3 Elections and the Electoral System

Introduction

3.1 The general election for the First Assembly was conducted pursuant to the provisions of the *Australian Capital Territory (Electoral) Act 1988* (Cwlth),[1] one of the four Acts providing for self-government in the ACT. The electoral system used at that election (and, as further modified, at the general election for the Second Assembly) was a modification of the d'Hondt system, which was the then Commonwealth Government's third proposal for an electoral system for the ACT.[2]

3.2 The conduct of the first elections, held on 4 March 1989, had not been without difficulties. Counting lasted eight weeks and five days and the poll was not declared until 8 May 1989. Widespread dissatisfaction with the modified d'Hondt system resulted in an inquiry by the Commonwealth Parliament's Joint Standing Committee on Electoral Matters into the ACT election and electoral system; the committee reported in November 1989.

3.3 The report recommended that a referendum be held in the Territory to establish whether the majority of voters preferred a system of single-Member electorates using the House of Representatives' voting system or a system of proportional representation with multi-Member electorates modelled on the Tasmanian Hare-Clark system.[3]

3.4 Arising out of the Commonwealth Government's review of the recommendations of the 1989 report of the joint standing committee, the Australian Capital Territory (Electoral) Amendment Bill 1991 was introduced in the House of Representatives on 6 March 1991. The bill provided for a revised system of election to the Legislative Assembly designed to overcome the inadequacies of the heavily modified d'Hondt system (which in turn had arisen out of parliamentary consideration of the government's legislative proposals in 1988).[4] As introduced, the bill did not contain a provision for a referendum as recommended by the joint committee.[5]

3.5 Amendments made in the Senate and agreed to by the House inserted a new part 4 in the principal Act making provision for a referendum in the Territory to choose an electoral system. The choice was to be between two voting systems: a single-Member electorate system or a proportional representation (Hare-Clark) system. Voting on the referendum was to be conducted on the same day as the next Assembly general election after the commencement of that part[6] (which, in fact, would be the general election for the Second Assembly).[7]

1 Act No. 107 of 1988 of the Commonwealth.

2 The then government had first proposed the adoption of single-Member electorates and then proposed a mixed system consisting of approximately half of the Members being elected from single-Member electorates using House of Representatives rules and the balance of the Members being chosen using a proportional Senate style election from one electorate. See H.R. Deb. (19.10.1988) 1926-7; *Inquiry into the ACT Elections and Electoral System*, Report No. 5 of the Joint Standing Committee on Electoral Matters, PP 405 (1989), p. 40.

3 *Inquiry into the ACT Election and Electoral System*, Report No. 5 of the Joint Standing Committee on Electoral Matters, PP 405 (1989), pp. xiii-xiv.

4 H.R. Deb. (6.3.1991) 1419.

5 The government had rejected the joint committee's recommendation for a referendum on the grounds that such a course was not likely to provide a definitive outcome, might not be accepted by the parties concerned and might merely serve to reopen earlier debates on the merits of self-government. The cost of the referendum was a further, but secondary, factor in the decision. See H.R. Deb. (6.3.1991) 1419.

6 Sen. Deb. (4.6.1991) 4254-66, H.R. Deb. (5.6.1991) 4739-48.

7 The election and referendum were held on 15 February 1992.

3.6 Earlier, on 19 February 1991, the Assembly had agreed to two resolutions relating to an electoral system. The first urged Members of the Federal Parliament to adopt the joint committee's recommendation to conduct a Commonwealth funded referendum to allow the people of the ACT to choose their own electoral system. The second:

- welcomed the Federal Government's stated intention to repatriate to the people the power to determine their own electoral arrangements;
- called on the Federal Government to initiate action in this direction; and
- expressed concern at the Federal Government's apparent intention to abolish preferential voting in the Territory and called upon it to preserve this democratic principle in the existing legislation.[8]

3.7 Following the commencement of the *Australian Capital Territory (Electoral) Amendment Act 1991*,[9] but prior to the scheduled referendum, the Australian Capital Territory Self-Government Legislation Amendment Bill 1991 was introduced into the House of Representatives, fulfilling, inter alia, an undertaking to give the ACT the power to control its own electoral system following the next ACT election.[10] The bill was enacted[11] with those sections of the Act providing for the devolution to the Territory of control of the electoral system and for provisional arrangements to commence immediately after polling day for the second general election of Members of the Assembly.

