

Increasing the Representation of the Territories in the House of Representatives

- 7.1 The majority of submissions received by the Committee supported increasing the representation of the Territories in the House of Representatives. Throughout the course of the inquiry, a number of proposals for achieving this were raised. These included to:
- amend the Electoral Act to provide for an increase in the guaranteed minimum number of House of Representatives seats for the Territories, and make a further determination;
 - incorporate the margins of error surrounding the population estimates for the Territories when determining entitlements to seats in the House of Representatives;
 - introduce a requirement that determinations of entitlements to seats for the Territories be confirmed by a subsequent determination during the next Parliament before becoming effective; or
 - change the process for determining State and Territory entitlements to seats in the House of Representatives.
- 7.2 One submission to the inquiry strongly opposed increasing the minimum number of House of Representatives seats for the Territories. Associate Professor Malcolm Mackerras argued that such

a proposal should be rejected as a matter of principle.¹ He argues that the current formula for determining Territory representation entitlements in the House of Representatives is consistent with the process – as set out in the Constitution - for determining State entitlements to seats, and should be retained.²

Proposals to amend the Electoral Act

7.3 Sub-section 48(2B) of the Electoral Act provides that a least one Member of the House of Representatives shall be chosen in the ACT and the NT at each general election. The Private Member's Bill introduced by Mr David Tollner MP seeks to increase the minimum number of seats guaranteed to the Territories from one to two. While many submissions to the inquiry support increasing the current entitlement of the Territories, not all submissions agree with the Bill.

7.4 Three submissions from the ACT suggest amending the Electoral Act to provide that the ACT be guaranteed a minimum of three House of Representatives seats, if the NT is to be guaranteed a minimum of two seats.³ This seeks to account for the different sized populations of the ACT and the NT, and to also prevent the situation of the Territories oscillating between losing and gaining a seat at successive elections. The reasons cited for this included:

- that there would be no practical benefit in guaranteeing the ACT two seats given that the ACT's quota is unlikely to slip back to 1.5;
- the ACT's population is currently just under the 2.5 quotas needed to gain a third seat;
- oscillating between two and three seats creates instability in representation; and
- the ACT currently has two seats of approximately 110,000 voters each (that is, they are relatively large in terms of number of electors).⁴

7.5 Mr David Tollner MP, introduced his Bill into the House of Representatives on 16 June 2003. It proposes that if the minimum

1 Submission # 1 from Associate Professor Malcolm Mackerras.

2 See Hansard transcript of public hearing, 18 August 2003, Canberra p 32-47.

3 See submissions: #23 from the ACT Government, #18 from Mr Alan Hatfield, and #26 from the ACT Division of the Australian Labor Party.

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number of Members for the Territories is to be changed, the Electoral Commissioner must make a new determination of the number of Members to be chosen in that Territory.

- 7.6 The AEC has however expressed some concern that, if the Bill is passed, it will be redundant after the NT has reverted to two electorates. Furthermore, the AEC advises that it may not have sufficient time to undertake a redistribution – which can take between nine and 12 months – once the Bill is passed and before the next election is called. The Hon Warren Snowdon MP notes that a redistribution in the NT is unnecessary if the minimum number of seats for the Territories is to be increased to two.⁵
- 7.7 The AEC and Mr Snowdon suggest that it would be more useful to include transitional provisions in the Act which would set aside the February 2003 determination in the case of the NT, and provide that the election of NT Members be conducted in accordance with the determination in force at the time of the immediately preceding election. The transitional provisions proposed by Mr Snowdon are set out in Appendix C.
- 7.8 Mr David Tollner MP also envisages an amendment to his Bill along the same lines.⁶ These amendments are at Appendix D.
- 7.9 The NT Government suggested amendments to the Electoral Act in order to increase the representation of the Territories in the House. One of these proposals is consistent with the aim of the Tollner Bill. The other seeks to ensure that the Territories are granted an additional seat on any remainder of the quota. The NT Government further notes that such a proposal in relation to the States was rejected by the High Court in *McKellar v Commonwealth (1977)*. The amendments suggested by the NT Government are set out in Appendix E.

Proposals relating to margins of error

- 7.10 The issue of incorporating the margins of error around population estimates in the determination of seats for the Territories followed discussions about the accuracy of population estimates, more specifically, the level of confidence that can be placed in the

5 Submission #22 from the Hon Warren Snowdon MP, p 27.

6 Submission # 14 from Mr David Tollner MP, p 3.

population statistics produced by the ABS and used by the AEC to determine State and Territory entitlements to seats in the House of Representatives. This proposal seeks to account for cases such as the current loss by the NT of a seat on a shortfall of 295 people, which is well within the margin of error of plus or minus 2,600 people associated with the population estimate of the NT.

