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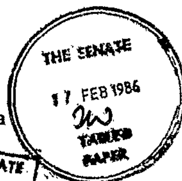
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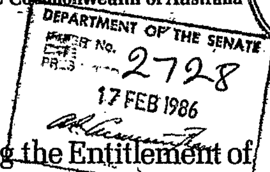
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Determining the Entitlement of Federal Territories and New States to Representation in the Commonwealth Parliament

A report from the Joint Select Committee on Electoral Reform

Report No. 1

November 1985

Parliament of the Commonwealth of Australia

DETERMINING THE ENTITLEMENT OF FEDERAL TERRITORIES AND NEW STATES TO REPRESENTATION IN THE COMMONWEALTH PARLIAMENT

A report from the Joint Select Committee on Electoral Reform

Report No. 1

November 1985

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RECOMMENDATIONS

The Committee recommends:

1. That no new State should be admitted to the Federation on terms and conditions as to its representation in the Parliament more favourable than those that the Committee recommends for representation of Commonwealth Territories (para. 4.4 page 45).

2. Representation in the House of Representatives

   (a) The people of the Australian Capital Territory and the Northern Territory shall each be entitled to be represented in the House of Representatives by at least one Member. The people of each Territory shall be entitled to representation thereafter in proportion to the population of the Territory. The quota obtained under section 48 of the *Commonwealth Electoral Act* 1918 shall be divided into the population of each Territory to determine the number of Members the Territory is entitled to return. The Australian Electoral Commission shall determine the entitlement of both Territories to representation at the same time as it determines the entitlement of the original States of the Commonwealth under section 59 of the *Commonwealth Electoral Act* 1918 (para. 4.6 page 46).

(b) The people of a Commonwealth Territory shall be entitled to separate representation in the House of Representatives only when the population of the Territory exceeds more than one half of a quota under section 48 of the Commonwealth Electoral Act 1918 for the election of a Member to the House of Representatives from an original State of the Commonwealth. Until an entitlement to separate representation vests, arrangements should continue to be made to include the people of Commonwealth Territories other than the Australian Capital Territory or the Northern Territory in Electoral Divisions of the Australian Capital Territory and the Northern Territory (para 4.6 page 47).

3. Representation in the Senate

(a) The Australian Capital Territory and the Northern Territory shall be entitled to representation in the Senate on the basis that each Territory shall return one Senator for every two Members of the House of Representatives it is entitled to return under the calculation in 2(a) above. But the people of the Australian Capital Territory and the Northern Territory shall each be entitled to representation in the Senate by at least two Senators.

(b) A Commonwealth Territory other than the Australian Capital Territory and the Northern Territory shall be entitled to representation in the Senate on the basis of one Senator for every two Members of the House of Representatives it is entitled to return under the calculation in 2(b) above (para 4.6 page 48).

4. Application of Constitutional Provisions to Territory Representation

(a) The provisions of Part III - Divisions 2 & 4 of the Commonwealth Electoral Act 1918 referred to in Chapter 2 which apply existing Constitutional provisions to Territory representation should continue in force.

(b) The provisions of section 42 of the Commonwealth Electoral Act 1918 providing for the term of a Senator for a Territory to relate to the period between House of Representatives elections should continue in force.

(c) The provisions contained in section 44 of the Commonwealth Electoral Act 1918 for the filling of casual vacancies in the Senate, for the Australian Capital Territory, by a joint sitting of the members of the Senate and the House of Representatives and for the Northern Territory, by the Legislative Assembly of the Northern Territory, should continue in force. However, should the Australian Capital Territory obtain self-government, then the Legislative body established under those arrangements should be substituted for the joint sitting of the members of the Senate and the House of Representatives for the purpose of choosing a Senator to replace the Senator causing the vacancy (para 4.6 page 48).

CHAPTER I - BACKGROUND TO THE INQUIRY

Introduction

1.1 The Joint Select Committee on Electoral Reform was first appointed in the 33rd Parliament in May 1983.[1] Its terms of reference enabled it to undertake a comprehensive review of all aspects of the conduct of elections for the Parliament. Its first report of 13 September 1983[2] resulted in substantial reforms to Commonwealth Electoral Legislation which included changes to the redistribution procedures, the introduction of public funding of election campaigns, the establishment of the Australian Electoral Commission and significant changes to electoral laws and procedures. The Committee's resolution of appointment was amended by resolution which passed both Houses on 8 September 1983[3] to extend the life of the Committee and to enable it to report from time to time on matters within its original terms of reference. The Committee presented a second report[4] to Parliament in August 1984 which covered political advertising and some incidental matters. It was not possible to complete inquiries on other matters the Committee had under examination, before the end of the Parliamentary session. One of the matters the Committee had then under consideration, which is the subject of this report, was the establishment of fixed formulae for determining the numbers of Senators and Members of the House of Representatives to which the Australian Capital Territory and the Northern Territory are to be entitled.

1.2 The 34th Parliament appointed the present Committee in March 1985[5] with the terms of reference set out in the resolution of appointment reproduced as Appendix 'A' of this report.* Term of reference (e) requires the Committee to inquire into and report on:

> The establishment of fixed formulae for determining the number of Senators and Members of the House of Representatives to which the Australian Capital Territory, the Northern Territory and <u>other Territories are entitled</u>.*

1.3 Para. 13 of the resolution provides that the Committee or any sub-committee have power to consider and make use of the evidence and records of the Joint Select Committee on Electoral Reform appointed during the 33rd Parliament.

1.4 Submissions on the topic were received from the people and organisations listed in Appendix 'B' of the report. The Committee held one public hearing on Tuesday 6 August. Minutes of proceedings relating to the Inquiry are reproduced at Appendix 'C'.

The Inquiry

1.5 On 10 November 1983 in the course of the House of Representatives debate[6] on the Committee stage of the clauses of the <u>Commonwealth Electoral Legislation Amendment Bill 1983</u>, the Hon. I.B.C. Wilson MP, Member for Sturt, moved an amendment to the Bill, the effect of which would have been to insert fixed formulae into the <u>Commonwealth Electoral Act 1918</u> to determine the entitlement to representation in the Senate and the House of

---

* On 26 November 1985 the resolution of appointment was amended by resolution of both Houses to provide that either House might refer a matter for inquiry by the Committee.

* The emphasised words extend the ambit of the Inquiry

Representatives of the Australian Capital Territory and the Northern Territory. In moving the amendments, Mr Wilson said:

> The matter of representation of the Territories in both Houses of the Parliament has in the past been under challenge. I accept the fact that the High Court of Australia has found that the Parliament has the power to grant representation to the Territories both in the Senate and in the House of Representatives. I am concerned, however, that on one interpretation of clauses 121 and 122 of the Constitution it would be possible for the Parliament to increase the representation of both Territories out of proportion to their populations.[8]

1.6 In the same debate the Special Minister of State, the Hon. K.C. Beazley MP, responded by saying that although the Government was not prepared to support amendments to the Bill because of delays that would have been caused to the passage of the legislation, the Government shared his concern:

> These are matters which have been discussed at different points of time in the High Court of Australia. I think all Honourable Members are aware that there is always likely to be concern in that quarter about what precisely are the entitlements of the Territories. Under the Constitution as it exists at the moment and as the Honourable Member for Sturt quite clearly recognises, to place that beyond doubt will probably require Constitutional amendments. I suppose that is the reason why he very sensibly wishes to pursue the matter in at least one area at the Constitutional Convention. In seeing those merits in the Honourable Member's arguments, I am impelled to undertake to him that I will raise with the Government the possibility of referring the matters that are in his amendments to the Joint Select Committee on Electoral Reform which brought down the original report and which contains suggestions for the legislation that we are now considering. I think that would be a very appropriate forum for the propositions that he is putting forward to be considered in detail.[9]

1.7 Mr Wilson had previously sponsored the following resolution at the 1978 Perth session of the Australian Constitutional Convention:

> That this Convention recommends that the Constitution be amended:
>
> (a) to require that Representatives and Senators from the Territories and new States are chosen by the people as is now provided in the case of the original States;

(b) to ensure that once Parliament has decided that the people of a Territory or a new State shall be represented in the House of Representatives by a number of Members in excess of one, the number of Members is in the same proportion to population as the number of Members chosen by the people of the original States (other than a State for which the guaranteed minimum representation of five Members is assured by Section 24); and

(c) to ensure that once Parliament has decided that the people of a Territory or a new State shall be represented in the Senate, the number of Senators in excess of two shall be in the ratio of one additional Senator to every two Members in the House of Representatives from that Territory or State in excess of four; provided that the number of Senators for a Territory or a new State shall not at any time exceed the number of Senators for an original State.[10]

1.8 The concern to which these proposals for legislative and constitutional change gives expression derives from a series of decisions of the High Court of Australia when it was called upon to determine the Constitutional validity of the Senate (Representation of Territories) Act 1973. This was the Act which made provision for the representation of the Australian Capital Territory and the Northern Territory in the Senate.

Representation of the Australian Capital Territory and the Northern Territory

1.9 Section 122 of the Constitution provides:

> 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 Territories in either House of the Parliament to the extent and on the terms which it thinks fit.

1.10 Section 122 occurs in chapter VI of the Constitution entituled "New States". Under section 122 it has been held by the High Court in a series of cases that the section confers on the Commonwealth a virtually unqualified power to make laws for

Territories.[11] The power contained in the section to provide representation "in either House of the Parliament to the extent and on the terms which it thinks fit" had been employed but not tested before the matter was presented to the High Court in Western Australia v Commonwealth[12] (First Territory Representation Case).

1.11 The Northern Territory was granted a seat in the House of Representatives by enactment of the Northern Territory Representation Act 1922.[13] The Member elected was not entitled to vote on any question, not counted towards quorums and majorities and was declared incapable of being chosen as Speaker or Chairman of Committees or performing the duties thereof. By the Northern Territory Representation Act 1936[14] the Member for the Northern Territory was entitled to vote on any motion for the disallowance of any ordinance of the Northern Territory and on any amendment of such motion. This right was extended to a vote on any question concerning a proposed law that related solely to the Northern Territory, as well as any motion for the disallowance of a regulation made under an ordinance by the Northern Territory Representation Act 1959[15]. Full voting rights were conferred on the Member for the Northern Territory together with all the powers, immunities and privileges of a Member representing an Electoral Division of a State by the Northern Territory Representation Act 1968[16].

1.12 Representation of the Australian Capital Territory in the House of Representatives was first prescribed by the Australian Capital Territory Representation Act 1948[17] which provided for one Member whose voting and other rights were the same as those exercised by the Member for the Northern Territory. These rights were extended to full voting rights by the Australian Capital Territory Representation Act 1966[18].

1.13 Australian Capital Territory (House of Representatives) Act 1973[19] repealed all previous legislation relating to the Australian Capital Territory representation and provided for two Members to represent the Australian Capital Territory in the House of Representatives with full voting rights.