Adoption of Hare-Clark voting system

3.8 The referendum provided for by part 4 of the *Australian Capital Territory (Electoral) Amendment Act 1991* was held in conjunction with the general election for the Second Assembly held on 15 February 1992, with 65.3% of the electors voting for the proportional representation (Hare-Clark) electoral system.[12]

3.9 The Hare-Clark system was adopted in the ACT in two stages. The *Electoral Act 1992*, agreed to by the Legislative Assembly, as amended on 24 November 1992,[13] established the ACT Electoral Commission and an independent procedure for the determination of electoral boundaries. The Assembly's first electoral boundaries were formally determined on 23 August 1993.

3.10 On 16 December 1993 the Electoral (Amendment) Bill 1993 was introduced into the Assembly. It was agreed to, with amendments, on 21 April 1994.[14] This bill provided for the election of 17 Members of the Assembly from three multi-Member electorates by the Hare-Clark electoral system, the essential features of which are:

- it is a type of proportional representation system known as the single transferable vote method;
- electors vote by showing preferences for individual candidates;

8 MoP 1989-91/405-6; Assembly Debates (19.2.1991) 375-452. The resolutions followed discussion of a matter of public importance on the matter.

9 25 June 1991.

10 H.R. Deb. (6.11.1991) 2467.

11 The Act, No. 10 of 1992, was assented to on 6 March 1992.

12 34.4% voted in favour of single Member electorates (the figures represent those electors casting a valid vote), 5.57% of votes were informal. Elections ACT, <http://www.elections.act.gov.au/ref92.html>.

13 Electoral Act 1992, No. 71 of 1992.

14 Electoral (Amendment) Act 1994, No. 14 of 1994. This Act was superseded by subsequent legislation and repealed by the Statute Law Amendment Act 2000.

- to be elected, a candidate generally needs to receive a quota of votes;[15] and
- each elector has a single vote, which can be transferred from candidate to candidate according to the preferences shown until all the vacancies are filled.

General elections and the election process

3.11 The Hare-Clark proportional representation system is a single transferable vote system (thus allowing the direct election of representatives).[16] Electors vote by showing preferences for individual candidates by putting the number '1' next to the name of their preferred candidate (the 'first preference vote') and numbering the remaining candidates sequentially (2, 3, 4, …) in the order of their preference. Voters are not required to indicate a preference for every candidate.

3.12 Currently, there are three electorates. The electorates of Brindabella and Ginninderra each return five Members and the electorate of Molonglo returns seven Members. To be declared elected, a candidate must obtain a quota of votes in the electorate he or she is contesting (but see footnote 15).

3.13 A quota for an electorate is calculated by dividing the total number of valid votes cast by the number of vacancies plus 1 and adding 1 to the result (disregarding any remainder). In each electorate, those candidates whose first preference (or No. '1') votes are equal to or greater than the quota are declared elected. If all vacancies have been filled at this stage the election is completed.[17]

3.14 If all vacancies are not filled, there is, firstly, a downward distribution of the surplus votes (those votes in excess of the quota) of the successful candidates. Should there still be vacancies after all surplus votes have been dealt with, a process of excluding the lowest scoring candidates commences.

3.15 The successful candidates' surplus votes are distributed to continuing candidates at a reduced value (a fractional transfer value)[18] according to the preferences shown on the ballot papers. After the surplus votes from each elected candidate have been distributed, the total number of votes received by each continuing candidate is recalculated. Those continuing candidates who have votes equal to or greater than the quota are elected, and if vacancies remain to be filled, the surplus votes of newly elected candidates are then distributed in the same manner.

3.16 Should there still be vacancies after all the surplus votes from elected candidates are distributed, the process of excluding the lowest scoring candidate begins. The candidate with the lowest number of votes is excluded and his or her ballot papers are distributed to continuing candidates according to the preferences shown by the voters. The ballot papers are distributed according to the value at which they were received by the excluded candidate.[19]

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15 Note that a candidate could be elected to the Assembly without receiving a quota of votes where the number of candidates remaining in the count who have not been already elected or excluded is equal to the number of vacancies that remain to be filled. This situation has not arisen in ACT elections to date.