- 7.11 The ABS cautioned however, that if the Parliament was going to develop the concept of tolerance levels (margins of error) for electoral purposes, it would need to consider the minus as well as the plus aspect of it, that is, it is just as likely that a population is overestimated as it is underestimated.⁷

Proposals for successive determinations

- 7.12 The concept of changing a Territory's representation only if the change is confirmed by successive determinations, seeks to remove the risk of the Territories "flip-flopping" between one and two – or in the case of the ACT, two and three - House of Representatives seats at successive elections by providing that a Territory's entitlement to seats in the House of Representatives be based on the outcome of two successive determinations rather than one. Under this proposal, a Territory would only lose or gain a House of Representative seat if the outcome of the determination was the same on both occasions.
- 7.13 Difficulties with this proposal relate primarily to the inherent time lag involved in responding to population changes.

Proposals for changing the basis for determinations

- 7.14 Evidence received by the Committee urged that the populations of the Territories be included in the formula used to determine the quota, and therefore the entitlements to seats in the House of Representatives. Those who support this view believe that such an amendment would not only more adequately reflect the actual situation with reference to the population of Australia and the number of Senators in Parliament, but that it may result in the NT, at least, being entitled to more House of Representatives seats.⁸

7 Hansard Transcript of public hearing, 18 August 2003, Canberra, p 14.

8 See submissions #3 from the Country Liberal Party (Parliamentary Wing), #2 from Mr Col Friel, and the Hansard transcript of public hearing, 29 August 2003, Darwin, p 41-44.

- 7.15 In its submission, the ACT Division of the Australian Democrats noted the large electoral sizes of divisions within the ACT and the NT as being a significant issue, and argued that the Territories are under represented, but did not support the proposal to increase the number of House of Representative seats for the Territories to two, on the basis that the proposal:
- does not address adequate and fair representation for small jurisdictions generally;
 - does not address the long-term issue of determining a “fair” threshold at which a Territory should lose or gain a seat;
 - is ad hoc and appears to address a specific, short-term problem; and
 - appears to discriminate in its differential effect on the ACT and the NT.⁹
- 7.16 The ACT Division of the Australian Democrats recommends that the Electoral Act be amended to prevent electorates in the Territories from being greater than 10% in excess of the quota.¹⁰ Dr Kirschbaum proposed that a new formula be introduced for determining representation in the House of Representatives which shifts the transition points at which States and Territories are entitled to additional seats.¹¹
- 7.17 The ACT Branch of the Australian Labor Party (ALP) also proposed a new formula, using the enrolment data for Tasmania to determine the number of seats to be returned by the ACT and the NT at each election.¹²

Statehood

- 7.18 The issue of statehood for the NT was only briefly raised during the inquiry. The Committee is aware that the issue of statehood has been raised again by the NT Government and that the Government expects

9 Submission #17 from the ACT Division of the Australian Democrats, p 6.

10 See submission #17 from the ACT Division of the Australian Democrats.

11 Submission #7 from Dr Miko Kirschbaum.

12 Submission #26 from the ACT Branch of the Australian Labor Party, p 5.

to put this proposition to the residents of the Territory by 2008.¹³ While the Committee notes that the outcome of this referendum may have implications for the future representation of the Territory in the Parliament if it becomes a State, this issue is not discussed further in this report.

Committee conclusions

- 7.19 The Committee was asked to inquire into whether the minimum representation of the ACT and the NT should be increased from one to two seats each in the House of Representatives.
- 7.20 Most submissions to the inquiry focused on whether the guaranteed minimum representation of the NT should be increased from one to two seats. Only a few submissions addressed the minimum representation of the ACT and whether this should be increased to two or even three House of Representatives seats.
- 7.21 The High Court has held that section 122 of the Constitution confers on the Parliament a virtually unqualified power to make laws for the representation of the Territories in the federal Parliament.
- 7.22 The basic principle for determining State and Territory representation entitlements to seats in the House of Representatives is prescribed under section 24 of the Constitution and section 48 of the *Commonwealth Electoral Act 1918*.
- 7.23 Under this formula, a quota of the number of people that each State and Territory requires to return one House of Representative seat is established. The quota is divided into the population of each of the States and Territories and the result of the division (ie the number of quotas) determines the number of seats that each State and Territory is entitled to in the House of Representatives. If the result of the division shows a remainder which is greater than one half of a quota, the State or Territory is entitled to an additional seat. Calculations for the 2003 determinations in relation to the Territories are shown below:

13 Clare Martin, NT Chief Minister, Media release - *Statehood: this time let's get it right!* 22 May 2003. Accessed from www.nt.gov.au/ocm/media_releases/20030522_statehood.shtml

Table 7.1. 2003 determination of NT and ACT entitlements

	NT	ACT
Population	199,760	322,871
Quota	133,369.375	133,369.375
Number of quotas	1	2
Remainder	66,390.625	56,132.25
Half a quota	66,684.6875	66,684.6875
Shortfall (for extra seat)	295	10,553

- 7.24 The formula used to determine entitlements to seats is strictly a matter of arithmetic based on the population of the States and Territories. To this extent, it is a matter of “letting the chips fall where they might”. The Committee notes that the formula has produced electorates of different population sizes across Australia. In particular, the NT has benefited in the 40th Parliament with two seats that have enrolled populations substantially smaller than the national average divisional enrolment, and smaller than even the five seats Tasmania returns by virtue of the guaranteed minimum representation provided for in section 24 of the Constitution.
- 7.25 A particular issue is whether a Territory that has benefited from the operation of a “let the chips fall where they might” approach should have these benefits protected through an increase in the guaranteed minimum number of seats.
- 7.26 The Committee notes that should the ACT or any State – apart from Tasmania - fall below the quota by the same number of people that the NT fell below the number necessary to retain its second seat, that Territory or State would lose a House of Representatives seat. Regarding Tasmania, an increase in the minimum guarantee would give the NT the same advantage that Tasmania has enjoyed under the Constitution, that is, one seat more than its population would entitle it to.
- 7.27 The Committee endorses the 1985 report of the JSCER which noted the potential for abuse of the discretion given to Parliament to make laws governing representation of the Territories, and saw it as disquieting that the Parliament can apply different standards for representatives of the Territories to those which the Constitution prescribes for representatives of the original States.

- 7.28 The present Committee agrees with the earlier Committee that it is important to ensure that the representation of the Territories be contained within the parameters it set and which are now incorporated in the *Commonwealth Electoral Act 1918*, and that the power of the federal Parliament to make laws governing representation of the Territories be treated in a responsible and restrained fashion.
- 7.29 The Committee does not regard as decisive the various social and economic issues that were raised in support of increasing the minimum guarantee. Representation of the States and Territories in the House of Representatives is based on population, not on social and economic factors.
- 7.30 The Committee is of the opinion that the existing basic principle for determining the number of Members to be elected by the Territories should not be disturbed.
- 7.31 It is, however, also important that any systemic disadvantages imposed on the Territories in comparison with the original States be addressed whenever they are identified.
- 7.32 What is proposed in this report does not in any way derogate from the principle of meeting the quota provisions of the existing legislation and accepting the outcome of the formula used to calculate the Parliamentary representation of the Territories.
- 7.33 The Committee notes that there is some controversy surrounding the population estimates for the NT, including:
- the methodology used to estimate the population, including conflicting opinions as to the efficacy of the population count in remote and indigenous communities; and
 - questions about determining the percentage net undercount to be applied to the whole of the NT.
- 7.34 The ABS has acknowledged there are shortcomings in some areas, and a project to validate the methodology of the undercount is under way.
- 7.35 For the most part, the matters in contention are for statisticians and demographers to work through. It is important, however, that the ABS and the AEC resolve these issues promptly.¹⁴

14 The Committee also has concerns about the process undertaken to obtain the 'latest statistics of the Commonwealth'. As discussed in chapter five, the Committee has noted

- 7.36 What is beyond controversy is the fact that, as discussed in chapter five, there is a margin of error in the estimates provided by the ABS, based on the margin of error associated with the net undercount of the population in the 2001 census.
- 7.37 In the case of the NT, the margin of error in the 2001 net undercount is 1.2% at the 95% confidence level (which is up to 3 times the error margin in the States) and for the ACT, it is 0.8% (which is up to twice the equivalent in some of the States). The error margin for Australia as a whole is 0.2% (or one-sixth of the error margin for the NT).
- 7.38 There is greater variability in the estimates for the Territories compared with the estimates made for the States. The population estimates for the NT and the ACT are less reliable than they are for other jurisdictions.¹⁵ This leads to the conclusion that, in proportionate terms, the Territories are likely to have a relatively wider range of possible population figures than the States, and could suffer a greater relative disadvantage.
- 7.39 In view of the fact that the estimates of populations for the States are more reliable than those for the Territories, and in keeping with its Terms of Reference, the Committee has restricted to the Territories its consideration and analysis of the effects of the error margins associated with the ERP figures supplied by the ABS to the AEC.¹⁶
- 7.40 In addition, the Committee is mindful that Parliament's Constitutional power to legislate as it sees fit for Parliamentary representation is explicit in the case of the Territories.
- 7.41 For the NT, the population figure supplied by the ABS to the AEC for the 2003 determination, based on the "latest statistics of the Commonwealth", was 199,760.¹⁷ The margin of error in the estimated