1.14 By the Senate (Representation of Territories) Act 1973[20] the Commonwealth provided that the Australian Capital Territory and the Northern Territory should each be represented in the Senate by two Senators chosen by the people of the Territory each voting as one electorate. Each such Senator was to have all the powers, immunities and privileges of a Senator for a State. In particular the Territory Senator might vote on all questions arising in the Senate. Territory Senators were to serve only until the next general election of Members of the House of Representatives - a maximum of three years. A Senator for a Territory was placed on the same footing as a Senator for the States in all respects save the extent of his term and the basis on which casual vacancies were to be filled. Originally, the Act provided for the filling of a casual vacancy by a by-election.[21] However, this was later amended to provide for the vacancy to be filled in the case of the Australian Capital Territory by a Joint Sitting of both Houses, and in the case of the Northern Territory by the Legislative Assembly of the Northern Territory.[22] The 1973 legislation was opposed at all stages by the Coalition Parties and was eventually passed as one of the measures submitted to the joint sitting of the members of the Senate and House of Representatives in 1974 following on the 1974 Double Dissolution.

Interpretation of Section 122 by the High Court

1.15 The legislation was first challenged by the Governments of New South Wales, Western Australia and Queensland in the First Territories Representation Case.[23] The plaintiffs claimed that the Act was invalid on the grounds that it conflicted with section 7 of the Constitution which provided, inter alia, "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". The Commonwealth relied on the text of section 122. The High Court by a majority (McTiernan, Mason, Jacobs and Murphy JJ) held that section 122 must be given its full effect, unfettered by any implications which might be drawn from section 7 or from the special status of the Senate as a States House or guardian of the Federal compact.

1.16 The minority (Barwick CJ, Gibbs and Stephens JJ) supported the argument of the States that section 7 of the Constitution, particularly when read together with other provisions,[24] confirmed the notion that the Senate was conceived of as consisting only of Senators chosen from the States. On this argument it would be necessary to qualify the word "representation" appearing in section 122 as allowing something less than full representation, such as non-voting representation. In 1977 the legislation was subjected to another challenge to its validity in the case of Queensland v Commonwealth[25] (the Second Territories Representation Case). The action was thought to have been precipitated by remarks of the Chief Justice, Sir Garfield Barwick in the case of the Attorney-General of NSW on the Relation of McKellar v Commonwealth[26] when he indicated that should the question of the validity of the Senate (Representation of Territories) Act 1973 again be brought for determination in the Court he would persist in his view that it was ultra vires the Commonwealth. As there had, in the meantime, been changes to the composition of the Court, this was perceived as an invitation to challenge the legislation in a more favourable environment for opponents of the legislation. The Court, again by a majority, declined to reverse its earlier decision. Two of the Judges who had found against the legislation in the First Territories Representation Case, Gibbs and Stephens JJ, decided to follow the authority of the earlier case. While adhering to their previous views the two Justices declined to overrule the First Territories Case because it was a recent decision of the Court, had been fully argued on both occasions with no new arguments presented on the second, and because, in the words of Gibbs J (as he then was):

> To reverse the decision now would be to defeat the expectations of the people of the Territories that they would be represented, as many of them believed that they ought to be represented, by Senators entitled to vote - expectations and beliefs that were no less understandable because in my view they were Constitutionally erroneous, and that they were encouraged by the decision of this Court.[27]

1.17 The validity of representation of Members of the House of Representatives *from the Territories was squarely raised in the* Second Territories Case. The case is, therefore, authority for the proposition that the Commonwealth Parliament has power under section 122 of the Constitution to make provision not only for Senators and Members to represent the Northern Territory and Australian Capital *Territory, but also other external and* internal Federal Territories. Further, it confirmed that Territory representatives are not bound by a number of Constitutional provisions applicable to State Senators and Members of the House of Representatives.

1.18 The last conclusion derives from the decision of the High Court in the case of Attorney-General (NSW) on the relation of McKellar v The Commonwealth,[28] where it was held by the High Court that section 24 of the Constitution did not apply to the people or representatives of the Territories. Thus, there is no Constitutional requirement that Territory representatives shall be "directly chosen by the people". The Commonwealth might, for example, provide for them to be appointed. Also the formula in section 24 for fixing the number of Members of the House of Representatives as nearly as practicable to twice the number of Senators and for calculating each State's quota is determined without reference to Territory Senators. But there is also no guarantee of a minimum number of Territory Members in the House of Representatives (5 for original States) or the Senate (6 for original States), nor is there any guarantee that increased representation will be granted as the population of the Territory increases.

1.19 A number of other Constitutional provisions are also not applicable, for example: the term of office of Territory Senators is not governed by section 13 and the casual vacancy provisions in section 15 do not apply.

1.20 Of more significance in the present context is the fact that the limitation in section 23 of the Constitution that "each Senator shall have one vote" does not appear to apply to

Territory representatives. Section 122 gives Parliament power to appoint Territory Senators with less than full voting rights, it would seem to follow that Commonwealth legislation could provide for Territory Senators *with greater voting rights than those set* out in section 23.[29]

1.21 For present purposes, the most relevant conclusion which can be drawn from the above is the fact that the Commonwealth has full power to determine the *number of Senators and* Representatives for both the Northern Territory and the Australian Capital Territory. However, it is also of significance that the Commonwealth Parliament has similar freedom to determine the method of election or appointment of Territory *representatives and the voting rights of such representatives.*

ENDNOTES : INTRODUCTION & CHAPTER I

1. Votes & Proceedings of the House of Representatives nos 3 & 7 of 4 & 7 May 1983; Journals of the Senate nos 7 & 8 of 11 & 12 May 1983.

2. Parliamentary Papers no 227/83.

3. *Votes & Proceedings of the House of Representatives* no 7 of 7 September 1983; Journals of the Senate no 8 of 8 September 1983.

4. Parliamentary Papers no 198/84.

5. Votes & Proceedings of the House of Representatives nos 5 & 6 of 27 & 28 February 1985; Journals of the Senate no 6 of 28 March 1985.

6. HANSARD - House of Representatives for 10 November 1983 at p. 2524 to 2526.

7. 2nd Reprint September 1983.

8. Ibid.

9. Ibid.

10. Proceedings of the Australian Constitutional Convention (Hobart 27th - 29th October 1976) at pp. 88-90, 204-5.

11. see - Australian National Airways Pty Ltd v Commonwealth (1945) 71 CLR 29; Lamshed v Lake (1958) 99 CLR 132; Teori Tau v Commonwealth (1969) 119 CLR 564; Minister for Justice of Western Australia [ex rel Ansett Transport Industries (Operations) Pty Ltd] v Australian National Airlines Commission (1976) 12 ALR 17.

12. 1975 7 ALR 159.

13. Act No 18 of 1922.

14. Act No 65 of 1936.

15. Act No 27 of 1959.

16. Act No 11 of 1968.

17. Act No. 57 of 1948.

18. Act No 3 of 1966.

19. Act No 11 of 1973.

20. No 39 of 1973.

21. Ibid section 9 (1) If the place of a Senator for a Territory becomes vacant before the expiration of his term of service, the President of the Senate may issue his writ for the election of a new Senator ... (2) If the places of both Senators for a Territory becomes vacant ... a writ may be issued under this section for the election of two new Senators at the one election.

22. Senate (Representation of Territories) Amendment Act No 14 of 1980.

23. Western Australia v Commonwealth op cit.

24. Such as sections 11, 15 and 21, all of which appear to presume that the Senate will be composed of Senators from the States.

25. (1977) 139 CLR 585.

26. (1977) 139 CLR 527.

27. *Queensland v Commonwealth op cit at p. 600.*

28. Op cit.

29. L. Zines, Representation of Territories and New States in the Commonwealth Parliament, a paper prepared for Standing Committee D of the Australian Constitutional Convention, published as Appendix H in Volume 2 of the 4th Report of Standing Committee D of the Australian Constitutional Convention (August 1982).

CHAPTER 2 - LEGISLATIVE PROVISION FOR REPRESENTATION OF TERRITORIES

2.1 When Commonwealth Electoral Legislation was amended in 1983 the opportunity was taken to consolidate the various enactments on electoral and related matters to include them within the Commonwealth Electoral Act 1918 (hereafter "The Electoral Act"). The Electoral Act thus became a Code of Commonwealth Electoral Law including the legislation relating to Territorial representation. Part III of the Electoral Act is headed Representation in the Parliament, Division 2 (Representation of the Territories in the Senate) and Division 4 (Representation of the Territories in the House of Representatives) now cover all aspects of representation of the Territories in the Parliament. They provide:

2.2 The Senate

- The Australian Capital Territory and the Northern Territory shall each be represented in the Senate by two Senators for the Territory directly chosen by the people (S.40).
- A Senator for a Territory has all the powers and privileges and immunities of a Senator for a State, shall be counted in the quorum and have a vote on all questions arising in the Senate (S.41).
- Sections 16 (qualifications for office), 19 (resignation), 26 (deemed vacancy after two months of unauthorised absence), 42 (oath of office) and 48 (entitlements), to the extent that they do not already apply, are made applicable to Territorial Senators (S.41).

- The term of a Senator for a Territory commences on the day of his election and expires on the day before polling day for the next general election for the House of Representatives (S.42).
- An election of the Senators for each Territory shall be held at the same time as each general election (S.43).
- Casual vacancies for places as Senators for Territories are to be filled:

  (a) In the case of the Australian Capital Territory by the members of the Senate and the House of Representatives sitting and voting together as a joint sitting, choosing a replacement to sit for the residue of the uncompleted term.

  (b) In the case of the Northern Territory, by the Legislative Assembly for the Northern Territory choosing a person to hold the place until the expiration of the term.

  If Parliament or the Legislative Assembly are not in session when the vacancy occurs, the Governor-General is empowered to appoint a person to hold the office for 14 days or until the next election whichever is the shorter.

  It is provided that any such vacancy shall be filled by a member of the same party as the Senator creating the casual vacancy unless there is no member of the party available to be chosen (S.44).[1]

2.3 The House of Representatives

- The representation of the Australian Capital Territory in the House of Representatives shall be by 2 Members directly chosen by the people of the Territory.

- The representation of the Northern Territory in the House of Representatives shall be by one Member directly chosen by the people of the Territory (S.51 & 52)

- A Member of the House of Representatives chosen in a Territory has all the powers, privileges and immunities of a Member of the House of Representatives chosen in a State and shall be counted in the quorum and have full voting rights [S.53(1)].

- Sections 32 (issue of writs), 33 (writs for vacancies), 37 (resignation) and 38 (vacancy by absence) are applied to the extent that they are not already applicable to Members of the House representing Territories [S.53(2)].

2.4 The Australian Capital Territory returns two Members under section 51. It is distributed into two Divisions under the procedures set out in Part IV - Electoral Divisions - of the Electoral Act. Section 61 deals with Redistribution of Boundaries in the Australian Capital Territory. In a redistribution of the Australian Capital Territory the whole of the Jervis Bay Territory is included in one Electoral Division.

