Fairness and Equality in Electoral Redistributions in Australia

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Abstract

This thesis is about drawing electoral districts in Australia. Its first task is to make an assessment of the various redistribution structures, process and criteria currently in use around the country, and it finds that Australia’s system for electoral redistributions – or redistricting, in US terminology – generally falls short of what parliaments intended. Australian parliaments have all committed to fair electoral competition and have delegated their redistribution powers to independent authorities to draw districts which will provide them with a level playing field. The thesis finds that the established model of redistributions employs a fair process but cannot provide any assurance that its maps will perform in a fair way.

Australia’s redistribution authorities could be asked to complete their task. They have strong independent structures and a process which is transparent and accountable. What they lack is methodology. The second task of the thesis is to provide the core methodology required to draw an unbiased and responsive electoral map: a set of criteria; measures of party support, bias and responsiveness; and a standard to assess when a map is fair enough to be adopted. The thesis has already contributed to South Australia’s methodology and now brings together a generic set of tools for drawing fair electoral district maps.

With the exception of several papers by Colin A. Hughes there has been little academic consideration in Australia of electoral redistributions or of the methodology questions which they raise. So the thesis is informed by an understanding of past and current redistributions in Australia and also draws on an understanding of redistricting in the United States where authority structures, process and methodology have been the subject of academic interest, party intrigue and court involvement for 50 years. The inherent challenges in drawing electoral maps are the same in both countries, and the relevance of US experience for Australia is shown by the fact that when South Australia’s authority adjusted its methodology in 2012 it was the state of New Jersey’s experience that was considered.

The thesis argues that campaigns will always be important in shaping election outcomes. Therefore a redistribution authority cannot be required to generate a map which will guarantee that the party with majority support will win a majority of seats. But South Australia and New Jersey show that it can, and should, be required to provide a map which will give neither party an advantage going into a subsequent election and which will respond if voters change their support.
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Declaration

I declare that this thesis contains no material which has been accepted for the award to me of any other degree or diploma.

I declare that to the best of my knowledge this thesis contains no material previously published or written by another person except where due reference is made in the text.

I declare that this thesis is purely my own work.

Signed:

Date:
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Signed: [Signature]

Date: 31 January 2013
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Abbreviations

2PP two party preferred
AEC Australian Electoral Commission
EARC Electoral and Administrative Review Commission
EDBC Electoral Districts Boundaries Commission
JSCEM Joint Standing Committee on Electoral Matters
JSCER Joint Select Committee on Electoral Reform
NCSL National Conference of State Legislatures (US)

Equivalent Terms

<table>
<thead>
<tr>
<th>Australia</th>
<th>United States</th>
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<tr>
<td>apportionment</td>
<td>apportionment</td>
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<tr>
<td>electoral roll</td>
<td>register of voters</td>
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<td>formal vote</td>
<td>valid vote</td>
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<tr>
<td>redistribution</td>
<td>redistricting (New Jersey also uses the term ‘apportionment’)</td>
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<td>two party preferred vote</td>
<td>two party vote</td>
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Preface

The thesis focuses firmly on the redistribution of electoral districts, and takes Australia’s political and electoral systems as given. It accepts that Australia’s parliamentary elections are contests between the two major parties for government as much as contests to elect individual representatives to each district. In modern times Australia has not had ‘one party states’ and despite occasional election landslides the two major parties (the Australian Labor Party and the Liberal Party – federally and in most states in semi-permanent coalition with the National Party) have similar levels of support at most state and federal elections. The thesis argues that a map of electoral districts can be assessed in terms of how well it sets up a level playing field for the two major parties at a subsequent election. How fair the map will be for Independent or minor party candidates is not assessed, because they are incidental to the contest for government.

In Chapter one the thesis assesses how well Australia’s redistribution authorities are protected from party and parliamentary influence. It considers past redistributions when Australian parliaments retained the power to draw their own maps or influence the outcome of redistributions, and also reviews alternative structures in place in various US jurisdictions. It shows that a redistribution authority’s structure constrains whether it can come to agreement on a fair map.

Chapter two assesses the process of Australian redistributions: their frequency, timing of the various stages, transparency and accountability and the stance taken by the authorities. Legislated triggers mean that redistributions are no longer conducted at times which can advantage the government of the day, although the frequency with which those triggers operate could be improved in some jurisdictions. Half of Australia’s jurisdictions now adjust their maps after each election, but federal maps may stay in place for up to three elections. In addition, federal triggers treat some states and territories differently: Tasmania’s federal divisions (federal districts are called divisions in Australia) always stay in place for three elections while Queensland’s federal divisions have been redrawn after almost every election. This chapter also considers the stance taken by Australian redistribution authorities and differentiates between the apolitical stance, according to which the commissioners refuse to consider the party-political nature of their task, and the impartial stance taken by South Australia’s redistribution commissioners which allows them to recognise the parties’ interests and to balance them.
Chapter three begins the assessment of how well the established Australian process complies with statutory criteria. Enrolment equality is the over-riding criterion of all Australian redistribution legislation and this chapter shows why compliance with that requirement calls for frequent redistributions: when maps stay in place for too long, many districts fall out of tolerance by the time elections are held. So some jurisdictions require that maps be within tolerance at the time of subsequent elections or midway through the life of the map, and some redistribution authorities have interpreted a demographic change criterion to achieve the same goal.

