



Premier of New South Wales
Australia

TCO/LB

08 DEC 2003

Senator the Hon. Nick Bolkus
Chair
Legal and Constitutional References Committee
Parliament House
Canberra ACT 2600

Dear Senator,

Thank you for your letter regarding the inquiry into the *State Elections (One Vote, One Value) Bill 2001*. I understand that your Committee is to report on this Bill by 1 March 2004.

The New South Wales Government supports the principle that all electorates should be as equal in size as possible. This principle is already reflected in the *NSW Constitution Act 1902*, which strikes the appropriate balance between the need to maintain electorates of equal size with the substantial cost of redistributing the seats.

By attempting to prescribe one very specific method for ensuring reasonably equal electorates, the *State Elections (One Vote, One Value) Bill 2001* will result in a number of practical and legal problems.

The New South Wales Government's comments on the Bill are contained in the attached submission. I would be grateful if you could ensure that your Committee takes these comments into consideration.

Thank you for providing me with an opportunity to comment on the Bill.

Yours sincerely

Bob Carr
Premier



NEW SOUTH WALES GOVERNMENT

SUBMISSION TO THE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE

Introduction:

The New South Wales Government supports the principle that all electoral districts should be as equal in size as possible, however, it does not support the *State Elections (One Vote, One Value) Bill 2001*.

The principle was first accepted in New South Wales in 1893 with the introduction of a quota system based on the "one vote, one value" principle. While the system has not been maintained continuously since that period, the principle of "one vote, one value" is currently reflected in the *Constitution Act 1902 (NSW)*. The principle has been firmly entrenched since 1979 and any changes to the system would require a referendum.

The *Constitution Act 1902 (NSW)* currently ensures that elections are generally carried out using electorates of equal size, albeit through a system that is different from that provided for under the Commonwealth Bill.

The Current System

The *Constitution Act 1902 (NSW)* provides that each electoral district for the Legislative Assembly must be as equal in size as possible. In some respects the *Constitution Act 1902 (NSW)* is stricter than the proposed *State Elections (One Vote, One Value) Bill 2001* as it allows each electorate to be within a margin of only 10 per cent above or below the quota of voters for electorates at the time a redistribution is carried out. The quota of voters is calculated by dividing the total number of electors in the State by the number of electoral districts. Further, more than three-quarters of the electorates must be within five per cent of the quota.

The New South Wales Legislative Council is elected by the people in one electorate comprising the entire state. This means that the proposed *State Elections (One Vote, One Value) Bill 2001* would have no application to the New South Wales Upper House.

The *Constitution Act 1902 (NSW)* provides a process to regularly review the quota of voters in each electoral district for the Legislative Assembly and, if necessary, for a redistribution of the electoral districts. A redistribution is required in the following circumstances:

- Section 27 of the *Constitution Act 1902 (NSW)* requires a redistribution of the electoral districts after two elections have been conducted using the same electoral boundaries. Such a redistribution must take place “forthwith” after the election, but in any case not later than two years after the election. A redistribution is currently underway in New South Wales because the same electoral boundaries have been in place for both the 1999 State election and the recent State election held in March 2003.
- A redistribution is also required under section 28A of the *Constitution Act 1902 (NSW)* where more than one-quarter of the electoral districts have been “malapportioned” for a period of more than two months. An electoral district is “malapportioned” if the number of voters in the electoral district varies from the average number of electors in an electorate by more than five per cent. A redistribution of seats under this provisions cannot occur within 12 months of an election. This 12 month “cut-off” date recognises that it is not practicable to carry out a redistribution in the year before an election.

The redistribution is conducted by three independent Electoral Districts Commissioners being a Judge or former Judge of the Supreme Court, the Electoral Commissioner and the Surveyor-General.

The Electoral Districts Commissioners use the best demographic information available from the Australian Bureau of Statistics and the Department of Lands to draw the boundaries for electoral districts taking into account not only existing numbers of voters in each electoral district but also changes in voter numbers anticipated in the future.