2.5 As the Northern Territory is entitled to only one seat by section 52 of the Electoral Act, there is no need for Redistribution procedures to apply to it. However, under section 79 of the Electoral Act the Territory has been divided into Districts by the Electoral Commission. The Districts are the Electorates for returning Members to the Northern Territory Legislative Assembly. It is provided that the Territory of Cocos (Keeling) Islands (population 600) and of Christmas Island (population 2,800) shall be Districts of the Division of the Northern Territory. Thus, representation of the people of Jervis Bay, the Cocos (Keeling) Islands and Christmas Island is achieved by including them within the Federal Divisions returning Territorial Members. The remaining Federal Territories are not represented in the Parliament. The remaining Territories of the Commonwealth together with their populations are:

Ashmore and Cartier Islands - islands and reefs north-west of Darwin, close to Timor, no permanent population, no Parliamentary representation;

Australian Antarctic Territory - no permanent population;[2]

Coral Sea Islands Territory - ocean, reefs and small islands east of Queensland, no permanent population, no Parliamentary representation;

Heard and McDonald Island - no permanent population, no Parliamentary representation;

Norfolk Island - island south of New Caledonia, permanent population approximately 1,800, no Federal Parliamentary representation, separate Norfolk Island Legislative Assembly with legislative and executive powers, subject to direct Commonwealth control.

Representation of the States in Parliament

2.6 Representation of the people of the Commonwealth (a phrase that has been interpreted not to include the people of Federal Territories) is determined by a formula contained in section 24 of the Constitution, which determines the composition of the House of Representatives. The requirements of section 24 are:

- the House of Representatives be composed of Members directly chosen by the people of the Commonwealth;

- the number of Members to be as nearly as practicable twice the number of Senators (this proviso is called the "Nexus");

- the number of Members chosen in the States to be in proportion to the number of their people according to a quota prescribed in section 24;

. five Members at least to be chosen in each original State.

2.7 The quota prescribed in section 24 has now been enacted as a provision (section 48) of the Electoral Act. The quota is determined by dividing the latest population figures for the Commonwealth[3] by twice the number of Senators. The quota thus obtained is then divided into the population of each State from which is ascertained the number of seats to which the State is entitled. Tasmania, as an original State, is entitled to at least five Members. This formula implements the nexus as it ensures that the number of Members of the House of Representatives will not exceed twice the number of Senators. Each State is then apportioned into Electorates according to its entitlement by the Australian Electoral Commission. The distribution of seats is determined according to procedures prescribed in the Electoral Act.[4]

2.8 Section 7 of the Constitution provides that the Senate shall be composed of Senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise prescribes as one Electorate. Until 1983 there was a provision in section 7 that enabled Queensland to make laws dividing the State into Divisions and determining the number of Senators to be chosen for each Division. This was subject to the proviso "until the Parliament otherwise provides". The Parliament did otherwise provide in 1983 and enacted section 39 of the Electoral Act which declares that Senators for the State of Queensland shall be directly chosen by the people of the State voting as one Electorate and prohibiting the Parliament of the State from enacting a law to divide the State into Divisions. The Constitution prescribed a minimum of 6 Senators for each original State empowering Parliament to increase or diminish the size of the Senate but so that equal representation of the several original States shall be maintained and so that no original State shall have less than six Senators. Each original State returns 12 Senators to Canberra elected on a quota preferential proportional representation system.

2.9 In commenting on these provisions, Quick and Garran in their original commentary on the Constitution observed:

> As the Senate is the legislative organ representing the States, so the House of Representatives is the legislative organ representing the nation. This appears from the exact words of the Constitution. The Senate is composed of an equal number of Senators "for each State", directly chosen by the people of the State (sec.7). The House of Representatives is composed of members directly "chosen by the people of the Commonwealth", and the number of members chosen in the several States is required to be in proportion to the respective numbers of the people. In one chamber the States are equally represented. In the other chamber the people are proportionately represented. The Senate represents the States as political units. The House represents the people as individual units.[5]

Section 122 of the Constitution

2.10 Interpretation of section 122 of the Constitution by the High Court has confirmed that representation of Federal Territories pursuant to its provisions is to occur quite separately and so as to be largely unaffected by the provisions of Chapter I of the Constitution dealing with the Parliament. It appears that this was intentional as the following quotation from Quick and Garran seems to establish:

> A territory which has been surrendered to the Commonwealth by a State, or placed under the authority of the Commonwealth by the Queen, or been otherwise acquired by the Commonwealth, may be allowed representation in either house of the Federal Parliament, to the extent and on such terms as the Parliament thinks fit. The representation thus accorded is not representation as a State, but territorial representation. It may be allowed not only - as in the case of new States - "to the extent" which the Parliament thinks fit, but also "on the terms which it thinks fit". Apparently, therefore, the Parliament may not only fix the number of representatives for a territory, but determine - at least in some degree - the mode of representation. In the United States, there being no power to allow the territories to send members to Congress, the organized territories are nevertheless allowed to be represented in Congress by delegates who may speak but not vote. It would seem clear that under this Constitution the Parliament may, if it thinks fit, allow the representation of territories by delegates of the same kind, who, although allowed to sit

> and speak in the Senate or the House of Representatives, would not be members of either House, or entitled to vote therein. The Parliament may, however, under this section, *allow a territory to be represented by actual members* in either house; and in that case no terms would be imposed inconsistent with the provisions of the Constitution as to mode of election, tenure, and right to vote. The number of representatives which a territory may be allowed is of course absolutely in the discretion of the Parliament.[6]

2.11 The full potential of section 122 was not realised, despite the fact that the Northern Territory had been represented in the House of Representatives since 1922, until the issue was brought to a head by the enactment of the Senate (Representation of Territories) Act 1973. It emerged from the decision of the High Court of Australia in the two Territories Representation cases and McKellar's case that:

- under section 122 of the Constitution the Commonwealth may be able to provide that a Territory Senator has more than one vote
- there are no limits to the number of Representatives in either Chamber that the Parliament may "see fit" to grant the Territories
- Territory representatives need not be directly chosen by the people. The Parliament may, for example, provide for them to be appointed or indirectly chosen
- as section 24 does not apply, there is no Constitional "nexus" between the number of Members of the House of Representatives and the number of Senators representing the Territories.

2.12 These matters are discussed more fully in chapter 3. What does emerge, however, is that Parliament is not restricted by the Constitution as to the number or the powers of the representatives that it may see fit to grant to the Territories although the determination of the representation of the original

States is rigidly controlled by the nexus provisions of section 24. Territorial representatives are appointed outside the nexus and that representation is surplus to and uncontrolled by the nexus. Herein lies the opportunity for a Government, or a governing party in control of both the Houses of Parliament, to create Territorial representatives to the end of achieving control over the legislative power of the Commonwealth. The danger was averted to in the opinions of some of the judges in the First Territorial Representation Case. It was dismissed as a danger by those judges in the majority who argued that:

> It disregards the assumption which the framers of the Constitution made, and which we should now make, that Parliament will act responsibly in the exercise of its powers.[7]

2.13 Recent historical experience, however, tends to suggest that it would be imprudent to dismiss the possibility so lightly. The First Committee on Electoral Reform in its 1983 report adverted to the situation in these words:

> The Committee recognised the potential peril, however remote the implementation may be, of a government commanding a majority in both Houses legislating to increase territory representation in either House to advance its own political ends. The Committee recommends that the attention of the Parliament be directed to this specific potential problem, with a view to making explicit constitutional provision that future territory representation cannot be exploited so as to increase without constraint either House.[8]

2.14 We discuss in the next chapter the issues involved in procuring appropriate amendments to the Constitution. The Hon. I.B.C. Wilson has proposed in the Parliament and submitted to this Committee that pending Constitutional amendment along the lines of his resolution before the Australian Constitutional Convention that the intended result can be achieved in practice by appropriate amendments to the Electoral Act.

2.15 Mr Wilson submitted to the Committee:

> I recognise that in determining an appropriate level of representation from any territory or new state in either or both Houses of Parliament, there are a number of options which could be considered.[9]

2.16 The extent of representation could be according to a number of possibilities which he enumerates and dismisses on the argument that they were intended only to apply to original States:

> If these guarantees of equal or minimum representation in the Senate or House of Representatives are acknowledged to apply only to original States, there are two principles contained in Clauses 7 and 24 of the Constitution which provide guidance as to the kind of formula which should be applied to the determination of representation of new States and Territories. With the one exception referred to (sic. Tasmania), original States are entitled to be represented in the House of Representatives in proportion to population. In its way, this entitlement provides to the original States (with) representation on a basis approximating one vote, one value. To apply any other principle to representation in the House of Representatives from Territory or new State, would involve a departure from this principle.
>
> The Constitution requires automatic readjustment of the representation of States if the proportions of their respective populations change so as to give them a different entitlement to representation. With rapid population growth occurring in both the ACT and the NT, provision should now be made for automatic rather than ad hoc readjustment of Territory representation.
>
> So long as there remains a nexus between the size of the House of Representatives and the Senate, representation of a Territory or new State in the Senate beyond 2 Senators should be in the ratio of 1 additional Senator for every 2 Members of the House of Representatives beyond 4 to which that Territory or new State is entitled. In this way, the House of Representatives can be composed of "as nearly as practicable twice the number of Senators".[10]

2.17 The Australian Electoral Commission points out in its submission, that this proposal to amend the Electoral Act would:

- Provide a formula for determining entitlement to representation of the Australian Capital Territory and the Northern Territory in the House in line with existing provisions for determining the entitlement of the original States to representation. Under the proposal, the quota obtained under Section 48 of the Electoral Act (and section 24 of the Constitution) would be divided into the population of the Territory to determine the number of seats in the House to which each Territory is entitled. <u>Under this formula, a Territory's population would affects its own representation entitlement in the House, but, not being included in the quota, could not affect the relative representation of the States.</u>

- Provide a formula for determining entitlement to representation of each Territory in the Senate by halving the number of Members to which it was (on that calculation) entitled, with the proviso that each Territory was to have a minimum of two Senators.

2.18 The Australian Electoral Commission concluded that the determination of the number of Senators for each Territory by reference to the number of Members, while reversing the chain of causation applying in the States, is reasonable. Furthermore, while the nexus requirement of section 24 does not apply to Territorial representation, it might be thought desirable, nevertheless, to incorporate the 2:1 ratio in this way by adopting Mr Wilson's approach. While the formulae set out in Mr Wilson's amendments are thus satisfactory for achieving their proclaimed objectives, the amendments themselves might require some redrafting, and could not be adopted as they stand. For example, while it is clearly envisaged that the Electoral Commissioner would have to ascertain the populations of the Territories, an amendment was not proposed which would specifically require him to take such action.[11]

2.19 The proposal for the inclusion of a fixed formula to determine entitlement to representation in the House of Representatives is supported by all submissions made to the Inquiry, except that of the Northern Territory Government. The Australian Labor Party and the Australian Democrats (NSW) did not express firm views on a fixed formula to determine entitlement to representation in the Senate. The Northern Territory Government is opposed to fixed formulae of any kind in legislation or in the form of a Constitutional amendment.

2.20 It appears from the foregoing that the Commonwealth would have power under section 122 to legislate for fixed formulae to determine the future entitlement of Federal Territories to representation in the House and in the Senate. It needs to be stressed, however, that legislative action of this kind would do nothing to overcome the perceived problem that some Government might in future exploit its control of the legislature to achieve a political advantage by manipulating Territorial representation to its own advantage. This danger can only be overcome by appropriate amendments to the Constitution.

ENDNOTES : CHAPTER 2

1. This provision reflects the situation resulting from the successful referendum of 1977, Constitutional Alteration (Senate Casual Vacancies) Act No 82 of 1977. The proposal was successfully submitted to referendum on 29 July 1977. The effect of the amendment is to make it incumbent on the State Parliament when choosing a successor to a retiring Senator to choose a person from the same political party as the retiring Senator.