16 See ACT Electoral Commission fact sheet on Hare-Clark: <http://www.elections.act.gov.au/hare.html>.

17 See ACT Electoral Commission fact sheet on Hare-Clark: <http://www.elections.act.gov.au/hare.html>.

18 See ACT Electoral Commission fact sheet on Hare-Clark: <http://www.elections.act.gov.au/hare.html>. The fractional transfer value is determined by dividing the number of surplus votes the successful candidate received by the total number of ballot papers for that candidate with further preferences shown. Following a transfer (either from successful candidates or from an excluded candidate (see below)), should a candidate receive more votes than the required quota, it is only the 'last parcel' of ballot papers the candidate received, (i.e. the transferred votes that 'got the candidate over the line') that are transferred to continuing candidates at the fractional transfer value.

19 Ballot papers received by the excluded candidate as first preference votes have a value of '1' whilst ballot papers received following a distribution of a surplus have the appropriate fractional transfer value.

3.17 At each stage after ballot papers have been distributed from an excluded candidate, the total votes received by each continuing candidate are recalculated to determine whether any candidate has received votes equal to or greater than the quota. The process of distributing surplus votes from elected candidates and excluding the candidate with the fewest votes continues until all vacancies are filled.

3.18 As soon as practicable after the result of an election has been ascertained, the Electoral Commissioner must declare each of the successful candidates elected, declare the result of the election and notify the Clerk of the Assembly of the names of each of the candidates elected.[20] The Clerk is required to present to the Assembly the official notification prior to the Members making and subscribing the prescribed oath or affirmation on the first day of meeting of an Assembly for the dispatch of business after an election.[21]

Casual vacancies

Selection by recount

3.19 A casual vacancy occurs when a Member of the Assembly vacates their place, or is declared ineligible to sit as a Member by the Court of Disputed Elections (see paragraphs 3.26 to 3.31) during the term of the Assembly. Under the Hare-Clark system as it operates in the ACT, casual vacancies are filled not at by-elections but by a process of re-counting the votes cast at the previous general election to choose a replacement candidate from among those unsuccessful candidates for the electorate who wish to be considered for the vacancy.[22]

3.20 The Assembly and the Speaker have specific roles and duties in relation to the filling of casual vacancies.[23] Should the Speaker notify the Electoral Commissioner in writing that the seat of an MLA has become vacant[24] and if the Commissioner is satisfied that it is practicable to fill the vacancy in accordance with the provisions of section 194 of the Electoral Act, he or she must publish a notice in a newspaper circulating in the Territory containing a statement to the effect that there is a casual vacancy and that a person may apply to be a candidate if he or she was an unsuccessful candidate at the last election for the relevant electorate and is an eligible person.[25] The Commissioner must also, as far as is practicable, give a copy of the notice to any person who may be entitled to make an application in relation to the vacancy.

3.21 If there is only one candidate in relation to the casual vacancy, the Commissioner declares that candidate elected. If there is more than one candidate, the Commissioner must fix a time and place for a re-count of the ballot papers for the former MLA and so notify each candidate. The Commissioner then conducts a re-count of the ballot papers of the vacating Member in order to determine which candidate for the casual vacancy was the next most favoured candidate chosen by the voters who elected the vacating Member.[26]

20 *Electoral Act 1992*, section 189.
21 Standing order 1(c).
22 Part 13 of the *Electoral Act 1992* deals with the filling of casual vacancies; section 192 refers to the eligibility of candidates.
23 For the purposes of Part 13, should there be a vacancy in the office of Speaker it is the Deputy Speaker who performs the duties; should there be vacancies in both offices, it is the Clerk: *Electoral Act 1992*, section 190.
24 Otherwise than because of the dissolution of the Assembly, the expiration of the term for which MLAs were elected or the failure or partial failure of an election. Interestingly, it appears that there is no statutory compulsion on the Speaker to activate the process or order of the Assembly that requires him or her to do so.
25 *Electoral Act 1992*, section 192. An 'eligible person' is a person who is eligible to be an MLA or would, apart from the provisions of subsection 103(2)(b) of the Electoral Act, be eligible to be an MLA. Paragraph 103(2)(b) provides that a person is not eligible to be an MLA if the person holds an office, appointment or employment under a law of the Territory, the Commonwealth or a state or another territory and is eligible for certain remuneration or allowance in relation to the office, appointment or employment (see Chapter 4: Membership of the Assembly).
26 *Electoral Act 1992*, Schedule 4, Part 4.3.

