional Law and Theory" Sydney 2002, p 422

five years old<sup>3</sup>, and secondly whether it was satisfactory that any resulting redistribution of boundaries would affect only elections held after the redistributions were complete. The Court held that sections of the Representation Act giving effect to section 24 of the Constitution were invalid<sup>4</sup>.

2.9 The 1977 McKellar case (139 CLR 527) came before the Full Bench of the High Court as a challenge to provisions of the Representation Act: firstly, that it excluded the people of the Territories from 'the people of the Commonwealth'; and secondly, that the 1964 amendment permitting an extra seat when there was any remainder after dividing the population of a State by the quota was unconstitutional. The Court held that the exclusion of the people of the Territories was valid, but that the provision permitting an extra seat when there was any remainder was invalid<sup>5</sup>.

2.10 In summary the McKinlay case required a more current base than a census every ten years<sup>6</sup> and the McKellar case required a return to the pre 1964 practice of a State gaining an extra seat only where the remainder was greater than 0.5 of a quota.

2.11 In February 1976, the Secretary of the Attorney-General's Department (A-Gs) forwarded to the Chief Australian Electoral Officer a copy of a joint opinion by the Attorney-General and the Solicitor-General. The opinion advised that the High Court had held that a count of the populations of the States and the Commonwealth should occur during the life of each Parliament and that any necessary redistribution to give effect to a change in a State's entitlement should occur before the next ordinary general election.

2.12 In December 1976, the Secretary of A-Gs advised the Chief Australian Electoral Officer that no determination of entitlements should be made under the existing legislation (a determination would have been due following the 1976 Census). The advice referred to discussions between ministers expected to result in amending legislation in the next sitting.

2.13 In early 1977, the *Representation Amendment Act 1977* was passed to provide that determinations of entitlement would occur during the twelfth month of each Parliament and that the Australian Statistician would provide the AEC with the required statistical information. The amending Act also reinstated the requirement for a quota remainder greater than one-half before an extra seat was warranted and required the next ordinary general election to be carried out in accordance with the twelfth-month determination (therefore requiring any necessary redistributions to be carried out during the life of the Parliament, or raising the possibility of a State being one electorate under section 29 of the Constitution).

2.14 There was a concurrent amendment to the *Census and Statistics Act 1905* (Census Act), requiring the Australian Statistician to publish statistics of

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<sup>3</sup> It should be noted that from 1961 censuses were required every ten years but were conducted every five years.

<sup>4</sup> ALJR 1976, Vol 50 page 280

<sup>5</sup> ALJR 1977, Vol 51 page 328

<sup>6</sup> See footnote 3.

the number of people of each State and Territory as at the end of each quarter, and requiring a census to be conducted every five years.

2.15 In 1980, the then Australian Electoral Office sought the advice of A-Gs on the interpretation of the amendments contained in the *Representation Amendment Act 1977*. A-Gs advised that the expression ‘the latest statistics of the Commonwealth’ was not defined but was the subject of comment by the High Court in the McKinlay and McKellar cases. A-Gs went on to advise that the amendments to the Representation Act and the cognate amendments to the Census Act in 1977 were intended to deal with the defects in the legislation brought to light by the two High Court decisions.

2.16 In the opinion of A-Gs, the requirement for ‘the latest statistics of the Commonwealth’ contemplated use being made of the latest statistics of the number of people of each State and Territory as at the end of each quarter prepared by the Australian Statistician pursuant to the Census Act. Having regard to the decisions of the High Court in the McKinlay and McKellar cases, A-Gs considered that the Court would regard the current process as consistent with section 24 of the Constitution.

2.17 The amendments introduced by the *Representation Amendment Act 1977* were included in the Electoral Act in 1983 and remain largely unchanged as sections 46 and 47 of the Electoral Act.

2.18 The amendments to the Electoral Act in 1983 also made the redistribution process independent of control by a government or the Parliament (except for the appointment of members of the Australian Electoral Commission).

### **3. Obtaining the latest statistics of the Commonwealth from the Australian Statistician**

3.1 Section 47 of the Electoral Act governs the supply of statistical information to the Electoral Commissioner from the Australian Statistician. The section states:

The Australian Statistician shall, on request by the Electoral Commissioner, supply the Electoral Commissioner with all such statistical information as he or she requires for the purposes of this Division.