2. As a result of a recommendation of the Joint Select Committee on Electoral Reform, the Commonwealth Electoral Act 1918 was amended in December 1983 to enable Australians in Antarctica to vote in Federal Elections if they chose to do so. Those working in Antarctica and enrolled in Australian Electoral Divisions could enrol as Antarctic Electors and cast their votes under the supervision of appointed Antarctic Electoral Officers according to normal procedures. These votes would then be transmitted electronically to Electoral Officials in Australia.

   This facility under the Act was available for the 1984 General Election enabling all eligible Australian National Antarctic Research Expedition (ANARE) personnel to vote for the first time.

3. The populations of the Federal Territories is excluded from this figure following the decision of the High Court of Australia in MacKellar's case.

4. Electoral Act - Part IV, Electoral Divisions, sections 55 to 78.

5. Quick and Garran, The Annotated Constitution of the Australian Commonwealth (1900) at p. 447.

6. Ibid. p. 973.

7. Western Australia v the Commonwealth op.cit. per Mason J at p. 94.

8. First Report of the Joint Select Committee on Electoral Reform at p. 73.

9. Transcript of Evidence p. 198.

10. Ibid. p. 199.

11. The Australian Electoral Commission appended advice from the Department of the Attorney-General which stated, in part, that:

> In my opinion, legislation along the lines proposed by Mr Wilson could be validly enacted by the Commonwealth Parliament pursuant to s. 122 of the Constitution. Such legislation would, in my view, run no greater risk of invalidity than the present legislation concerning representation of the Australian Capital Territory and the Northern Territory (as to which, see Western Australia v the Commonwealth (1975) 134 CLR 201 and Queensland v the Commonwealth (1977) 139 CLR 585). I regard that risk as slight.

CHAPTER 3 - PROPOSALS FOR CONSTITUTIONAL REFORM

3.1 Amendment of the Commonwealth Constitution is extremely difficult to achieve. There have been 38 proposals for Constitutional change submitted to the people since Federation of which only 8 have been carried. Experience has been that proposals which encounter concerted opposition are not carried. Even where a proposal has substantial support from the main political groupings there can be no certainty that it will be successful. For instance, the unsuccessful referendum proposal of 1967 to break the nexus between the sizes of the House of Representatives and the Senate was sponsored by the Holt Government and supported by the ALP Opposition, but nevertheless failed to carry in the face of vehement opposition by a small group of Senators.

3.2 As it will emerge there are particular problems likely to confront a proposal to include fixed formulae in the Constitution to determine the entitlement of Federal Territories to representation in the Parliament. To many the issue is linked to proposals to break the nexus which has again emerged as a proposal attracting the support of some Constitutional reformers. The proposals that have been brought to the Committee's attention also involve the question of the right to representation of new States, thereby introducing additional complications.

Submissions made to the Inquiry

3.3 As noted in para. 1.7, the Hon. I.B.C. Wilson, MP introduced a motion at the 1978 Perth session of the Australian Constitutional Convention. This matter has been on the agenda of the Convention ever since and has been under consideration as recently as August 1985.[1] The text of the

motion is set out in para. 1.7. In his submission to the Inquiry, Mr Wilson explained his position:

> I believe that steps should be taken to amend the Constitution:
>
> firstly so that the representation of the Northern Territory, the ACT and any other territory as well as any new state established or admitted to the Commonwealth is in accordance with a prescribed formula contained in the Constitution rather than, as at present, to the extent that the Parliament shall from time to time "think fit"; and
>
> secondly so that Senators shall be required to be directly chosen by the people of the territory or state and Members shall be required to be directly chosen by the people of divisions of the territory or state which they represent.[2]

3.4 The Liberal Party, in its submission, supports Mr Wilson's proposed amendment and also recommends that:

- no division of Territory Senators into long-term and short-term Senators be made until a Territory is entitled to at least 4 Senators, otherwise, the provisions of the Senate (Representation of Territories) Act continue to apply in relation to the terms of all Senators elected for the Territories
- Territory Senators continue to be excluded from the nexus calculations provided for in section 24 of the Constitution
- no steps be taken to provide for any direct* Parliamentary representation by the people of Australia's Territories other than the Australian Capital Territory and the Northern Territory.[3]

3.5 Mr Wilson's resolution before the Constitutional Convention and the Liberal Party policy both couple representation of new States with that of Territories in its proposal. This raises implications that will also need consideration, and which are discussed further below.

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* The Committee understands this to mean separate representation and uses that word in the report.

3.6 The Northern Territory Government, both in its submission to the Inquiry[4] and its intervention at the Constitutional Convention,[5] adopts a different position. The submission argues for the status quo and sees no need for either Constitutional or legislative intervention. It quotes from the Convention Debate on the Constitution to support the view that the founders intended to give the Commonwealth a large discretion in the matter of representing Territories and new States, and expressed the view that anxious concern about the potentiality for the Commonwealth to abuse its power are unwarranted and exaggerated. It would limit the scope of Constitutional change to providing that:

- Territory Representatives are to be elected directly by the people;
- Territory representatives are to have no more than one vote, and
- the number of Senators chosen for a Territory not exceed the entitlement of an original State.

3.7 In the Territory's view, such an amendment would to a large extent limit possible abuse of the Parliament's powers to provide for Territory representation while maintaining the desirable flexibility of the existing provisions.

3.8 In the Constitutional Convention, Mr Everingham, the then Chief Minister of the Northern Territory, moved an amendment to Mr Wilson's resolution to delete all references to new States other than a provision that would simply state that the number of Senators for a new State shall not exceed the number of Senators for an original State. He supported this with a paper to Standing Committee D.[6] In this paper he submitted:

- the proposal of Mr Wilson for a formula to determine the entitlement of a Territory, specifically the Northern Territory, unduly emphasised the importance of population.

- other factors, such as distance and isolation are equally important considerations, so that the Northern Territory upon Statehood should be entitled to the minimum representation guaranteed to an original State by section 24 of the Constitution, of 5 members.
- the proposal of Mr Wilson to limit increases in Senate representation on the basis of one to every two members of the House of Representatives in excess of four would mean that the population of the Northern Territory would have to reach 650,830 before it would become entitled to one additional Senator, even were it to become a new State. He compares this with the entitlement of Tasmania to 12 Senators, with a present population smaller than that the Northern Territory would be required to achieve for its additional single Senator.

3.9 He concluded that in the view of the Northern Territory the argument should remain as resolved in the 1897 Convention Debates. The proposal to amend sections 121 and 122 has emerged largely from a fear that the Party system has so distorted the workings of the Senate that it is an institution no longer capable of protecting the interests of the States. Such a view, he argued, is complimentary to neither the Senate nor its members.

3.10 It emerged from the Department of Territories' submission that it would be hard to justify separate representation of any of the Federal Territories other than the Northern Territory and the Australian Capital Territory on the basis of their existing population.[7]

3.11 The Australian Labor Party submission is silent on the question of Constitutional change. The Party only supports the inclusion of a fixed formula to determine the entitlement to representation of the Australian Capital Territory and the Northern Territory in the House of Representatives. The Australian Democrats submit that in the Senate the existing two per Territory should not be altered and that the number of Members of the House of Representatives should be arrived at by adopting a population quota determined for the purpose of calculating the number of Members from each State.

3.12 In his letter supporting the submission of the Department of Territories (Commonwealth),[8] the Minister for Territories, the Hon. Gordon Scholes, MP qualified support for a Constitutional amendment, saying "... that the resultant inflexibility means that far greater certainty about objectives and the most desirable approach would be needed." He saw no difficulty about incorporating fixed formulae in the Electoral Act, as this "would more readily permit alteration should circumstances change". The Committee also received a submission from the Premier of Queensland, Sir Joh Bjelke Petersen, supporting the thrust of Mr Wilson's proposed reform to the Constitution. It also received a submission from Mr Fischer of the Department of Economics, Adelaide University, recommending that 50 percent of a quota to elect a member should be the minimum population to entitle a new State or Territory to representation.

Conclusions of Standing Committee D of the Constituional Convention

3.13 Professor Leslie Zines, Garran Professor of Law at the Australian National University, prepared a paper for Standing Committee D of the Australian Constitutional Convention.[9] Standing Committee D had had referred to it Mr Wilson's resolution for Constitutional amendment. Professor Zines, in his analysis, identifies the Constitutional changes likely to flow from Mr Wilson's proposed amendments to the Constitution:

- Parliament would be required to provide for a system of direct election by the people of the Territories.
- Provision could be made for one Member of the House of Representatives for each Territory regardless of population. The amendment would enable the Commonwealth to provide one Member to represent an electorate covering more than one Territory but it could not, regardless of population, provide for two Members for a multi-Territory electorate.
- There could be provision for up to two Senators for each Territory regardless of population.

- Subject to the above provisions, a Territory's representation in the House of Representatives would be related to the proportion of its population. Its Senate representation would be limited to half its representation in the House of Representatives.

- There would be a maximum limit on the number of Senators that Parliament could prescribe for a Territory.

3.14 Standing Committee D reported to the Constitutional Convention on Mr Wilson's proposal, Mr Everingham's amendment, and amendments moved by another member of that Convention, Mr Solomon.[10]

3.15 On the proposal for representation in the Senate, a sub-committee of Standing Committee D pointed out that, although Mr Wilson's proposal was based on the nexus requirement, the similarity between his proposal and the way the nexus actually worked was only superficial. Section 24 calculates the total number of Members for all the States by reference to the total number of Senators for the States. There is no direct correlation between numbers of Members and numbers of Senators within any one State. In NSW, for instance, the ratio is 12 Senators to 51 Members: in Western Australia the ratio is 12 Senators to 13 Members. The nexus achieves an overall ratio of 1 Senator to every 2 Members. Furthermore, the number of Members is in proportion to the number of Senators. Mr Wilson's proposal reverses this procedure.

3.16 The sub-committee could not agree whether to support the proposal or not, and noted the opposing views. According to one view, some control over Territories representation in the Senate is necessary to prevent distortion of the Federal balance. On this view if the formula provided in the Wilson proposal is not feasible, another formula should be found. On the other hand, there are undoubted difficulties in developing any formula suitable for inclusion in the Constitution. It also noted what it described as an inequity for the Northern Territory in that its population would have to reach 2,360,000 before it was entitled to 10 Senators.

3.17 In its Fourth Report, Standing Committee D[11] of the Convention recommended:

(a) the Constitution be amended to require Territory Senators and Members to be "directly chosen by the people";

(b) the proposal which was foreshadowed by Mr Solomons at the Perth Convention, that the Constitution be amended to ensure that a Territory other than the Northern Territory and the Australian Capital Territory may not be granted representation in the Senate be rejected;

(c) the possibility of representation of Territories other than the Northern Territory and the Australian Capital Territory should not be precluded by any amendments to the Constitution;

(d) the Constitution be altered to ensure that the total number of Senators for a Territory shall not at any time exceed that of an original State;

(e) the following provisions of the Constitution should expressly be applied to or in relation to Territory Senators and Members;

ss. 8 and 30	- each elector to vote only once
ss. 16 and 34	- qualifications of Senators and Members
ss. 17 and 35	- election of President and Speaker
ss. 18 and 36	- absence of President or Speaker
ss. 19 and 37	- resignation of Senator or Member
ss. 20 and 38	- vacancy by absence
ss. 22 and 39	- quorum
ss. 23 and 40	- voting
s. 42	- oath or affirmation of allegiance
s. 43	- Member of one House ineligible for other
s. 44	- disqualification
s. 45	- vacancy on disqualification
s. 46	- penalty for sitting when disqualified
s. 47	- disputed elections
s. 48	- allowance to Members
s. 49	- privileges of Houses

(f) the implementation of the proposals for Constitutional amendment be made as far as possible by a general amendment rather than by detailed alterations to individual sections.