Selection by the Legislative Assembly

3.22 Should the Electoral Commissioner not be satisfied that it is practicable to fill a casual vacancy using this method—for example, if no candidates from the previous election come forward wishing to contest the vacancy—the Commissioner must inform the Speaker accordingly.[27] The Legislative Assembly then chooses a person to fill the vacancy for the remainder of the term of the former MLA. The Speaker must notify the Commissioner that the Assembly has chosen a person to hold the vacant office as an MLA for the remainder of the term of the former MLA and the Commissioner must declare elected the person chosen.[28]

3.23 As far as is practicable, a person chosen by the Assembly to fill a casual vacancy must be of the same political affiliation as the Member they are replacing.[29] Where the name of the outgoing Member appeared on the ballot paper for the last election as a party candidate, the person chosen to hold the vacant office must be a member of that party who is nominated by the party. If there is no member of the relevant party available to be chosen, or if the vacating Member was elected as an independent, the person chosen to fill the vacancy cannot be a person who has been a member of a registered political party within the 12 months preceding the filling of the vacancy.[30]

3.24 The term of office of a Member declared elected to fill a casual vacancy begins at the end of the day when the election of the MLA is declared and, unless sooner ended by resignation or disqualification or by dissolution of the Assembly, ends on the polling day for the next election.[31]

3.25 The Commissioner may not take any action (or any further action) under part 13 of the Electoral Act in relation to a casual vacancy after the Assembly is dissolved or a pre-election period begins in relation to the electorate in which the casual vacancy has occurred.[32] 'Pre-election period' means the period of 37 days ending on the end of polling day for an election.[33]

Disputed elections

3.26 The Supreme Court, as the Court of Disputed Elections, has jurisdiction to hear and determine:

- applications disputing the validity of elections; and
- questions referred to the Court by the Assembly relating to the eligibility of persons declared elected to be Members of the Assembly or vacancies in the membership of the Assembly.

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27 *Electoral Act 1992*, section 193.

28 *Electoral Act 1992*, section 195.

29 *Electoral Act 1992*, section 195. Should the person chosen cease to be a member of the party before the Assembly next meets after the Speaker has notified the Commissioner that the Assembly has chosen the person to hold the office vacated, the person shall be taken not to have been chosen. A person shall not be taken to have ceased to be a member of the party merely because the party has ceased to exist or has been removed from the register of political parties.

30 *Electoral Act 1992*, section 195. Should the person chosen become a member of a registered party before the Assembly next meets after the Speaker has notified the Commissioner that the Assembly has chosen the person to hold the office vacated, the person shall be taken not to have been chosen.

31 *Electoral Act 1992,* section 196.

32 *Electoral Act 1992*, subsection 191(4) and section 197.

33 *Electoral Act 1992*, dictionary. For example, on 14 September 2004 Ms Tucker resigned her office as a Member of the Legislative Assembly and the Speaker, pursuant to the provisions of subsection 191(1) of the Electoral Act, notified the Electoral Commissioner of the vacancy that day (see copies of correspondence presented on 7 December 2004—MoP 2004-08/16-7). As Ms Tucker had resigned within the 37 days of the pre-election period (polling day was 16 October 2004) and the pre-election period having commenced on 10 September the Electoral Commissioner took no action in relation to the vacancy pursuant to the provisions of section 197 of the Electoral Act.