Chapter four continues the assessment of how well Australian redistribution authorities comply with their statutory criteria, in this case, the traditional criteria which include community of interest, existing boundaries, transport and communication, and geography. Most aim for a set of districts that will have equal enrolments and be meaningful in terms of community of interest and geography, but what is not generally understood is that compliance with these subordinate criteria will in fact have partisan effects. The chapter illustrates how Australian authorities’ apolitical stance and their application of the existing criteria combine to conserve existing bias and reduce responsiveness in the map.

In Chapters five and six the thesis draws on the work of redistribution authorities in New Jersey and South Australia to show how Australian authorities can comply with an extra criterion requiring that the map will perform in a fair way. Chapter five shows that the structure of New Jersey’s legislative redistricting authority – a bipartisan commission with a single independent member – creates a need for methodology which will allow the independent member to assess whether a map is fair enough to secure his agreement. In Australia the parties stand in a different relationship to a redistribution authority, and a criterion which calls for a map which will perform in a fair way could be understood simply as requiring that the redistribution task be completed. Chapter six considers how performance criteria have been implemented in South Australia, where the redistribution is conducted by a non-partisan authority and legislation establishes that a fairness requirement will have a high priority. Because South Australia’s electoral system has districts drawn to equalise electors rather than population, and also has compulsory enrolment, compulsory attendance to vote and frequent redistributions, this jurisdiction could be seen as a test of whether any redistribution authority can be required to provide a map which will prevent wrong winner elections when one party wins the support of a majority of votes but its opponents win a majority of the seats.
The **Conclusion** considers the relevance of these findings for other Australian redistribution authorities and for US reform groups.

There is a large body of Australian material on electoral systems, but relatively little on redistributions, so instead of a stand-alone literature review chapter, the thesis addresses the available academic literature as it becomes relevant. The thesis is particularly concerned with Australia’s process for drawing electoral districts, and material from the United States – particularly New Jersey – is used to illustrate the nature of the redistributions *per se* and the particular character of redistribution structures and process in Australia.

Except where indicated, all tables and graphs in this thesis are the author’s calculations, using data from official sources. Census data are from the Australian Bureau of Statistics and election results are from the various Australian electoral commissions or the New Jersey State Department, all of which are listed (with their website addresses) in the References.
Introduction

This thesis is about redrawing electoral districts in Australia. It argues that the established Australian model employs a fair process but fails to complete the task the parliaments have intended. It uses South Australia’s example to argue that Australian redistribution authorities could draw maps which will perform in a fair way, without compromising their own independence or their fair process. And it develops methodology for the task.

In Australia, electoral maps are redrawn at least every nine years and in some jurisdictions every four. Each time, they are more or less disruptive to incumbent members depending on how much their own districts are changed; more or less advantageous to parties depending on whether the new districts bring extra seats within reach of a good campaign; and of only passing interest to members of the general public. The public interest in redistributions is protected by the relevant legislation and by those who draw the maps, not by the media or watchdog entities.

The established model in Australia asks a judge and several senior public sector officials to redraw boundaries in a legislatively defined process according to legislatively defined criteria, and the parliament has no involvement in the process. Even the political parties are constrained because most Australian redistribution authorities will not engage with arguments made in partisan terms nor consider the political effects of the maps they adopt. Australian redistribution authorities (the thesis adopts this generic term in order to include committees and commissions) not only have strong, independent structures but can bring their maps into effect without parliamentary ratification, so they are in an ideal position to come to agreement on a set of districts which would perform in a fair way.

Australia’s legislatively defined process is impartial, transparent and accountable, and its use has given Australian authorities an exemplary reputation among international academic and electoral experts: Canada followed the Australian model when reforms were introduced in the 1960s and US reform groups also widely advocate similar structures and processes.¹ But

¹ See for example Chapter 4 ‘Going down under: Canada looks to Australia’, in J.C. Courtney 2001, Commissioned Ridings, McGill-Queen’s University Press, Montreal. Also, in the US ‘Fair Vote encourages a number of short-term solutions such as national standards for transparency and public input, as well as replacing the partisan system with independent commissions at the state level’; the American Bar Association has urged each jurisdiction to ‘assign the redistricting process for congressional and legislative districts to an independent commission’; Americans for Redistricting Reform advocate that
Australian redistribution authorities have adopted a stance which prevents them from completing their task. In order to minimise the party-political nature of redistributions they have emulated judges’ apolitical stance and refuse to consider submissions made in partisan terms or to consider the political effect of their maps.

But redistributions are inevitably political: they have the effect of allocating power and they inevitably change each party’s chances of assuming government, and in Australia the reason why they take place at all is to prevent party advantage building up in a map when population changes occur. So there is a political effect when maps stay in place for too long and compromise equality of electors at the time of an election. There is no agreed standard for equality in Australian redistributions, and the thesis offers one: a majority of districts should have enrolments within 5 per cent of the average at the time of an election. The thesis argues that where redistributions are infrequent, too few districts are equal by the time of the map’s last election, but also finds that the current levels of inequality do not predictably advantage one party.

Meanwhile, established Australian redistribution practice aims to keep existing maps intact as far as possible. This protects redistribution authorities from the risk of inadvertently changing the number of seats held by each party, but minimal change is not a primary criterion in the legislation of any Australian jurisdiction and it allows maps to lose responsiveness as incumbents on both sides of the House build up their margins. In addition, minimal change is not always possible: half of all federal redistributions are triggered when a state loses or gains a division.