3.18 The committee referred to the full Convention for further consideration the following proposals:

(a) that the Constitution be amended to ensure that once Parliament has decided that the people of a Territory or a new State shall be represented in the House of Representatives by a number of Members in excess of one, the number of Members is in the same proportion to population as the number of Members chosen by the people of the original States (other than a State for which the guaranteed minimum representation of five Members is assured by s. 24) provided that the representation of the Northern Territory and the Australian Capital Territory in the House of Representatives as provided for at (date) shall not be diminished;

(b) that the Constitution be amended to ensure that once Parliament has decided that the people of a Territory or a new State shall be represented in the Senate, the number of Senators in excess of two shall be in the ratio of one additional Senator to every two Members in the House of Representatives from that Territory or State in excess of four provided that the number of Senators for a Territory or a new State shall not at any time exceed the number of Senators from an original State; and

(c) that the Constitution be amended to provide for the inclusion of Territory Senators in the nexus calculation provided for in s.24 of the Constitution.

3.19 The Report of the Committee was considered together with a Report from the Structure of Government Sub-committee at the Brisbane Session of the Australian Constitutional Convention in July 1985. The matter was debated and a resolution was moved, the effect of which would have been to break the nexus and to include provisions in the Constitution for the representation of Territories and new States. That motion was defeated. The Convention merely resolved that the Report be noted.

New States

3.20 The formulae proposed by Mr Wilson would apply to new States as well as to Federal Territories. The Constitution makes provision for the admission or establishment of new States in section 121, which 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 representation in either House of the Parliament, as it thinks fit.

3.21 The founders had in mind two possibilities in framing this provision:[12]

- "Admission" to the Commonwealth of existing Nation State or Crown Colonies such as New Zealand and Fiji.

- The word "establishment" would cover the situation whereby a Territory of the Commonwealth is granted Statehood, or a new State is created from an existing State or States whether by partition, union of the whole or parts of two or more States, or by the junction of contiguous parts of two or more States. Sections 123 and 124 of the Constitution indicate procedures for changing boundaries between States and Territories, and the creation of new States from within the Territories of existing States requiring the consent of the Parliament of the affected States.

3.22 Section 121 provides for the Commonwealth to impose conditions on the admission of a new State. In particular it may deal with the question of representation and in this respect it is to be noted that the rule of equal respresentation in the Senate may be departed from, as this requirement only applies to the original States. Quick and Garran[13] state that even the principle of proportional State representation in the House of Representatives, though expressed without qualification in section 24, might, under the words of this section "including the extent of represenation in either House," be varied in the case of new States. However, no terms or conditions could be imposed which were inconsistent with the provisions of the Constitution. For example, the Judicature provisions of the Constitution (Chapter III) or section 92 (free trade between the States) or 116 (Religion freedom) could not be excluded.

3.23 *Professor Zines in the paper he prepared for Standing* Committee D examined in detail the implications of the proposal on the provisions of the Constitution dealing with new States.[13] After commenting on the absence of any guidance as to the likely operation of section 121, he made the following points:

- Section 121 by empowering the Commonwealth to determine the extent of representation to be afforded to a new State seems to presume that the new State shall have some entitlement. In this respect it differs from section 122 which gives the Commonwealth a complete discretion whether to grant any representation as well as the terms and extent of that representation.

- The Constitution does not guarantee a new State the right of equal representation in the Senate with original States. The relevant provisions in Chapter 1 of the Constitution, *section 7, which guarantees equal representation is limited* to original States.

- Parliament could not admit or establish a new State upon the basis that there were to be no Senators for such a State nor any Members of the House of Representatives chosen in such State. But it seems clear that any number above one is for the Commonwealth to determine under section 121.

- Other provisions of the Constitution such as (a) section 7, Senators to be directly chosen by the people of the State, (b) section 9, that the electoral laws for choosing Senators be uniform, (c) section 23, limiting Senators to one vote each; because their application is not limited to original States would all apply to new States. By the same argument, new State Members of the House would require to be "*directly chosen by* the people". However, the minimum entitlement of 5 Members of the House would not apply to them.

- Section 121 would not of itself provide authority for altering the "extent of representation" of a new State after it has been established or admitted as the power is exercisable only "upon such admission or establishment". But of course the conditions may be in the form of formulae for determining the entitlement to representation of a new State in future inserted in the instrument of admission or establishment.

- It appears from Professor Zines' analysis that the details *of a new State's representation entitlement both at the* time of admission or establishment and thereafter would need to be dealt with at the time of the admission or establishment. He points out that the Commonwealth Parliament has no power to increase or diminish the entitlement of an individual State to representation in the House of Representatives. Section 121, as noted, does not provide this power. The Commonwealth can only increase or diminish the size of the House overall through the nexus. The entitlement of a particular State to seats from this overall number is determined by application of the section 24 formula.

This raises the question of whether new State entitlement should be included in the nexus calculation. This would only appear feasible if the new State entitlement to Senate representation was uniform with that of the original States - that is to say, equal representation. If Senate entitlement was not equal then the inclusion of new State Senators in the formula would produce a distortion. On this argument it would also be necessary to exclude the people of new States from the population of the Commonwealth for the purpose of the other part of the equation. For them to be included would likewise produce a distortion. It would appear from this that there would need to be devised some sort of representation formula for each new State on its admission or establishment. Furthermore, it would seem

undesirable that representation in the Commonwealth Parliament should be determined by a wide variety of different formulas and a case seems to be established for a uniform basis of representation applicable to new States and Territories related to the established representation formulae in the Constitution.

Another alternative would be to include States and Territories within the nexus formula. This, however, would not work if Senate entitlement varied between original States, new States and Territories. Finally, mention should be made of proposals now under consideration to break the nexus. If this were to happen the representation of Territories and new States might then need to be looked at in a different light.

Breaking the Nexus

3.24 The Australian Constitutional Convention has had under consideration Senator Macklin's 1983 Constitution Alteration Parliament Bill 1983.[15] The Bill which passed in the Senate was similar to that endorsed by the Constitutional Convention at Plenary Sessions in Melbourne in 1975 and Hobart in 1976. The issue was referred to the Structure of Government Sub-committee which reported on the matter to the Constitutional Convention in its sessions of August 1985. The Committee commissioned a paper from Mr G. Lindell, Senior Lecturer in Law, Australian National University, which is included as an appendix to its Report.[16]

3.25 A proposal to break the nexus between the size of the House of Representatives was put to the people at a referendum on 27 May 1967. The Referendum was defeated. The referendum was carried in only one State, NSW. The percentage of formal votes in favour was 40.25 percent nationally.

3.26 The proposal put to the people in 1967 originated as a recommendation of the 1958 Report of the Joint Committee on Constitutional Review[17] which recommended that the Constitution should be amended to provide that the number of Members of the House of Representatives should no longer be tied to being as nearly as practicable twice the number of Senators. The proposal envisaged that the Parliament should continue to have the power to make laws for increasing or diminishing the number of Members of the House of Representatives, and that the number of Members chosen in the several States should remain in proportion to population. However, it was proposed that the power of the Parliament to determine the number of Members of the House of Representatives should be subject to the qualification that the number of Members to be chosen in any State should be determined by dividing the population of the State by a figure determined by the Parliament. That figure was to be the same for each State and not less than 80,000, thus providing that there should be on average at least 80,000 people for every Member. The latter qualification was intended as a limitation or Constitutional barrier on the power of the Parliament to increase the size of the House of Representatives.

3.27 It is not necessary to repeat in this report the arguments mounted at the 1967 Referendum for and against the proposal.[18] In general terms the argument for the change is that the size of the House of Representatives should be capable of increase with the growth of the population without the Senate necessarily having to increase at the same time. Further, that the Senate as a House of Review could continue to perform its Constitutional function and maintain its status and prestige regardless of its numerical size. Against this it was argued that the nexus provided a valuable brake on unnecessary increases in the number of Parliamentarians, that upon it was dependent the prestige, influence and authority of the Senate, and that it ensured that the smaller States would continue to return adequate representation to the Parliament to participate in Party forums and to influence events. To this, one might add, on the

experience of the 1974 Joint Sitting under section 57, that the nexus is needed in order to ensure that the influence of the Senate in that forum is not reduced to insignificance. Mr Lindell suggests in his paper[19] that this last objection would be overcome if a system of weighting the votes of Senators participating in joint sittings were adopted in the Constitution.

3.28 The Constitutional power to provide representation for Territories derives from section 122 and has been held to be quite separate and independent from Chapter 1 of the Constitution. A Constitutional amendment breaking the nexus would have no effect on this situation unless the opportunity were taken at the same time to amend the Constitution to deal with the representation of Territories and new States by bringing them within the formula for representation replacing the nexus. A choice that will need to be made by Constitutional reformers in the future is whether to continue to treat Territories and new States differently in determining their representation entitlement or whether to include those people and those Territories in the formula. If the devisor for determining the quota to elect a Member of the House of Representatives ceased to be tied to the size of the Senate, then there would appear to be no problem as far as determining entitlement to representation in the House is concerned. Territories and new States would return Members on the basis of their population in the same way as the original States. The problem would appear to be in the area of entitlement to representation in the Senate.

3.29 The Senate was originally conceived as a State House. Quick and Garran observe in regard to it:

> The Senate is one of the most conspicuous, and unquestionably the most important, of all the Federal features of the Constitution, using the word Federal in the sense of linking together and uniting a number of co-equal political communities, under a common system of Government. The Senate is not merely a branch of a bicameral Parliament; it is not merely a second chamber of revision and review representing the sober second thought of the nation, such as the House of Lords is supposed to be; it is that, but something more than that. It is the chamber in which the States, considered as separate entities, and corporate parts of the Commonwealth, are represented. They are so represented for the purpose of enabling them to maintain and protect their Constitutional rights against attempted invasions, and to give them every facility for the advocacy of their peculiar and special interests, as well as for the ventilation and consideration of their grievances. It is not sufficient that they should have a Federal High Court to appeal to for the review of Federal legislation which they may consider to be in excess of the jurisdiction of the Federal Parliament. In addition to the legal remedy it was deemed advisable that original States at least should be endowed with a parity of representation in one chamber of the Parliament for the purpose of enabling them effectively to resist, in the legislative stage, proposals threatening to invade and violate the domain of rights reserved to the States.[20]

3.30 Commentators have noted, however, that the Senate has never fully functioned as a State House in the sense intended by the founders. The reason for this is the dominance of Party political interests in the Chamber. Professor Geoffrey Sawer observed with regard to the Senate in 1974 when its decision to defer supply precipitated the double dissolution of that year:

> Although the Senate is a democratic body and has proved capable of exercising both second-chamber and Federal functions with dignity and efficiency, it is in fact, and hopelessly, made up mainly of representatives from the major political Parties whose chief loyalty is to their respective Party organisations in the Parliament as a whole, and outside Parliament. The decision whether or not to defer supply in April 1974 and in October 1975 was not taken in the Senate by Senators; it was taken by the joint Liberal- Country Party Parliamentary organisation, in the second case after consideration as well by the Liberal Party extra-Parliamentary organisation; in each case the decision was first announced not by any Senator but by the Liberal leader in the Representatives. In other words, the practical reality is that the Senate is an instrument in the hands of the Parties in the Parliament as a whole.[21]

3.31 This is further illustrated by the circumstances leading to the eventual enactment of the Senate (Representation of Territories) Act 1973. The Act could not have passed the Joint Sitting in the face of concerted opposition by the Senate as a whole. It was of course supported by Senators elected to

represent the (then) Government. The point is further illustrated by the successful Referendum in 1977 to ensure that casual vacancies in future would result in the vacant place being filled by a person representing the same political party as the Senator creating the vacancy. This amendment, for the first time, enshrined a reference to the existence of political parties in the Constitution itself. It might also be perceived as a qualification of State rights in that the provision overrides the previous position which gave to the Parliament of the State the right to appoint a successor to the retiring Senator.