uncertainty about the date of the latest statistics of the Commonwealth and that there is a significant degree of discretion available to the Statistician and the Electoral Commissioner in deciding which statistics should be used. The Committee has accordingly made recommendations for change.

15 The Committee has been advised that margins for error in the estimated populations of the Territories are significantly higher in relative terms than the margins for the States because of the difficulty associated with deriving an accurate estimate from a smaller population.

16 Legal advice could be sought regarding the consideration of margins of error surrounding the population estimates of the States.

17 In its submission to the Committee, the ABS states that: 'Like all statistical measures, the data sources used to compile the population estimates are subject to measurement error.'

population is plus or minus 2,600 people at the 95% confidence level. For the ACT, the population figure supplied by the ABS to the AEC for the 2003 determination, based on the “latest statistics of the Commonwealth”, was 322,788. The margin of error in the estimated population is plus or minus approximately 2,400 people.

- 7.42 This means that we can be 95% confident that the estimated population of the NT is 199,760 plus or minus 2,600, that is, that it is between 197,160 and 202,360 people.
- 7.43 The estimated population figure of 199,760 provided by the ABS is the mid-point in the estimated population range of 197,160 to 202,360 people. In fact, each number in the range is equally likely to be the actual population of the NT. It is equally valid to say that, at the 95% confidence level, the population of the NT for the purposes of the determination was any number within the range 197,160 to 202,360, ie 2,600 below or 2,600 above the population figure used.
- 7.44 In most circumstances, error margins would have no impact on the result because the population shortfall from the number required to retain or gain another seat is usually much greater than the margin of error. However, where the shortfall is in the margin of error, the choice of the mid-point of the range is of considerable significance. In such cases, the practical implications of using the figure that the ABS provides to the AEC – that is, the mid-point of an estimated population range, are as follows:
- (1) If the population mid-point divided by the quota results in a fraction that is larger than half a quota, the Territory is entitled to an additional seat. It is possible, however, that the actual population would not have entitled the Territory to an additional seat. But using the mid-point results in this possibility being ignored. In effect, the estimated population figure is treated as the lowest possible population figure rather than the mid-point of a range.
 - (2) Conversely, if the population mid-point divided by the quota results in a fraction of half a quota or less, the Territory is deemed to have fallen short of the number necessary to gain an additional seat. It is possible, however, that the actual population would have entitled the Territory to an additional

The ABS does not, however, include any reference to error margins in any of the material supplied to the AEC for the determination of representation in the House of Representatives.

seat. But using the midpoint results in this possibility being ignored.

- 7.45 In effect:
- In (1), the estimated population figure is treated as the lowest possible population figure and the actual population may be advantaged by getting a seat to which it is not entitled; and
 - In (2), the estimated population figure is treated as the highest possible population figure and the actual population may be disadvantaged by not getting a seat to which it is entitled.
- 7.46 This differential, asymmetrical treatment is unfair in that it discriminates for or against population numbers that may be entitled to an additional seat on the arbitrary basis that they fall on different sides of the mid-point but still within the margin of error.
- 7.47 To treat populations equally where they fall within the margin of error, the question is whether one chooses to uniformly:
- take the lowest number in the range as being representative of the whole range, or
 - take the highest number in the range as being representative of the whole range.
- 7.48 In both cases, each and every number in the range would be treated equally and fairly – in contrast to taking the mid-point, where the numbers above and below that point are ignored even though they are within the range of potentially correct numbers.
- 7.49 In the context of determining Parliamentary representation for the Territories, the Committee believes that it would be inappropriate to choose the lowest number of the range of possible population figures for the following reason. Where the highest number in the range of possible population figures would qualify a Territory for an extra seat, and if that highest number was in fact the real population, choosing the lowest number would deprive the people of that Territory of a seat in Parliament.
- 7.50 The fairest method, one which ensures that no possibly correct number is arbitrarily excluded, is to use the highest number in the range for purposes of the Australian Electoral Commissioner's determination. This is because if the lowest number is used it is almost certain that the actual population will be excluded, whereas if

the highest number is used it is almost certain that the actual population will be included.