Worse, the neutral subsidiary criteria which redistribution authorities rely on to guide their decisions when they do adjust their maps are not neutral at all but have party-political effects. When a district is drawn to reflect a strong community of interest it will be politically homogeneous, whether the shared interest is geographic, racial or cultural. Similarly, respect for existing boundaries conserves any advantage built up by incumbent members. So while Australian redistribution authorities believe that their apolitical stance ensures that their process will be fair to both parties and to the general public, in fact it is their undoing. Drawing maps blind and selectively deaf means that they cannot understand the partisan effect of the

jurisdictions ‘[a]ssign the redistricting power to an independent commission’; and Common Cause ‘supports redistricting reforms such as creating independent commissions to conduct redistricting, establishing criteria for how districts must be drawn, requiring a fair and transparent process for conducting redistricting, and creating “shadow” commissions to present their own recommendations’. Websites are given in the References.
changes they make and the maps they adopt. Compliance with the subordinate criteria provides no assurance of a map which will perform in a fair way.

It was because the established Australian process could not produce a map that would treat the parties equally that South Australia’s redistribution authority was given an extra criterion – a performance requirement. Drawing the map blind to its political effect had meant the authority could not recognise partisan bias generated by a combination of the state’s complicated geography and the geographic distribution of non-Labor support. Since 1990 the authority has been required to draw maps which will prevent distortion caused by bias as well as by malapportionment, and has developed methodology to suit that task.

In New Jersey successive independent members of that state’s legislative redistricting authority have developed very similar methodology. A map which could be supported by the independent member of that otherwise bipartisan commission must comply with constitutional, legislative and public interest requirements, and many aspects of the process remain matters of judgment and agreement – including methodology issues. But successive independent members of New Jersey’s Apportionment Commission have adopted performance criteria which mean that the independent member can give his agreement on the grounds that a map’s measured characteristics come closest to the standard. That enhances the perception of legitimacy of this process and signals to the courts an intention to be fair to both parties. Still, the New Jersey process relies heavily on the independent member’s negotiating skills as it is not in the parties’ interests to agree to an unbiased and responsive map.

New Jersey’s experience is that even with high levels of turnout and a set of districts which is equitable, unbiased and responsive, a map cannot guarantee to prevent wrong winner election outcomes, because campaign effects can occasionally be strong enough to skew the result. Similarly, even in South Australia with full turnout and tighter equality, the Electoral Districts Boundaries Commission (EDBC) determined in 2012 that it could not practicably provide a map which will prevent wrong winner elections but could provide one which will be unbiased and responsive, ensuring a level playing field for fair electoral competition.

It will be argued in this thesis that in all Australian redistributions, whether conducted according to the established Australian model or South Australia’s version, the aim is the same: to draw a set of electoral districts which will privilege the public interest over party interests, and which will treat the parties equally. What differs between the two models is how, and to
what extent, that is achieved. This aim is relevant to all aspects of the redistribution process, and is invoked throughout the thesis. Most importantly it generates a standard for assessing maps. In this thesis a map will be considered to be fair if it responds when voters change their support (this is the core public interest in elections) and will not give either party an advantage going into an election (this ensures that the map is fair between the parties). Currently in Australia, only South Australia’s redistribution process provides a way to assess whether a map will perform in a fair way.

As the United States Supreme Court found in its one vote, one value judgments of 1964, malapportionment can be addressed without considering the partisan advantage it causes. That court simply required that all districts be drawn with equal population numbers, and has never gone further to invalidate a map which complies with the equal population requirement but which nonetheless advantages one party. It has never adopted measures for partisan advantage or a standard by which it might judge how much advantage is egregious and therefore unconstitutional. Similarly, the Australian one vote, one value reforms generated legislation which requires districts with equal numbers of electors, and authorities can comply without considering the partisan effect of the lines they draw. But this stance would not allow South Australia’s EDBC to address the bias caused by an over-concentration of one party’s support. To do that, the commission adopted a different stance in relation to the parties, and developed a body of methodology which includes measures for party support and bias, and a standard to assess a map as fair. That put South Australia in a position more analogous to an independent US redistricting authority which might aim to treat the parties impartially by crafting a map to translate votes into seats in an unbiased way. So while South Australia has, at each redistribution, consulted with the parties and with academic advisors to incrementally develop its methodology, when that methodology was challenged in 2010 by a wrong winner election result on what had seemed an unbiased map, the commission took notice of the redistricting process in New Jersey.

South Australia’s EDBC needed a better measure of party support, a clearer understanding of how to measure bias, and a clearer standard to assess whether a map is fair, and it accepted the author’s submission based on an understanding of methodology used by New Jersey’s Apportionment Commission.² The EDBC determined that it can draw a map which is not biased by malapportionment or by the geographic over-concentration of party support. It can draw a

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map which will provide a level playing field for the parties at a subsequent election and which will respond if voters change their support. But it cannot – and indeed should not – control for how differential party campaigns then skew the translation of votes into seats. When parties with roughly equal voter support run campaigns which are more effective in some districts than in others, a wrong winner election outcome will always be possible. And because parties must be allowed to campaign and win seats as best they can, such an outcome cannot be held to invalidate a fair map. At a previous redistribution the commission had also determined that it was not appropriate for it to take account of post-election agreements between parties (or between a party and Independent candidates).