3.2 Under section 46 of the Act, the Electoral Commissioner is required to ascertain the numbers of the people of the Commonwealth and of the several States and Territories in accordance with the latest statistics of the Commonwealth. The Electoral Commissioner is required to make this ascertainment in the 13<sup>th</sup> month after the first meeting of the House of Representatives.

3.3 As indicated above, following legal advice, the AEC is of the opinion that the statistics compiled of the number of people of each State and Territory as at the end of each quarter by the Australian Statistician constitute the latest statistics of the Commonwealth. These are called the quarterly Estimated Resident Population (ERP) figures.

3.4 In order to obtain the latest statistics of the Commonwealth, the Electoral Commissioner writes to the Australian Statistician pursuant to section 47 of the Act requesting that the Australian Statistician provide the latest statistics of the Commonwealth during the month of ascertainment. The Australian Statistician then responds during the month of ascertainment with the latest available ERP.

3.5 Occasionally, the latest available ERP during the month of ascertainment may not yet have been published. This has occurred in 1994, 1999, and 2003. In these circumstances, the Australian Statistician will either arrange to ensure the latest ERP is released slightly earlier than anticipated to meet the timeline determined by section 46 of the Act, or provide the Electoral Commissioner with an embargoed version of the latest ERP for use in the ascertainment.

3.6 When this occurred in 1994, the AEC sought legal advice to determine whether such early release or embargoed ERPs constituted the latest statistics of the Commonwealth. Based on this legal advice, the AEC believes it is not necessary for the latest ERPs to be publicly available in order to be considered the latest statistics of the Commonwealth.

3.7 That said, the AEC understands the Australian Statistician prefers to make the ERP publicly available at the time it is provided to the Electoral Commissioner. In 1994, 1999, and 2003, the ABS did publish the latest statistics of the Commonwealth prior to the publication of the Electoral Commissioner's determination.

#### **4. Obtaining the latest statistics of the Commonwealth for the 19 February 2003 section 48 Determination**

4.1 The process by which the AEC obtained the latest statistics of the Commonwealth for the 18 February 2003 section 48 Determination was discussed by the Australian Bureau of Statistics (ABS) at paragraphs 8 and 16 of its submission to the inquiry (Submission 6).

4.2 On 22 October 2002, the Electoral Commissioner wrote to the Australian Statistician indicating that an ascertainment under section 46 of the Act would be required between 13 February and 12 March 2003. The letter indicated that an AEC staff member had asked an ABS staff member about the availability of the September 2002 ERP, which was due for release in March 2003.

4.3 The Electoral Commissioner then indicated that the ABS staff member advised the AEC staff member that the September 2002 ERP would not be available until late March 2003, but that the ABS may prepare a 'special version' of the September 2002 ERP as a separate publication. The term 'special version' in this instance refers to the type of publication, not the statistics contained in the publication. What is being referred to in the letter is an early release of the September 2002 ERP as discussed above, rather than a specially compiled set of statistics.

4.4 The Electoral Commissioner went on to ask for confirmation that a separate publication containing the September 2002 ERP may be produced in time for the ascertainment, that is, by 12 March 2003.

4.5 On 12 November, the Australian Statistician responded that the ABS would be producing a special issue of ERP figures for September Quarter 2002, to be released in mid February 2003.

4.6 On 18 February 2003, the Australian Statistician wrote to the Electoral Commissioner providing, as requested, the latest statistics of the Commonwealth for the ascertainment required under section 46 of the Act. At that time, the latest statistics of the Commonwealth were the September 2002 ERP statistics, published on the same day as *Population, Australian States and Territories, September Quarter 2002* (ABS cat. no. 3239.0.55.011)

4.7 The letter then points out that the statistics published in *Population, Australian States and Territories, September Quarter 2002*, would also be included in the ABS's usual compendium publication, *Australian Demographic Statistics, September Quarter 2002* (ABS cat. no. 3101.0), to be released on 20 March 2003.

4.8 On 19 February 2003, the Electoral Commissioner made the ascertainment required under section 46 of the Act and the section 48 Determination.

4.9 In summary, the process followed to obtain the statistics used in the 19 February 2003 section 48 Determination was the same process used in all previous instances since the formation of the AEC in 1984. The process is based on the legislation and on legal advice provided by the Attorney-General's Department and the Australian Government Solicitor about the correct interpretation of the legislation.