Under the *Constitution Act 1902 (NSW)* there is to be only one redistribution during any four year term of Parliament. The costs of carrying out a redistribution are high (for example, the current redistribution will cost approximately \$1.92 million).

Inconsistency of the Commonwealth Bill with New South Wales legislation

As demonstrated above, New South Wales legislation already reflects the “one vote, one value” principle. There is, however, a risk that the provisions of the *Constitution Act 1902 (NSW)* could conflict with the proposed Commonwealth legislation. It might therefore be argued that the relevant provisions of the *Constitution Act 1902 (NSW)* are invalid under section 109 of the Commonwealth Constitution.

This situation could arise because the proposed Bill requires each electoral district to be as nearly equal in size as possible (within 15 per cent of the quota) *at the time of the election*. Under the *Constitution Act 1902 (NSW)* it is *at the time of the redistribution* that the number of voters in each electoral district is measured, and the electoral boundaries are varied accordingly. It is possible (indeed highly probable) that the number of voters in each electoral district may vary between the time of the redistribution and polling day.

Under the proposed Bill, the result of the election could be challenged, even if just one of the seats had varied by more than 15 per cent of the quota by the time of the election. This situation is unacceptable given that the New South Wales system already provides a robust system for protecting the principle of "one vote, one value". While New South Wales could move to amend its laws to make them consistent with the proposed Commonwealth legislation, it is difficult to see why it should do this. Both systems achieve "one vote, one value" elections, but by different means. There is no reason to think that the Commonwealth's means are any better than those adopted some time ago in New South Wales.

If New South Wales were to amend the *Constitution Act 1902 (NSW)* to take account of the Commonwealth legislation, it would be necessary to carry out a referendum. As history shows, there is no guarantee that a referendum will be passed and it would cost between \$10 million and \$20 million. If the referendum were not passed, New South Wales might be left in a situation where elections could be routinely challenged.

Power of the Commonwealth Parliament

The possibility of a challenge of course assumes that the Commonwealth Parliament has the legislative power to make the proposed law.

There is an implied limitation on the Commonwealth Parliament's legislative powers that prevents it from passing laws that impose a restriction or burden upon the constitutional powers of a State, or a burden upon its capacity to function as a government.

It is the view of the New South Wales Government that the powers of the Commonwealth do not extend to interfering in the constitutional and electoral processes of the States. As such the proposed Bill is likely to be subject to constitutional challenge.

Practical Problems

The New South Wales Government submits that the *State Elections (One Vote, One Value) Bill 2001*, in its current form, could place a substantial financial and administrative burden upon New South Wales not because of any difference in principle but because of the different means adopted by the Commonwealth proposal and the current, longstanding arrangements in New South Wales to achieve "one vote, one value". In addition to the impact of carrying out the referendum, the following points should be noted.

- First, the Bill as drafted assumes that a redistribution can be carried out at any time up until an election. This aspect of the Bill is unworkable. A redistribution takes at least six months and political parties then need time to identify candidates to contest a seat. The candidates also require greater certainty of their electoral boundaries (so as to properly identify their constituents) well in advance of conducting their campaigns.

- Secondly, at some point a decision will need to be made to proceed with the boundaries as they are, or to proceed to a redistribution. Obviously the first course of action is extremely risky as one malapportioned seat could invalidate the whole election. An election that is invalidated would result in substantial waste. The cost of the most recent election in New South Wales was approximately \$31 million.

Summary

New South Wales' existing system for ensuring that electoral districts are properly apportioned implements the "one vote, one value" principle. A redistribution under the *Constitution Act 1902 (NSW)* takes account of anticipated population shifts. As such the risk of malapportioned seats is substantially minimised.

Further the redistribution is carried out by three independent Electoral Districts Commissioners, and the Chair of this group must be a Supreme Court Judge. Any manipulation of the boundaries for electoral gain is simply not possible in New South Wales.

New South Wales has in place a robust, and fair system to ensure that the principle of "one-vote, one value" applies in New South Wales. New South Wales does not consider that it should change its laws to make the *Constitution Act 1902 (NSW)* consistent with the Commonwealth law, and it appears that the Commonwealth Parliament lacks the power to force it to do this.