These notions of fairness and lack of bias are important in Australia because strict party-line voting is the norm and a majority in the lower house determines whether a party forms government. But redistributions and their methodology are not discussed in Australia to anywhere near the extent that they are in the United States, and what commentary does exist about South Australia’s model is often misinformed. So electoral management bodies and redistribution authorities in other Australian jurisdictions have seen South Australia’s fairness provision as a misguided flight of fancy bound to be revoked when it fails. And by 2012, more than 20 years after its adoption, the turnover of members of the parliament and within the parties meant that even in South Australia the aim of the process was no longer clearly understood. But in clarifying its task in 2012 the EDBC has kept faith with the original aim of Australia’s parliaments when they drew up their one vote, one value reforms. At that time the parties expressed their aim in terms of a fair election outcome, although what they wanted was a map which would allow both parties an equal chance of winning government if they had equal support. None would have accepted that if they campaigned astutely on an unbiased set of districts and won more seats than their share of votes would indicate, then the map should be adjusted to handicap them at a subsequent election.

Equally, the 2012 determination may allay the fears of Australian electoral management bodies and redistribution authorities outside the state. From time to time it is proposed that they too might be asked to produce maps which will be fair to both parties, and that ideal is usually articulated in terms of preventing wrong winner election outcomes. The South Australian commission’s determination should mean future proposals could reasonably only call for a level playing field. At the same time, the South Australian model shows that these other Australian redistribution authorities could relinquish their apolitical stance without losing their protection from political interference, and would gain the ability to check that they
had not adopted a map which would predictably advantage one party over the other. Rather than a frolic, South Australia’s model is probably their future.

Finally, there are even messages for reform groups in the United States. A contested question in Australia as well as the US is whether it is feasible to ask redistribution authorities to provide maps which will perform in a fair way, providing a level playing field for fair competition and generating fair outcomes. South Australia and New Jersey show that performance criteria are feasible, and also that the partisan symmetry standard proposed several times to the US Supreme Court is indeed a useful standard, but a level playing field should be the aim, not fair outcomes. Wrong winner elections can occur when campaigns are strong enough to skew the translation of votes into seats, even on an unbiased map, even in a jurisdiction with the multiple advantages that Australian electoral systems provide.

These conclusions emerge from the following chapters as they consider and assess Australia’s redistribution system – both models – and its history, current operation and methodology. But because the work of redistributions takes place in the context of each jurisdiction’s legal and political system it is relevant first to consider just what redistributions do.

A legislative act with political effect

On the grounds that parliaments should control matters relating to the way they are constituted, redrawing district boundaries was originally carried out by the parliaments themselves. Since Australia’s parliaments have delegated their redistribution power to independent authorities, the courts have continued to recognise the task as legislative and have accorded redistribution authorities the respect they would have given to a parliament if the task had remained in parliamentary hands. When South Australia’s parliament delegated its redistribution powers to an independent commission in 1976, the legislation gave the state’s Supreme Court a power not only to ‘quash the order and direct the Commission to make a fresh electoral redistribution’ but also to vary the redistribution order. That was challenged in Gilbertson v. South Australia where it was argued that drawing electoral districts was a legislative activity and that in giving the court a power to vary an order the legislation was purporting to confer a non-judicial power on it. The Supreme Court justices disagreed on the nature of the redistribution task. Bray CJ considered that it was judicial:

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3 Constitution Act 1934 (SA) s. 86.
Drawing lines on a map and dividing territories into areas is not, in my view, foreign to the exercise of judicial power...And it is interesting to note that even in America, where the doctrine of the separation of powers flourishes in vigour, the Supreme Court has not withheld its blessing from an order of a district court ordering reapportionment of the electoral divisions of a State when the existing state of apportionment violated the provisions of the Equal Protection clause of the 14th Amendment of the Constitution of the United States. Such an order was held to be a proper exercise of judicial power: Reynolds v. Sims.5

To Wells and Jacobs JJ, the court was simply being asked to exercise judicial powers of review. But to Zelling J the power to change a redistribution was necessarily legislative because it had previously only been exercised by the parliament and still required the kind of broad discretion characteristic of legislative powers.

[I]f the power to quash and order a fresh redistribution means anything it must include a power in the Court to set the criteria under which its order is to be carried out by the Commission and those criteria are in fact legislative and not judicial...We are making orders that will give “rights”, using that word in its widest sense, in futuro...We are not acting judicially nor are there any criteria by which our discretion is circumscribed.6

The judgment was appealed to the English Privy Council which read down the court’s power to vary an order, to the extent that it would only allow the court to correct errors of law, thereby protecting the redistribution authority from challenge on matters of judgment.7

[T]he Full Court would not be entitled to enter into the merits of any redistribution...[and] could only examine whether the order was ultra vires the Commission by reason of some illegality in the form or contents of the order, the procedure adopted by the Commission in the making of the order, or by reason of the Commission’s failure to give consideration to matters to which the relevant statutory provisions required it to have regard, or by reason of the Commission

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5 As above, p. 88.
6 As above, p. 100.
7 Privy Council transcript cited in R. Graycar & K. McCulloch 1977, ‘Gilbertson v. South Australia – the case for section 51 (xxxviii)?’, Adelaide Law Review, vol. 6, no. 1, p. 140. Until the passage of the Australia Act 1986 (Cwlth) and the Australia Act 1986 (UK) the Privy Council, an English court of appeal, was the highest court of appeal for Australian state supreme courts such as the South Australian Supreme Court.
having had regard to matters that no reasonable body of persons could regard as relevant.\(^8\)

As other jurisdictions also delegated their redistribution powers to independent authorities, some also made that protection clear in their legislation.