In exercising this jurisdiction, the Supreme Court has the same powers as it has in exercising its original jurisdiction; any decision of the Court is final and conclusive, is not subject to appeal and shall not be called into question.[34]

3.27 The validity of an election can be disputed only by application to the Court of Disputed Elections after the result of the election is declared and, without limiting the grounds upon which an election can be challenged, section 256 of the Act sets out certain matters which cannot be questioned in a court except by application to the Court of Disputed Elections. The Act also sets out the persons entitled to dispute elections, the requirements in relation to an application and matters in relation to declarations and orders by the Court.

3.28 After an application is filed the Registrar of the Supreme Court is required to serve a sealed copy of the application on the Speaker.[35] If the Court finds any illegal practice in connection with the election, the Registrar is to report the findings to the Speaker[36] as well as any declarations and orders of the Court.

3.29 Where the Assembly resolves to refer to the Court a question relating to the eligibility of a person who has been declared elected to be a Member or a vacancy in the membership of the Assembly, the Speaker gives the Registrar a statement setting out the question referred together with any documents in the possession of the Assembly that relate to that question. The Court is required to hear and determine a question referred to it. It may determine that a person who is declared elected is not eligible to be an MLA; declare a vacancy in the membership of the Assembly or refuse to make a declaration; and make the orders in relation to the referral that it considers appropriate. The Registrar must serve a copy of the declaration and any orders on the Speaker and each party to the referral.[37]

3.30 Where the Court declares a vacancy in the membership of the Assembly or declares that a person elected to the Assembly is not eligible to be a Member, a vacancy in the membership of the Assembly arises at the conclusion of the day on which the declaration is made. The vacancy is to be filled in accordance with Part 13 of the Electoral Act (Casual vacancies).

3.31 It must be noted that section 16 of the *Referendum (Machinery Provisions) Act 1994* provides that Part 16 (Disputed elections, eligibility and vacancies) applies to ensure that, as far as is practicable, the validity of a referendum may be disputed in the same way as the validity of an election and not otherwise.

Entrenchment of Hare-Clark voting system

3.32 Section 26 of the Self-Government Act provides that the Assembly may pass an entrenching law prescribing restrictions on the manner and form of making particular enactments; the entrenching law is then submitted to referendum and, if approved by a majority of electors, it takes effect (see Chapter 11: Legislation). The Proportional Representation (Hare-Clark) Entrenchment Bill 1994 was introduced in the Assembly on 30 November 1994 as a private Member's bill, its long title being 'A Bill for An Act to entrench the principles of the proportional representation (Hare-Clark) electoral system'.

34 *Electoral Act 1992*, sections 252-5.

35 As well as the person whose election is being disputed and the Commissioner (if he or she is not an applicant); see *Electoral Act 1992*, section 261. The Act (section 251) also makes provision for the unavailability of the Speaker and Deputy Speaker should he or she be absent from duty, should there be a vacancy in the office or should he or she be the subject of a proceeding.

36 As well as the Minister, the Commissioner and the Director of Public Prosecutions; see *Electoral Act 1992*, section 266.

37 *Electoral Act 1992*, sections 276-9.

3.33 The bill, as amended by the Assembly, was enacted as the *Proportional Representation (Hare-Clark) Entrenchment Act 1994*.[38] Section 4 provides that the Act applies to any law that is inconsistent with the principles of the proportional representation (Hare-Clark) electoral system, including:

- an odd number of Members of the Legislative Assembly shall be elected from each electorate;
- at least five Members of the Legislative Assembly shall be elected from each electorate;
- voting in an election shall be compulsory;
- each voter has the right to a fully preferential vote;
- votes can only be cast for individual candidates;
- ballot papers shall be prepared and collated in accordance with the method known as the Robson Rotation;
- a candidate whose total votes equal or exceed a relevant quota shall be declared elected;
- transfer of votes surplus to a quota;
- if there are no surpluses to be distributed, the candidate with the least total votes shall be excluded and votes cast for them shall be transferred to continuing candidates;
- casual vacancies shall be filled by a re-count of the ballot papers at the last election before the vacancy occurred (see paragraphs 3.19 to 3.25).