3.32 Once representation of the Territories in the Senate was conceded, then the original "Federal balance" which the founders sought to achieve through the nexus was upset. From that time the Senate ceased to be an exclusively State House. Thus it is not now possible to restore the original Federal balance unless the Constitution is amended to reverse the High Court's decisions and prohibit representation of the Territories in the Senate.

3.33 The Senate as conceived by the founders of the Commonwealth was not designed to represent population as such; quite the reverse, it sought to ensure equality among the States, that is to say, the Territorial components of the Federation. The amendment would introduce a principle of entitlement to representation based on population which some may see as alien to the principles which shaped the design of the Australian Constitution. Such representation that has been provided in the Senate to date - for the Australian Capital Territory and the Northern Territory - does not relate entitlement to population as both Territories have two Senators. The choice of two was dictated by Party political considerations as being unlikely to upset the balance of Party political representation in that House.

3.34 It must be concluded that essentially the problem of representation of the Territories results from the decision of the High Court in McKellar's case that the provisions of the Constitution relating to representation in the Parliament in

Chapter 1 do not apply to representatives of the Territories chosen pursuant to legislation under section 122. This enables the Commonwealth to legislate for the increase of Parliamentary seats uncontrolled by the nexus or the provision in Chapter 1. In the ability of the Commonwealth to do this lies its potential power to swamp the Parliament with Territorial representatives. The original Federal balance between population represented in the House and State interests represented in the Senate would not be restored by the adoption of Mr Wilson's amendment. It would merely limit the extent to which some future Government could manipulate the situation to upset the political balance.

3.35 These considerations suggest that Constitutional change in regard to representation entitlement of Federal Territories is an issue that should be examined in a broad context of Constitutional change.

ENDNOTES : CHAPTER 3

1. Proceedings of the Australian Constitutional Convention, Brisbane 1985 for 31 July 1985.
2. Transcript of Evidence p. 199.
3. Ibid. p. 224.
4. Ibid. p. 246.
5. See Volume 2 of the 4th Report of Standing Committee D of the Australian Constitutional Convention dated August 1982.
6. Published as Appendix I in Volume 2 of the Fourth Report of Standing Committee D of the Australian Constitutional Convention dated 27 August 1982.
7. See Chapter 2 paras .....
8. Transcript of Evidence p. 286.
9. L. Zines, Representation of Territories and New States in the Commonwealth Parliament - published as Appendix H in Volume 2 of the 4th Report of Standing Committee D of the Australian Constitutional Convention (August 1982).
10. See Fourth Report of Standing Committee D, Australian Constitutional Convention dated 27 August 1982, Vol.I p.52.
11. Ibid.
12. See; passim Lumb and Ryan, Constitution of the Commonwealth of Australia : Annotated, 3rd Ed. at p. 390-397.
13. Quick and Garran, op.cit. at p. 970.
14. L. Zines, op.cit. at pp.10-13.
15. Journals of the Senate.
16. Proceedings of the Australian Constitutional Convention - Structure of Government Sub-committee Report on "Breaking the Nexus between the Sizes of the Federal Houses of Parliament" (February 1985).
17. Joint Committee on Constitutional Review, 1959 Report, Parliamentary Paper No... at paras 58-68, 80, pp. 8-9, 11-12.

18. The Arguments For and Against: The Proposed Alterations Together with a Statement Showing the Proposed Alterations in relation to the Constitutional alterations (Parliament) 1967, dated 6 April 1967, published by the Chief Electoral Officer for the Commonwealth.
19. G. Lindell, op.cit. at pp. 30-32.
20. Quick and Garran, op.cit. p. 414.
21. Geofrey Sawer, Federation under Strain (1977 MUP) at p. 123.

CHAPTER 4 - THE COMMITTEE'S PROPOSALS

4.1 The Committee has concluded that the entitlement to representation in the Commonwealth Parliament of Federal Territories should be prescribed and not subject to alteration by the Parliament "as it sees fit" under section 122 of the Constitution. Initially the formulae should be enacted as provisions of the Electoral Act. The Committee also concludes that the entitlement of new States to representation in the Senate and the House of Representatives should be prescribed in the Constitution. It is strongly of the view that the principles we have determined as appropriate to apply to the representation of Territories in the Parliament should also apply upon the admission of new States to the Federation.

New States

4.2 The only Territorial component of the Federation with pretensions to Statehood currently being pressed is the Northern Territory. It does not seem to the Committee that there is a sustainable argument for the Northern Territory to obtain admission as a new State with entitlements to representation of the original States. Provisions of the Constitution guaranteeing a minimum of 5 Members and equal Senate representation to founding colonies were inserted for particular historical reasons related to the times and cannot be regarded as relevant to the admission of new States in the present historical climate.[1] This was clearly the view of the founders themselves who provided in sections 121, 123 and 124 a framework for negotiation. It was clearly envisaged that the representation entitlement of new States in both Chambers might be less than that of original States.[2] The Committee is not impressed by the argument of the

representatives of the Northern Territory that the Territory should be accorded greater representation in the House of Representatives than its population warrants to compensate for its size and isolation. To admit such a principle would be quite contrary to the general principles of representation that have evolved in recent times. It is concerned by suggestions that the Territory should obtain equal Senate representation with that of the original States and can see no justification whatsoever for a proposal which would result in gross over-representation of the Northern Territory.

4.3 It is clear from the Convention debates that the founders considered that new States should only be admitted to the Federation on conditions acceptable to the Commonwealth, that is to say, the original States. In summing up the effect of the provision, Quick and Garran state:

> Under the Constitution of the Commonwealth the Federal Parliament has a free hand in deciding the terms and conditions under which a new Member may be admitted into the Federal family system. It will be at liberty to impose such stipulations as it thinks fit, unhampered by considerations of equality of original States. Among the terms and conditions which may be imposed on such new States, the following may be suggested, viz., that such new States shall, before their admission, contain a population duly organized and of a certain numerical strength; that they shall have a Constitution suitable for State Government; that such Constitution shall contain a reasonable rule of suffrage; that such Constitution should contain no provision contrary to the recognized usages and policy of the other States.[3]

4.4 It would appear to the Committee that the Constitution ought to contain some limit on the ability of a Commonwealth Government to grant statehood on terms and conditions inimicable to the interests of the people or of components of the Federation. Its "free hand" in this respect should be restrained on the same principles as its free hand on Territory representation is to be restrained. We recommend that no new State should be admitted to the Federation on terms and conditions as to representation in the Parliament more favourable than those prescribed for representation of Territories in the Electoral Act.

4.5 As noted in chapter 2, the Commonwealth has the power under section 122 of the Constitution to legislate to determine Territorial entitlement to representation in the Parliament. However, it does not appear that the Commonwealth has power to legislate to determine in advance the conditions on which new States might be admitted to the Commonwealth. The power to legislate under section 122 would appear to be confined to "Territories surrendered by any State to and accepted by the Commonwealth or otherwise acquired by the Commonwealth". No power to legislate with regard to new States arises under this provision. The admission and establishment of new States is dealt with in sections 121, 123 and 124 of the Constitution. Sections 123 and 124 apply only where part of an existing State or the boundaries of a State would be affected by the creation of the new entity. The power in section 121 to "make or impose ... terms and conditions including the extent of representation ..." seems only to be exercisable "upon such admission or establishment". It would thus appear that the only way the terms on which new States might be admitted or established can be affected is by Constitutional amendment. Consequently the Committee's proposals for amendment to the Commonwealth Electoral Act apply only to the position of Territories.

Enactment of Fixed Formulae in the Electoral Act

RECOMMENDATIONS

4.6 The Committee recommends that the Electoral Act be amended to make the following provisions for the representation of the people of Commonwealth Territories:

1. <u>Representation in the House of Representatives</u>

   (a) The people of the Australian Capital Territory and the Northern Territory shall each be entitled to be represented in the House of Representatives by at least one Member. The people of each Territory shall be

entitled to representation thereafter in proportion to the population of the Territory. The quota obtained under section 48 of the Electoral Act shall be divided into the population of each Territory to determine the number of Members the Territory is entitled to return. The Australian Electoral Commission shall determine the entitlement of both Territories to representation at the same time as it determines the entitlement of the original States of the Commonwealth under section 59 of the Electoral Act.

   (b) The people of a Commonwealth Territory shall be entitled to separate representation in the House of Representatives <u>only</u> when the population of the Territory exceeds more than one half of a quota under section 48 of the Electoral Act for the election of a Member to the House of Representatives from an original State of the Commonwealth. Until an entitlement to separate representation vests, arrangements should continue to be made to include the people of Commonwealth Territories other than the Australian Capital Territory or the Northern Territory in Electoral Divisions of the Australian Capital Territory and the Northern Territory.

2. <u>Representation in the Senate</u>

   (a) The Australian Capital Territory and the Northern Territory shall be entitled to representation in the Senate on the basis that each Territory shall return one Senator for every two Members of the House of Representatives it is entitled to return under the calculation in 1(a) above. But the people of the Australian Capital Territory and the Northern Territory shall each be entitled to representation in the Senate by at least two Senators.

(b) A Commonwealth Territory other than the Australian Capital Territory and the Northern Territory shall be entitled to representation in the Senate on the basis of one Senator for every two Members of the House of Representatives it is entitled to return under the calculation in 1(b) above.

3. Application of Constitutional Provisions to Territory Representation

(a) The provisions of Part III - Divisions 2 & 4 of the Electoral Act referred to in Chapter 2 which apply existing Constitutional provisions to Territory representation should continue in force.

(b) The provisions of section 42 of the Electoral Act providing for the term of a Senator for a Territory to relate to the period between House of Representatives elections should continue in force.

(c) The provisions contained in section 44 of the Electoral Act for the filling of casual vacancies in the Senate, for the Australian Capital Territory, by joint sitting of members of the Senate and the House of Representatives and for the Northern Territory by the Legislative Assembly for the Northern Territory should continue in force. However, should the Australian Capital Territory obtain self-government, then any Legislative body established under those arrangements should be substituted for the joint sitting of members of the Senate and the House of Representatives for the purpose of choosing a Senator to replace the Senator causing the vacancy.