Almost 20 years later in *McGinty v. Western Australia* the High Court of Australia also deferred to the parliaments. It had been asked to find in the words ‘chosen directly by the people’ in the Australian Constitution an implied guarantee of equality which might give rise to something similar to the US Supreme Court’s one vote, one value judgments. But that phrase was not the source of either of the US guarantees and although the challenge went to malapportionment on a scale which would have been considered egregious anywhere else in Australia, the High Court found no implied guarantee of equality in Australia’s document. Dawson J differentiated between ‘questions of a political nature’ which the Constitution left to the parliament, and questions which were constitutionally prescribed.

In particular, it is left to parliament to make laws determining the electoral divisions for which members of parliament may be chosen...The only limitation is that a division shall not be formed out of parts of different states. In providing for those matters which are confided to it, parliament is required to determine questions of a political nature about which opinions may vary considerably.\(^9\)

Gerard Carney has argued that, apart from the High Court’s recognition of an implied freedom of political communication, it ‘has shown, at least in its majority judgments, a high degree of deference towards the electoral policies of the Commonwealth.’\(^10\) And Carney saw the *McGinty* decision as a resiling from the kind of cases which are recognised in the United States as ‘political questions’, better adjudicated by the legislative branch to which those powers were allocated by the US Constitution. In *McGinty*, Carney summarised,

the one vote, one value principle is not one capable of precise application; the US experience demonstrates the impossibility of measuring practical equality; and the court is loathe to imply a constitutional restriction which is likely to invite

\(^8\) *Gilbertson v. the State of South Australia And Another*, Privy Council (1977) 51 ALJR, p. 520.


litigation, or will require detailed rules or refinement, especially on an issue which belongs more to the political rather than the judicial process.\textsuperscript{11}

This deference continues despite two more recent decisions, in \textit{Roach v. Electoral Commissioner} (2007) when the High Court disallowed federal legislation which was intended to disenfranchise all prisoners, and also in \textit{Rowe v. Electoral Commissioner} (2010) when it disallowed federal legislation which would have reduced the time after the calling of an election during which the electoral roll remains open for new or changed enrolments.\textsuperscript{12} In \textit{Roach} the High Court recognised that although Australia’s Constitution envisages full franchise in its phrase ‘elected by the people’, nonetheless the franchise has always had limits and it is consistent for Parliament to legislate that some prisoners imprisoned for serious offences have, in the words of Gleeson CJ,

suffered a temporary suspension of their connection with the community reflected at the physical level in incarceration, and reflected also in temporary deprivation of the right to participate by voting in the political life of the community.\textsuperscript{13}

The court recognised that it was for Parliament to decide the basis on which to identify those prisoners whose offences had been sufficiently serious to warrant that suspension.

Because these courts defer to the parliament in relation to the questions of political judgment which are necessarily part of redistributions, Graeme Orr has characterised a redistribution as a ‘legislative act of political import.’ Not being a judicial act, it might be inappropriate then for most of Australia’s redistribution authorities to be chaired by judges.\textsuperscript{14} But Orr concluded that ‘so as to preserve judicial independence’ the redistribution process has been structured in such a way that its political content is circumscribed and the task can be treated as a matter of administrative law.\textsuperscript{15} With their role defined as semi-judicial, the other redistribution committee members or commissioners learned ‘to behave and to act like judges’ and have refused to consider arguments made in partisan terms or to consider the partisan import of

\textsuperscript{11} As above, p. 181.
\textsuperscript{15} Orr, \textit{The Law of Politics}, p. 39.
the maps they adopt.\textsuperscript{16} Former Australian Electoral Commissioner Brian Cox has attested, for example, that

\[\text{[a]t no stage during the process did the Committee or the augmented Electoral Commission look at possible political outcomes in the modelling of possible boundary options.}\textsuperscript{17}\]

When South Australia’s legislation was changed to require that state’s EDBC to consider the political effect of its map, the question of its judge-chairman’s ability to consider the political aspects of the process was raised again. The Privy Council’s declaration in \textit{Gilbertson} provided comfort: the judge is appointed as \textit{persona designata}, not to act as a judge, and as chair of the commission he or she exercises non-judicial powers.\textsuperscript{18} That would apply to the judge-chairs of each of Australia’s redistribution authorities. It is enough to allow South Australia’s commissioners to assume an impartial, rather than apolitical, stance and as will be shown in Chapter six, neither the judge’s impartiality nor the commission’s independence has been compromised.

The reference in Australia’s High Court to ‘political questions’ is a reference to a class of cases which the US courts originally refused to deal with on the grounds that they called for measures or remedies requiring political judgment and were therefore non-judicable. Justice Frankfurter warned in \textit{Colegrove v. Green} that the US Supreme Court should not enter that particular ‘thicket’.