3.34 In addition, during its consideration of the bill, the Assembly added paragraph 2 to clause 4. The paragraph states:

> This Act applies to any law made pursuant to a power at any time vested in the Legislative Assembly to make a law with respect to the number of members of the Legislative Assembly.[39]

3.35 Section 5 of the *Proportional Representation (Hare-Clark) Entrenchment Act 1994* provides that that Act, or any amendment or repeal of that Act, has no effect unless it is passed by at least a two-thirds majority of the Members of the Assembly and a majority of the electors at a referendum held in accordance with the *Referendum (Machinery Provisions) Act 1994*. Significantly, this section also provides that a law to which the Act applies has no effect unless it is passed by:

- the Assembly and a majority of the electors at a referendum held in accordance with the *Referendum (Machinery Provisions) Act 1994*; or
- at least a two-thirds majority of the Members of the Assembly (see paragraph 3.46).

Number of Members

3.36 There are 17 Members of the Assembly. Regulations made by the Commonwealth pursuant to the Self-Government Act may fix a different number of Members. Regulations may not be made for this purpose unless in accordance with a resolution of the Assembly.[40]

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38 Act No.1 of 1995.

39 Paragraph 4(1)(b) (Voting in an election shall be compulsory) and subclause 4(2) were inserted on the initiative of the then government; see Assembly Debates (8.12.1994) 4833-8. And see paragraph 3.46.

40 Self-Government Act, section 8. Section 74 of the Self-Government Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the Act (or adding further matters to Schedule 4 of the Act). The Governor-General does not perform executive acts alone, but does so 'in Council' (that is, acting on the advice of the Federal Executive Council (effectively the Commonwealth Government) as required by section 63 of the Constitution); see *House of Representatives Practice*, p. 13.

3.37 Over the years the Assembly has considered the issues of the need to vest the Assembly with the power to determine its own size and the need to alter the number of Members.

3.38 In April 1990 the Assembly's Select Committee on Self-Government recommended that there be an increase in the number of Assembly Members (but only in proportion to an increase in the number of electors) and that the Chief Minister request the responsible Commonwealth Minister to take action to transfer the ultimate power concerning the number of ACT Legislative Assembly Members from the Commonwealth to the Assembly.[41] The government supported the recommendation.[42]

3.39 In 1993 the Commonwealth Minister introduced the Arts, Environment and Territories Legislation Amendment Bill 1993 into the Senate. It included amendments to the Self-Government Act that emerged from a review of that Act by the ACT Administration and the relevant Commonwealth department. The amendments included giving the Assembly the power to decide the number of its own Members. That provision was omitted during Senate consideration.[43]

3.40 In April 1998 a joint Commonwealth-Territory review of the governance of the Territory (the Pettit Review) recommended that as the population of the ACT grows, the ratio of representatives to electors should be maintained at or above the very modest level that existed in 1989 (1:10,000) when self-government was introduced.[44] In addressing the established constraints on altering the number of Members of the Assembly, the Pettit Review argued that as the ACT was a body politic of nearly 10 years standing there was every reason why the Assembly should be able to amend these arrangements as it saw fit, without having to persuade the Commonwealth Parliament or the executive of the wisdom of doing so. It saw no Commonwealth interest involved in maintaining the constraints; it strongly believed that they should be removed and it so recommended.[45]

3.41 The Assembly immediately established a select committee to examine the recommendations of the Pettit Review and related matters.[46] Whilst the select committee accepted that strong arguments could be made for an increase in the number of Members, the majority view was that the arguments against an increase outweighed those in support. The committee accordingly recommended that the number of seats in the Fifth Assembly remain at 17.[47]

3.42 The select committee supported the Pettit Review's recommendation that the Self-Government Act be amended to give the Assembly power over such matters as the size of the Assembly and the number of Ministers. The committee recommended that the executive, in consultation with the Assembly and the community, undertake a detailed review of the Self-Government Act.[48] The executive agreed in principle to the recommendation regarding a detailed review of the Self-Government Act, undertaking to conduct a detailed review of

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41 Report of the Select Committee on Self-Government, April 1990, page xiii.

42 Assembly Debates (18.10.1990) 3779.

43 Sen. Deb. (6.9.1993) 975-81 and Sen. Deb. (28.9.93) 1317-9.

44 The review estimated that this would require an increase in the number of Members for the 2001 election to 21; see Review of the Governance of the Australian Capital Territory, April 1998, p. 39. The report was presented in the Assembly on 28 April 1998; see MoP 1998-2001/17.