Constitutional Change

4.7 The Committee has concluded that Constitutional change is required so that representation of Territories and new States in the Parliament in future occurs according to principles acceptable to the Australian community. Constitutional amendments along the lines of the formulae we have proposed for inclusion in the Electoral Act (which are in line with the proposals sponsored by the Hon. I.B.C. Wilson MP) would meet the problems and anomalies that have been disclosed to exist under the Constitution at present. It is not satisfactory for the entitlement to representation of the original States to be ridgidly controlled by the nexus provision in section 24, 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. The Northern Territory, which has argued against change, would support amendments to provide:

- that Senators and Members representing the Territories be "directly chosen by the people";

- that the entitlement of a Territory to representation in the Senate should not exceed the entitlement of the original States of the Federation;

- that Territory representatives not be entitled to more than one vote.

4.8 However, we do not agree with the argument of the representatives of the Northern Territory that these reforms, alone, would suffice.

4.9 The present position is such that, given the right circumstances, the situation could be exploited to the detriment of the Federation as a whole. In the First Territories Representation Case, Jacobs J. dismissed the possibility:

> The Parliament, it is said, might create fifty or a hundred Senators for a Territory with multiple voting to boot and that could never have been intended. It is a preposterous suggestion in that it puts the cart before the horse. It is the Parliament which must make the law for representation of Territories and the framers of the Constitution trusted a system of Parliamentary Government in which they were mostly immersed. Those who were lawyers were mostly Parliamentarians as well and if as lawyers they might scan a document for its hidden traps or loopholes, their sense as Parliamentarians would tell them that the Parliament itself was the safeguard against the absurd possibility. We likewise should construe the words of the Constitution by its plain terms and not by some distorting possibility.[4]

4.10 However, the distorting possibility of section 122 would not need to be exercised on the scale envisaged by His Honour to achieve a significant political advantage. The Party balance in the Senate could easily be upset by a small manipulation in favour of one or other of the Parties to ensure control of that Chamber. The situation is exacerbated by the possibility of multiple voting and selection by means other than direct election by the people.

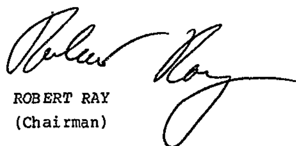
4.11 Similarly, the control of either Chamber, in a tight numbers situation, could be affected by legislative change affecting the existing entitlement of the Territories, as for instance to remove voting rights of Territory representatives.

The admission of the Northern Territory as a new State with an entitlement to representation out of all proportion to its population could likewise produce a distortion serving the interest of the governing Party which sponsored it. Nor does historical experience support the assumption that a Parliament can always be relied on to act responsibly. There are numerous examples from recent history where a political party or leadership has suborned the democratic constitution of a nation. The circumstances whereby the Nazis achieved control and destroyed the democratic constitution of the Weimar Republic is one example. Another was the process whereby the Nationalist Party in South Africa succeeded in overriding the constitutionally entrenched rights of black and coloured voters in South Africa as a prelude to the introduction of the apartheid system.[5] The assumption that it could not happen here involves an ability to predict the future which this Committee does not claim to possess. In a polity governed by the rule of law it is essential to ensure that the written Constitution cannot be legally exploited by the unscrupulous.

4.12 For these reasons it is our view that the Constitution should be amended to remove existing anomalies and to establish a consistent basis for representation of the people and the various Territorial components of the Federation. The recommendation we make for legislative formulae are essentially directed at providing a solution to the problems and anomalies that have been revealed by the decisions of the High Court discussed in Chapters 2 & 3 of this Report. However, Constitutional amendment even in ideal circumstances is a slow process.

4.13 For a variety of reasons we conclude that it would be premature to submit a proposal to the people concerning the representation of new States and Territories. Further clarification of the issues is needed before an acceptable proposal for change can be formulated. Our proposals for amendments to the Electoral Act are an interim step. If the

support of the Parliament can be obtained for these proposals a significant obstacle will be placed in the way of a government seeking to exploit the Territories' power for electoral advantage. A government seeking to change the process, once these provisions are enacted, would need the support of both Houses. It is some years since a government has been able to rely on Senate support for all its legislative proposals. The deadlock, double-dissolution and joint sitting provisions of the Constitution provide additional obstacles that would need to be cleared before such a program could be implemented. If, as we believe, the formulae we propose provide an equitable basis for the representation of the people of the Territories for the forseeable future, then the task of some future government in persuading the Parliament and the people that these arrangements are defective would itself constitute an obstacle to such a government seeking to replace the provisions with self-interested proposals of its own.



ROBERT RAY
(Chairman)

19 November 1985

ENDNOTES : CHAPTER 4

1. As participants in the conventions that preceded the founding of the Commonwealth, the original States were able to negotiate terms on which they would enter the Federation.

2. Quick & Garran, op.cit, at p. 970.

3. Ibid.

4. Western Australia v The Commonwealth (1975) 7 ALR 159 per Jacobs J. at p. 95.

5. At the time of the formation of the Union of South Africa 1908-1910 the various colonies seeking to federate had different qualifications for the franchise. Black and coloured voters in the Cape Colony were entitled to vote; in the other colonies black and coloured voters were excluded from the franchise. In the Constitution of the Union the rights of Cape coloured voters were entrenched. The Constitution could only be changed by a two-thirds majority at a Joint Sitting of both Houses. Upon Dominion status being granted to the Union by the Statute of Westminster 1931 the two Houses of the Legislature approved the passing of the Statute of Westminster on the understanding that the proposed legislation will in no way derogate from the entrenched provisions of the South Africa Act (UK). The Nationalist Government of Malan in 1948 purported to remove the rights of Cape voters by an enactment passed by a simple majority by the ordinary bi-cameral method. This legislation was challenged and declared unconstitutional in the case of Harris v Minister for the Interior 1952 (2) SA 428. The Government responded by passing, again by simple majority, the High Court of Parliament Act which provided that any judgement of the appellate Division invalidating an Act of Parliament was to be reviewed by Parliament itself sitting as a High Court of Parliament. Parliament then proceeded to set aside the Harris v Minister for Interior decision. The concept of the High Court of Parliament was then challenged and repudiated by the appellate division in Minister for Interior v Harris (1952) 4 SA 769 (AD). Still unable to muster the necessary support for a two-thirds majority at a joint sitting the Government proceeded to increase the size of the appellate division from 5 to 11 judges and passed the Senate Act 1955 again by a simple bi-cameral majority which increased the size of the Senate from 48 to 89. It then introduced the South Africa Act Amendment Act 1956 which was passed by a two-thirds majority of both Houses sitting together under the new arrangements. This Act revalidated the 1951 Separate Representation of Voters Act 1956, removed the entrenched provisions and provided that "no court of law shall be competent to enquire into or pronounce upon the

validity of any law passed by Parliament". This legislative scheme was subsequently upheld by the augmented appellate division in Collins v Minister for the Interior 1957 (1) SA 552 (AD) - see passim - Dugard, John, Human Rights and the South African Legal Order (Princeton University Press) 1978.

DISSENTING REPORT

SUBMITTED BY

SENATOR M.J. MACKLIN

TO THE

JOINT SELECT COMMITTEE

ON ELECTORAL REFORM

19 November 1985

The Majority Report of the Joint Select Committee on Electoral Reform, if implemented, will condemn the Northern Territory to the status of a second class State.

While being given equality of representation in the House of Representatives, the Northern Territory and any other new States of the Commonwealth will be denied the equality of representation as a State which is the constitutional principle upon which the Senate is founded.

The recommendations made by the Majority Report with regard to the Senate representation for territories and new States confuse in a serious way principles which underpin the constitutional processes in Australia.

The Majority Report in paragraph 4.1 says:

> It [the Committee] is strongly of the view that the principles we have determined as appropriate to apply to the representation of Territories in the Parliament should also apply upon the admission of new States to the Federation.

I see no reason, constitutional or otherwise, as to why this ought be the case. No reasons are advanced by the Majority Report. The territories are subservient organisations within the Federation even to the extent of total legislative superiority of the Commonwealth Parliament whereas new States will be inserted into the constitutional compact as partners in the Federation.

If, as the Majority Report suggests, the new States are not to be equal partners then the ensuing political history of Australia will be fraught with enormous difficulties and disputes.

The Majority Report in paragraph 4.2 says:

> It [the Committee] is concerned by suggestions that the Territory should obtain equal Senate representation with that of the original States and can see no justification whatsoever for a proposal which would result in gross over- representation of the Northern Territory.

This is an extraordinary proposal to bring forward since it entirely misconceives the way in which the House of Representatives and Senate have been constructed.

As I have already said the matters of territories and new States are distinct and separate. The construction of the House of Representatives is based on population. The Senate is not. In Sir Isaac Isaacs' words the Senate is a House which is "avowedly based on equality of statehood without regard to population." Hence, if the Northern Territory became a State, the only principle to apply is that of equality of statehood. There can be no proposition about "gross over-representation within the Northern Territory" since the Northern Territory would then be one state among seven states.

The Majority Report in paragraph 4.4 says:

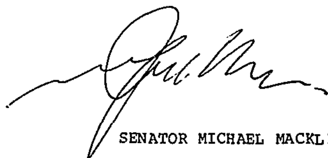
> We [the Committee] recommend that no new State should be admitted to the Federation on terms and conditions as to representation in the Parliament more favourable than those prescribed for representation of Territories in the Electoral Act.

I totally disagree with this proposal. If any attempt is made to create new States as second class States within the Federation, then there will be no philosophical underpinning for the operation of the Senate. If the Northern Territory becomes a State, regardless of its population at that time, it should have the same number of Senators as every other State of the Federation.

As a Senator I am aware of the way in which the political parties operate in the Senate. However, it must be acknowledged that the representation of the States in the Senate, which gives equal numbers regardless of population, has had an effect on the Federation and on its development. In breaking that principle, the new States would be condemned to operate as a subservient group within the Federal parliamentary structure.

If the recommendations of the Majority Report are accepted then, new States would not operate in any way distinctive from that of a territory at the national level.

When a territory becomes a State there is a significant legal and constitutional change both with regard to its own jurisdiction and with regard to its contribution to the wider Commonwealth jurisdiction. This can only be accomplished by equality of representation of electors in the House of Representatives and of States in the Senate.



SENATOR MICHAEL MACKLIN

APPENDIX 'A'

JOINT SELECT COMMITTEE ON ELECTORAL REFORM

RESOLUTION OF APPOINTMENT

THIRTY-FOURTH PARLIAMENT

(1) That a joint select committee be appointed to inquire into and report upon-

(A) all aspects of the conduct of elections for the Parliament of the Commonwealth and matters related thereto, including:

(i) legislation governing, and the operation of, the Australian Electoral Commission,

(ii) the provision of 'free' radio time for political messages during election periods,

(iii) the provision of the Commonwealth Electoral Act 1918 concerning the defamation of candidate for election,

(iv) tax deductibility of political donations, and

(v) the establishment of fixed formulae for determining the number of Senators and Members of the House of Representatives to which the Australian Capital Territory, the Northern Territory and other territories are entitled; and

(B) such other matters relating to Australian electoral laws and practices as may be referred to it by either House of the Parliament.