Nothing is clearer than that this controversy concerns matters that bring courts into immediate and active relations with party contests. From the determination of such issues, this Court has traditionally held aloof. It is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention in an essentially political contest be dressed up in the abstract phrases of the law.\textsuperscript{19}

The Supreme Court overcame its reticence in its \textit{Baker v. Carr} judgment of 1962 when it found that the courts did have remedies for maps which are egregiously malapportioned or obvious

\begin{footnotesize}
\begin{enumerate}
\item Comment attributed to the first Australian Electoral Commissioner, Colin A. Hughes, in Courtney, \textit{Commissioned Ridings}, p. 68.
\item B. Cox 1995, \textit{Supplementary Submission to the Inquiry into the redistribution provisions of the Commonwealth Electoral Act}, JSCEM, Canberra.
\item \textit{Colegrove v. Green} 328 U.S. 549, 553-4 (1946).
\end{enumerate}
\end{footnotesize}
racial gerrymanders, and the courts now play a major role in redistricting. No new map for US state or federal elections is now considered final until legal challenges have been finalised.20 Under unusual circumstances courts will now even draw maps or commission them from court-appointed special masters. Even then deference is accorded to legislatures which still draw their own maps in a majority of US states. That deference is clearest when the courts specify how their special masters should draw new maps: almost invariably, the existing map must be conserved as far as possible, in recognition that the power to draw a map does not lie with the court but rather with the legislature, and that the existing map embodies the ‘rational state policy’ of the legislature or its delegated authority.21 In Abrams v. Johnson the US Supreme Court considered that

redistricting is best left to state legislatures, elected by the people and as capable as the courts, if not more so, in balancing the myriad factors and traditions in legitimate districting policies.22

(In the US redrawing maps for a state legislature is termed ‘redistricting’, and redrawing congressional maps is termed ‘apportionment’, although New Jersey has reversed those terms. In Australia ‘redistribution’ covers redrawing maps for any jurisdiction and ‘apportionment’ refers to the allocation to each state or territory of its due share of federal divisions.)

Translating votes into seats

Whether the nature of the task is recognised as legislative or administrative, redistributions inevitably have a political effect. They translate votes into seats in the parliament, and in doing so they allocate each vote a weight – an equal weight if the map is fair.

As long as Australia’s colonial and then state parliaments were responsible for drawing their own electoral districts, all used malapportionment to advantage the party in government at the time. But that was never the case for the federal House of Representatives. The federal parliament chose a different model for federal and territory redistributions: those maps have always been drawn by independent authorities complying with relatively narrow elector

20 Because the redistricting process now is not considered to have ended until a map has court approval, Grofman has referred to the courts as ‘the “fat lady” of redistricting. Nothing is over until the fat lady has actually sung.’ P. Miller & B. Grofman, 2012, ‘Redistricting commissions in the western states’, presentation to UCLI Election Law Symposium, 14 Sept. 2012.
tolerances, and from the mid-1970s the states began to follow suit. When the states renounced malapportionment and gave independent redistribution authorities the power to have their maps implemented without parliamentary approval, they intended that the new structure and process would provide a set of districts which would not give in-built advantage to either party at elections. Malapportionment had been the principal mechanism by which governing parties had previously drawn advantage into electoral maps, so the new legislation set tight tolerances for elector numbers in each district and provided for regular redistributions to prevent malapportionment reappearing. Members of the newly constituted independent authorities understood their task as preventing malapportionment, ensuring that districts would be meaningful, and refraining from introducing any changes which might generate new advantage to either party. It seems there was a belief that if districts changed hands at a subsequent election it should be at the voters’ initiative, not the authority’s.

When a jurisdiction is divided into electoral districts with equal numbers of voters (in Australia) or even with equal population (in the US), each vote is weighted roughly equally; votes translate into seats in the legislature in the same way whether they are lodged in a rural district or a city district, for example. But until the one vote, one value reforms, that translation was intentionally biased so that votes of rural electors were given additional weight in electing representatives. In the US the effect was achieved by simply not adjusting existing districts – for example, the Tennessee districts at issue in Baker v. Carr in 1962 had not been adjusted since 1901 although the state’s constitution required redistricting every ten years. Over that period, population change had increased the number of voters in city districts much more than in rural districts, and the ‘creeping malapportionment’ had a political effect such that city voters were unable to have their policy needs addressed to the same extent as those from rural areas. In that same era Australian redistributions were conducted more regularly but almost always with the intent of providing advantage to the government of the day, and the preferred method of biasing the translation of votes into seats was zonal malapportionment.\(^\text{23}\) States were divided into zones and within each zone a specified number of districts would be drawn, each with roughly equal numbers of electors. In South Australia districts within the metropolitan zone each had roughly twice as many electors as districts within the rural zone, thereby giving rural votes twice the weight of city votes. Labor support

\(^{23}\) Most redistributions or changes in systems of weighting have benefited the party which introduced them, often making it possible for it to control government without a majority of votes.’ J. Rydon 1968, ‘Malapportionment – Australian style’, Politics, vol. 3, no. 2, p. 142.
was concentrated in metropolitan and provincial city areas, so malapportionment disadvantaged the party and its supporters.