45 *Review of the Governance of the Australian Capital Territory*, April 1998, p. 36. The recommendation was: 'The Self-Government Act should assign to the Legislative Assembly the power to alter arrangements having to do with the normal processes of government; in this respect the Assembly should have the same powers as those enjoyed by a State parliament.'.

46 MoP 1998-2001/17, 33.

47 *Report of the Select Committee on the Report of the Review of Governance*, 21 June 1999, pp. 12-3.

48 *Report of the Select Committee on the Report of the Review of Governance*, 21 June 1999, p. 7.

the Act with a view to identifying those provisions of the Act that may be repatriated to the Territory, but did not agree that the number of seats in the Fifth Assembly remain at 17.[49]

3.43 The issue was further considered at the commencement of the Fifth Assembly on 12 December 2001 when the Assembly resolved to request the Chief Minister to undertake discussions with the Commonwealth Minister for Territories on the possibility of amending the Self-Government Act to devolve to the Assembly the power to determine the number of Members (with the aim of commencing any change to the Assembly at the election scheduled for 2004) and to refer to the Assembly's Standing Committee on Legal Affairs for inquiry and report the appropriateness of the size of the Assembly and options for changing the number of Members, electorates and any other related matter.[50]

3.44 The committee reported on 27 June 2002, making a series of recommendations including that:

- in addition to undertaking discussions with the Commonwealth Government in relation to amending the *Australian Capital Territory (Self-Government) Act 1988* to devolve to the Assembly the power to determine the number of Members, the Chief Minister seek an amendment of the Self-Government Act to remove the power of the Commonwealth to fix the number of Ministers that make up the ACT executive;
- the number of Members in the Legislative Assembly for the ACT be increased to 21 Members based on three electorates of seven Members each;
- a decision about increasing the number of Members be made before October 2002 so that the Electoral Commission could take the decision into account as it conducts the 2002-03 redistribution required by the Electoral Act; and
- in the event that a decision is not made by October 2002, the Assembly amend the Electoral Act to provide for the 2002-03 redistribution to be delayed until a final decision is made on increasing the number of Members.[51]

3.45 The Assembly noted the report[52] and the government presented its response on 26 September 2002.[53] The day prior to the presentation of the government's response, the Chief Minister also gave notice of a motion noting the steps necessary to fix a different number of Members, resolving that the number of Members be increased from 17 to 25 and calling on the Chief Minister to communicate the resolution to the Commonwealth Government with a request that the necessary regulations be made. The notice was never called on and lapsed at the expiration of the Fifth Assembly.[54]

3.46 It should be remembered that, in the event of the Commonwealth Parliament at any time devolving to the Assembly the power to fix a different number of Members, subsection 4(2) of the *Proportional Representation (Hare-Clark) Entrenchment Act 1994* provides that that Act applies to any law made pursuant to a power at any time vested in the Legislative Assembly to make a law with respect to the number of Members of the Assembly.[55] Thus, should the

49 Noting that, 'While legally the Assembly could, by a simple majority, pass a resolution for the purposes of section 8 of the Self-Government Act requesting that the Commonwealth make a regulation to increase the number of Members of the Assembly, this would not be within the spirit of the *Proportional Representation (Hare-Clark) Entrenchment Act 1994*'; see ACT Government response to the report of the Select Committee on the Report of the Review of Governance, October 1999, p. 4.

50 MoP 2001-04/24-5.

51 *Appropriateness of the size of the Legislative Assembly for the ACT and options for changing the numbers of Members, electorates and any other related matter*, Report No. 4 of the Standing Committee on Legal Affairs, dated 26 June 2004.

52 MoP 2001-04/225.

53 MoP 2001-04/341.

54 NP (26.9.2002) 476 and NP (26.8.2004) 2631.

55 See paragraph 3.34.

Assembly gain the power to fix the number of its Members and seek to vary the number of Members, such a law would have no effect unless it was passed by the Assembly and a majority of the electors at a referendum or passed by at least a two-thirds majority of the Members of the Assembly.[56]

56 And see comments at Assembly Debates (8.12.1994) 4837.