(2) That the committee consist of 11 members, 4 Members of the House of Representatives to be nominated by either the Prime Minister, the Leader of the House or the Government Whip, 1 Member of the House of Representatives to be nominated by either the Leader of the Opposition, the Deputy Leader of the Opposition or the Opposition Whip, 1 Member of the House of Representatives to be nominated by either the Leader of the National Party, the Deputy Leader of the National Party or the National Party Whip, 2 Senators to be nominated by the Leader of the Government in the Senate, 1 Senator to be nominated by the Leader of the Opposition in the Senate, and 2 Senators to be nominated by any minority groups or any Independent Senator or Independent Senators.

(3) That every nomination of a member of the committee be forthwith notified in writing to the President of the Senate and the Speaker of the House of Representatives.

(4) That the members of the committee hold office as a joint committee until the House of Representatives is dissolved or expires by effluxion of time.

(5) That the committee elect a Government member as its chairman.

(6) That the committee elect a deputy chairman who shall perform the duties of the chairman of the committee at any time when the chairman is not present at a meeting of the committee, and at any time when the chairman and the deputy chairman are not present at a meeting of the committee, the members present shall elect another member to perform the duties of the chairman at that meeting.

(7) That 4 members of the committee constitute a quorum of the committee.

(8) That the committee have power to appoint sub-committees consisting of 3 or more of its members, and to refer to such a sub-committee any matter which the committee is empowered to examine.

(9) That the committee appoint the chairman of each sub-committee who shall have a casting vote only, and at any time when the chairman of a sub-committee is not present at a meeting of the sub-committee, the members of the sub-committee present shall elect another member of that sub-committee to perform the duties of the chairman at that meeting.

(10) That the quorum of a sub-committee be a majority of the members of that sub-committee.

(11) That members of the committee, not being members of a sub-committee, may participate in the proceedings of that sub-committee, but shall not vote, move any motion or be counted for the purpose of a quorum.

(12) That the committee or any sub-committee have power to send for persons, papers and records.

(13) That the committee or any sub-committee have power to consider and make use of -

(a) submissions lodged with the Clerk of the Senate in response to public advertisements placed in accordance with the resolution of the Senate of 26 November 1981 relating to a proposed Joint Select Committee on the Electoral System, and

(b) the evidence and records of the Joint Select Committee on Electoral Reform appointed during the 33rd Parliament.

(14) That the committee or any sub-committee have power to move from place to place.

(15) That a sub-committee have power to adjourn from time to time.

(16) That any sub-committee have power to authorise publication of any evidence given before it and any document presented to it.

(17) That the committee have leave to report from time to time.

(18) That the committee report as soon as possible.

(19) That the foregoing provisions of this resolution, so far as they are inconsistent with the standing orders, have effect notwithstanding anything contained in the standing orders.

APPENDIX 'B'

SUBMISSIONS RECEIVED

TERRITORY REPRESENTATION INQUIRY

Submission	Date
The Australian Electoral Commission Canberra, ACT	28 March 1984
4.The Hon. I.B.C. Wilson, M.P House of Representatives Parliament House Canberra, ACT	8 June 1984
The Liberal Party of Australia Canberra, ACT	6 June 1984
The Northern Territory Government Department of the Chief Minister Darwin, NT	7 June 1984
Mr N.J. Ellis Glen Iris, Victoria	12 June 1984
Mr A.J. Fischer Adelaide, SA	29 May 1985
The Australian Labor Party Canberra, ACT	8 July 1985
The Australian Democrats (NSW) Sydney, NSW	12 June 1985
The Hon. Sir Joh Bjelke-Petersen Premier of Queensland Brisbane, QLD	26 June 1985
Department of Territories Canberra, ACT	31 July 1985

APPENDIX 'C'

EXTRACTS OF MINUTES OF PROCEEDING

THIRTY-THIRD PARLIAMENT

JOINT SELECT COMMITTEE ON ELECTORAR REFORM

MINUTES OF PROCEEDINGS

NO. 20

WEDNESDAY 28 MARCH 1984

AT CANBERRA

Present
Dr Klugman (Chairman)
Senator Sir John Carrick, KCMG
Senator Macklin
Senator R. Ray
Senator Richardson
Mr Griffith
Mr Hall
Mr Scott

4. INQUIRY INTO TERRITORIAL REPRESENTATION:

The Committee deliberated.

Resolved - On the motion of Senator R. Ray -

> That the Committee inquire into the establishment of fixed formulae for determining the number of Senators and Members of the House of Representatives to which the Australian Capital Territory and the Northern Territory are to be entitled.

Resolved - on the motion of Senator Sir John Carrick

> That the terms of reference of the territorial representation inquiry be advertised in the national daily newspapers.

34TH PARLIAMENT

JOINT SELECT COMMITTEE ON ELECTORAL REFORM

MINUTES OF PROCEEDINGS

NO. 2

MONDAY 25 MARCH 1985

AT CANBERRA

Present

Senator R.F. Ray (Chairman)	Mr C.W. Blunt
Senator The Hon Sir John Carrick KCMG	Mrs C.A. Jakobsen
Senator B. Harradine	Mr A.H. Lamb
Senator M.J. Macklin	Mr M.J. Lee
Senator G.F. Richardson	The Hon M.J. Mackellar

1. The Committee met at 7.00pm.

2. FUTURE ACTIVITIES:

The Committee determined that it should complete the Inquiry commenced by the previous Committee into the establishment of fixed formulae for determining the number of Senators and Members of the House of Representatives to which the Australian Capital Territory, the Northern Territory and other territories are entitled. In addition, it should, under term of reference (a) conduct an Inquiry into the operation of the 1983-84 Amendments to the Electoral Legislation during the 1984 general election.

Ordered -

That public advertisements be placed in national newspapers seeking submissions on the Inquiry determined upon by the Committee as soon as possible.

MINUTES OF PROCEEDINGS

NO. 4

TUESDAY 6 AUGUST 1985

AT SYDNEY

Present

Senator R.F. Ray (Chairman)	Mr C.W. Blunt
Senator Sir John Carrick KCMG	Mrs C. Jakobsen
Senator B. Harradine	Mr A.H. Lamb
Senator M.J. Macklin	Mr M.J. Lee
Senator G.F. Richardson	The Hon. M.J. MacKellar
	Mr J.L. Scott

5. PUBLIC HEARING: TERRITORIES REPRESENTATION INQUIRY

Press and public admitted.

The Hon. Ian Bonython Cameron Wilson MP, Member for Sturt, was called in relation to his submission to the Inquiry, and that of the Liberal Party of Australia.

Ordered -

That the submissions of the Hon. I.B.C. Wilson MP and the Liberal Party of Australia be incorporated in the transcript of evidence.

The witness withdrew.

The following witnesses representing the Northern Territory Government were called and examined:

Ian McLelland Barker QC
Former Solicitor-General

David Grey Anderson
Director of the Secretariat for the Chief Minister

Ordered -

That the submission of the Northern Territory Government be taken as read and incorporated in the transcript of evidence.

Ordered -

That the following document tendered by the witnesses, i.e., Structure of Government Sub-Committee Report on Breaking of the Nexus between the Sizes of the Federal Houses of Parliament, be included in the records of the Inquiry as:

Exhibit No 2.

Ordered -

That the table presented by the witnesses be incorporated in the transcript of evidence.

Ordered -

That the document referred to by the witnesses, being the unrevised proofs of the debate at the Constitutional Convention for 31 July 1985, be included in the records of the Inquiry as:

Exhibit No 3.

The witnesses withdrew.

Mr Christopher Cole, Assistant Secretary, Secretariat Division, Commonwealth Department of Territories was called and examined.

Ordered -

That the submission of the Commonwealth Department of Territories be taken as read and incorporated in the transcript of evidence.

The witness withdrew.

The following witnesses representing the Australian Electoral Commission were called and examined:

Dr Colin Anfield Hughes
Australian Electoral Commissioner

Mr Andrejs Cirulis
Deputy Australian Electoral Commissioner

Mr Michael Charles Maley
Acting Director Research

Ordered -

That the Australian Electoral Commission's submission to the Inquiry be taken as read and incorporated in the transcript of evidence.

The witnesses withdrew.

MINUTES OF PROCEEDINGS

NO. 8

TUESDAY 19 NOVEMBER 1985

AT CANBERRA

Present: Senator R.F. Ray (Chairman)
Senator Sir John Carrick KCMG
Senator B. Harradine
Senator M.J. Macklin
Mr C.W. Blunt
Mrs C. Jokobsen
Mr A.H. Lamb
Mr M.J. Lee
The Hon. M.J. MacKellar
Mr J.L. Scott

4. Territories Representation Inquiry

The Chairman brought up for consideration his draft report on Representation of Federal Territories and New States in the Parliament. The Committee deliberated.

Chapter 1 - Background to the Inquiry

Paragraphs 1 to 21	-	Agreed to
Endnotes to Chapter 1	-	Agreed to

Chapter 2 - Legislative Provision for Representation of Territories

Paragraphs 22 to 39	-	Agreed to
Paragraph 40	-	Amended and agreed to
Paragraph 41	-	Agreed to
Endnotes to Chapter 2	-	Agreed to

Chapter 3 - Proposals for Constitutional Reform

Paragraph 42	-	Amended and agreed to
Paragraph 43	-	Amended and agreed to
Paragraph 44	-	Amended and agreed to
Paragraphs 45 to 55	-	Agreed to
Paragraph 56	-	Agreed to as two paragraphs
Paragraphs 57 to 66	-	Agreed to
Paragraph 67	-	Amended and agreed to
Paragraphs 68 & 69	-	Agreed to
Paragraph 70	-	Amended and agreed to
Paragraph 71	-	Amended and agreed to
Paragraphs 72 to 75	-	Agreed to
Endnotes to Chapter 3	-	Agreed to

Chapter 4 - The Committee's Proposals

Paragraph 76	-	Agreed to
Paragraph 77	-	Amended and agreed to
Paragraphs 78 to 80	-	Agreed to
Paragraph 81:		
Recommendation 1(a)	-	Agreed to
Recommendation 1(b)	-	Amended and agreed to
Recommendation 2(c)	-	Agreed to as Recommendation 2(a)
Recommendation 2(d)	-	Agreed to as Recommendation 2(b)
Recommendation 3(e)	-	Agreed to as Recommendation 3(a)
Recommendation 3(f)	-	Agreed to as Recommendation 3(b)
Recommendation 3(g)	-	Agreed to as Recommendation 3(c)
Paragraph 82	-	Amended and agreed to
Paragraphs 83 & 84	-	Agreed to
Paragraph 85	-	Amended and agreed to
Paragraph 86	-	Amended and agreed to
Paragraph 87	-	Amended and agreed to
Paragraph 88	-	Amended and agreed to
Endnotes to Chapter 4	-	Agreed to
Appendices 1 to 3	-	Agreed to

Resolved - on the motion of Mr M.J. Lee -

That the Chairman's Draft Report as amended be the report of the Committee.

Senator M.J. Macklin dissenting.

5. Adjournment

The Committee adjourned at 5.10 pm until Wednesday 20 November 1985.

Confirmed

ROBERT RAY
Chairman