Graham Gudgin and Peter Taylor have shown that the way votes translate into seats can be biased even when districts have the same number of voters. 24 Partisan support is almost always distributed unevenly across a jurisdiction, and any geographic area can be divided between electoral districts in different ways. One choice could take all of the Labor voters, another could take all of the non-Labor voters and a third alternative could take equal numbers of each. Votes will be translated into seats in a different way each time, so drawing electoral districts inevitably has a party-political effect. In the US Robert G. Dixon Jr. summarised the principle:

The key concept to grasp is that there are no neutral lines for legislative districts. Whether the lines are drawn by a ninth-grade civics class, a board of PhDs, or a computer, every line drawn aligns partisans and interest blocs in a particular way different from the alignment that would result from putting the line in some other place. And (bear in mind that the gross majority in each district captures the seat or seats assigned to that district), the electoral result will be different in each case. 25

Even when districts are drawn with equal numbers of electors, the uneven distribution of party support can bias the way that votes translate into seats. Bias is commonly introduced by concentrating one party’s votes in ultra-safe seats (known in the US as ‘packing’) while spreading (‘cracking’) the other party’s votes so that it is able to win a greater number of seats with its share of the vote. 26 Bias may be unintentionally produced: in South Australia bias was drawn into the map in 1976 and 1983 because the state’s geography and the distribution of Liberal Party support across the state combined to over-concentrate this support in a few ultra-safe seats. Similarly, US experience is that minority voters, usually Democrats, can be packed in ultra-safe districts on the pretext of complying with the Voting Rights Act. In both cases the bias can only be addressed by an intentional process of unpacking.

26 The Redistricting Song illustrates these concepts in a humorous way.
In the US incumbency can advantage a candidate by increasing the likelihood that voters will turn out to vote, so if one party’s incumbents are left within districts where they are well known while the opposing party’s incumbents are drawn into new districts (‘kidnapped’), fewer votes will be recorded in the opposing party’s seats and again the translation of votes into seats will be biased. In Australia attendance to vote is compulsory so turnout differences are not considered in this thesis except in Chapter five (which looks at methodology used in New Jersey). The vast majority of electors will lodge a ballot at each election and often at the same polling location (‘booth’), and when one party increases its two party preferred vote it is necessarily at the expense of the other party.27 So the concept of swing is more useful in Australia, and a campaign that resonates across the state is expected to produce swings of roughly the same size – uniform swings – in each district. Even so, parties campaign hardest in marginal seats and when those local campaigns are effective there will be a real difference between the swings in particular districts and the statewide swing. With effective local campaigns a party can win a larger share of the seats than of votes, so the acceptable effect of campaigns is referred to as skewing the translation of votes into seats, while the unacceptable effect of the over-concentration of one party’s support is referred to as biasing it.

The thesis defines a map as fair if it is not malapportioned or biased – if it will not predictably advantage either party at a subsequent election – and if it will respond when voters change their support. To be responsive, a map requires some districts which could change hands with the kind of swing experienced at an average election. In fact, it needs enough of these in play

27 Australia’s two party preferred result shows the share of all formal votes won by the Labor Party and the Liberal-National Coalition (or in SA the Liberal Party alone). It is made possible by the preferential ballot in which each elector must show a preference for each of the candidates contesting the district, so every ballot paper does show a relative preference for Labor and the Coalition. All formal ballot papers (showing a complete set of preferences or interpreted as complete) are allocated to the candidates against whose name a first preference is indicated. The candidate with the fewest first preferences is excluded and those ballot papers are re-allocated to the second-preferred candidate. Progressively less weak candidates are excluded until only two remain in the count and this final result is the two candidate preferred result. The winning candidate will always have more than 50 per cent of the total formal votes. In most contests the two final candidates will be Labor and Liberal/National so the two candidate preferred count is the same as the two party preferred count. Where an Independent or minor party candidate wins or comes second, a recount is done as if the non-major party candidate had not contested the district: all ballot papers showing a first preference vote for the candidate to be excluded are allocated to the next-preferred candidate and the recount continues until the final result in the district appears in terms of the share of votes won by the two major party candidates. The statewide two party preferred vote aggregates the number of votes won in each district by the ALP and Liberal (or Coalition) candidates expressed as shares of the total formal vote. This count recognises that the two major parties are the ones which could win government and shows which of them has the most support across the jurisdiction. In New South Wales and Queensland ballot rules now allow incomplete ballot papers as formal, so the two party preferred count is incomplete – it is expressed in terms of the total formal votes which show a preference for the major parties.
at an average election so that either party might win a majority of seats if it wins the support of a majority of voters. And it will be assumed that under most circumstances the parties’ campaigns will be roughly equally effective but that occasionally a campaign will skew the result, so a wrong winner election will not be evidence that a map was biased.

**Findings**

The following chapters look at how Australian redistribution authorities draw maps, and what they find is a mixed bag. The authorities are characterised as having strong structures, high degrees of independence and a consultative, transparent process, and many report at some length. They draw districts which are well within tolerance and most aim for districts to stay within tolerance by the time of subsequent elections. Federally they are let down by legislation which only triggers redistributions after three elections (though half of the federal redistributions occur more frequently if a state gains or loses a division). Victoria and Queensland also expect their maps to function for three elections. Given that the regular triggers are intended to prevent creeping malapportionment, maps which stay in effect for this long generally fail the test, and no jurisdiction has set its malapportionment triggers low enough to prevent that.