- 7.51 The Committee recommends that the *Commonwealth Electoral Act 1918* be amended to require the Australian Statistician to advise the Electoral Commissioner at the time of supplying the latest statistics of the Commonwealth, of the margins of error in numerical terms associated with the population estimates of the Territories for the Census on which the ERP figures are based.

Recommendation 2

- 7.52 **The Committee recommends that in future, the Australian Statistician advise the Electoral Commissioner of the margin of error for the Territories at the time of supplying the latest statistics of the Commonwealth, and that the margin of error for the ACT and the NT be incorporated into the determination of seats for the Territories when a Territory falls short of quota.**
- 7.53 **If the shortfall is within the margin of error acknowledged by the ABS, the Australian Electoral Commissioner is to use the ERP figure at the top of the margin of error to determine the Territory's entitlement.**
- 7.54 As discussed in paragraph 7.43, the NT's estimated population figure of 199,760 is the midpoint in the estimated population range of 197,160 to 202,360.
- 7.55 In the case of the NT, performing the determination calculation using the mid-point figure of 199,760 resulted in a determination that the NT was entitled to only one seat.
- 7.56 As appears from table 7.1, the NT would have qualified for a second seat had its population been just 295 more than 199,760, that is 200,055.
- 7.57 In fact, 200,055 is within the estimated population range of the NT that was used in the 2003 determination, that is, between 197,160 and 202,360. This means that it is as likely that the actual population of the NT was 200,055 as it was 199,760. Another way of looking at this is to say that 295 – the amount of the shortfall – was within the error range of plus or minus 2,600.
- 7.58 This means that it is possible that the actual population of the NT is entitled to two House of Representatives seats, and under the

Committee's recommendation for future determinations, in these circumstances, the NT would be determined to be entitled to a second seat.

- 7.59 In determining the NT's entitlement to representation, it is evident that the arbitrary use of the mid-point of the estimated population range may have resulted in the NT being denied a seat to which its actual population would entitle it. Denying the NT one seat has the severe effect of halving its representation in the House of Representatives.
- 7.60 During the course of the inquiry, the view was expressed that the arguments made in submissions and by witnesses for increasing the representation of the Territories would have been more credible had these arguments been made before the NT lost a House of Representatives seat, rather than as a reaction to the 2003 determination. This would have negated the prospect of retrospectivity and also negated the appearance of self interest on the part of those who argued in support of increasing the minimum representation to two seats.
- 7.61 It was also noted that the response to the NT's loss of a House of Representatives seat has galvanised a reaction that was not apparent when the ACT lost its third seat at the 1997 determination of entitlements.
- 7.62 The Committee considers these to be valid points. It acknowledges that the arguments may have been more credible if Parliament had foreseen these problems, however the Committee recognises that in reality problems are not usually addressed until they become apparent as a result of cases such as the NT.
- 7.63 The Committee notes that the core of longstanding opposition to retrospectivity is the concern that it adversely affects individual rights. Equally, there is the concern that retrospectivity does not result in a windfall gain. While the Committee believes that such a windfall gain would result if the NT was entitled to two House of Representatives seats regardless of the outcome of the quota or its population relative to the population of the States, it does not believe that such a windfall gain would result from granting two seats on account of the margin of error surrounding its population estimate.
- 7.64 Some Committee Members believe that the margin of error for the NT creates significant doubt as to the outcome of the 2003 determination.

These Committee Members believe that the estimate of the NT's 2003 population should be the ERP figure at the top of the margin of error. This would result in the NT retaining its second seat. For this reason, these Committee Members believe that the Electoral Commissioner's determination should be set aside to the extent that it applies to the NT.

7.65 Other Committee Members believe that it was the intention of the Parliament that the "latest statistics of the Commonwealth" be the latest *published* statistics at the time of the determination – not a special version or early release of the ERP figures – and for the 2003 determination the published statistics that should have been used were the June 2002 ERP figures. If the June 2002 ERP figures were used, the NT would have been entitled to two House of Representatives seats. For this reason, these Committee Members also believe that the Electoral Commissioner's determination should be set aside to the extent that it applies to the NT.

7.66 The Committee unanimously agrees on the following recommendation.

Recommendation 3

7.67 **The Committee recommends that the 2003 determination be set aside by government legislation to the extent that it applies to the NT.**

7.68 The AEC advises that setting aside the February 2003 determination to the extent that it applies to the NT would have the effect of restoring the NT to two divisions as if the determination had not taken place.¹⁸