More importantly there are now two models for electoral redistributions in Australia. Both treat the parties impartially and elevate the public interest above party interests, but the thesis argues that the aim of a redistribution exercise is not only about the process – drawing a map in a fair way – but also about how the map will perform when it counts – at subsequent elections. That means a redistribution authority must draw a map which will not be malapportioned or biased by other factors, so that it will not advantage either party at a subsequent election, and it must be responsive enough that when voters change their support the votes will translate into seats differently. Only South Australia’s model completes this task.

The apolitical stance originally adopted by commissioners in each of the jurisdictions to protect themselves from political interference restricts them to a conservative policy of applying ‘neutral’ criteria – which the thesis shows do in fact have political effects – and adjusting maps as little as possible. Even where major changes are required to add or abolish a district they do not recognise the political effect of the maps they draw. South Australia has shown that Australian redistribution authorities can consider political factors without compromising their independence, and that they can develop appropriate methodology to provide not only a fair process but a fair map. And in 2012 the South Australian redistribution authority resolved the
final question which needed clarification before other jurisdictions would adopt its process: it has determined that a commission cannot, and should not, be held responsible for preventing wrong winner outcomes. Parties must be allowed to campaign as best they can; what redistribution authorities must do is provide a level playing field for that contest.

**The Australian redistribution toolkit**

The thesis advocates the following methodology.

Redistributions should take place at least every two elections.

The redistribution process should treat the parties equally and elevate the public interest over party interests. The core public interest in redistributions lies in a set of districts which will respond when voters change their support and which will, given equally effective campaigns, award a majority of districts to the party with the support of a majority of voters.

The aim of a redistribution should be to provide a set of districts that will not advantage either party leading into an election and which will respond if voters change their support.

Each district should have an equal number of electors at the time of an election. The acceptable standard should be a majority of districts within 5 per cent of the average.

A set of districts should be unbiased. The acceptable standard should be partisan symmetry: the two major parties should have the same proportion of their support in safe districts when the result is adjusted to a hypothetical 50:50 outcome.

A set of districts should be responsive. The acceptable standard should be that there will be enough marginal districts available to change hands that the opposition could win a majority of districts if it wins the support of a majority of voters.

A set of districts should be unbiased in its responsiveness. The acceptable standard should be equal numbers of marginal seats on both sides of the pendulum when support is equal.

Equality should be measured using enrolments at the time of the election.

Party support should be measured using the results of several recent elections.

Bias should be measured using the proportion of a party’s support tied up in safe seats.
Chapter one: Redistribution authority structures

In Australia and across the US, a surprising variety of authorities draw electoral district boundaries. Whatever their process and criteria they need to find agreement internally and generate external acceptance of their maps, and their structures constrain where or how they can find it. It has been argued that the aim of a redistribution should be to produce an unbiased and responsive map, so this chapter considers the effect that these differing structures have on reaching that aim. The approach is not entirely original: in relation to election commissions, Christopher Elmendorf has suggested an inquiry into ‘how the policy choices of nominally independent bodies are affected by, inter alia, the body’s structure and powers.’\(^{28}\) And Michael P. McDonald has argued that ‘the redistricting plan that a state adopts is a function of its redistricting institutions and the players who work in it.’\(^{29}\) This chapter finds that although advisory authorities may reach agreement on a map they have insufficient autonomy to bring it into effect, that legislatures and independent partisan authorities may find agreement for a responsive map but not for an unbiased one, and that independent bipartisan authorities may negotiate an agreement which addresses bias but at the price of responsiveness. The analysis of alternative structures and their constraints shows the utility of the layers of autonomy and independence which have been designed into the structure of Australian redistribution authorities.

This analysis is important for those who work within existing electoral systems as well as for those who aim for reform. US reform groups are as concerned with unresponsive maps as they are with biased plans, and commonly work towards an independent authority with balanced partisan membership, but this analysis shows that within even that structure the need to find internal agreement will limit commissioners’ ability to produce a map which will gratify the reformers. In Australia it is widely considered that redistribution authorities’ independence from the parliament and the parties is guaranteed by the authorities’ refusal to consider the party-political nature of their task (the thesis terms this an apolitical stance). Indeed, these authorities have been concerned that the impartial stance taken by South Australia’s redistribution authority, which allows it to recognise the parties’ interests and to attempt a balance between them, potentially trades off vital independence for little apparent gain. But this chapter finds that there are two much more important guarantees of Australian


redistribution authorities’ independence, and both are structural: Australian electoral maps come into effect without parliamentary ratification, and Australian redistribution commissioners are appointed *ex officio*, not by the political parties.

The chapter considers how internal agreement and public acceptance can be reached when legislatures draw their own districts, or when they delegate the task of drawing a map but retain the power to change or veto it, or when an independent authority or a court draws a map. This analysis is supported by observations from both the United States and Australia.

**Legislatures**

Both United States legislatures and Australian parliaments owe much to the British parliamentary tradition where power over matters affecting the business of the parliament – including setting members’ salaries, judging election appeals as a court of disputed returns, and defining electoral districts – rested with the parliament itself.\(^{30}\) When legislatures draw their own districts they have an opportunity to preference partisan interests above the public interest, biasing the map if one party has a majority in both houses, or protecting the status quo if control is split. Australian parliaments had no original requirement to adjust district boundaries regularly, so governments could choose to do it when they could rely on the agreement of a majority of members in both houses. As long as Australian parliaments retained the redistribution power and also retained the discretion to adjust districts only when convenient, bipartisan agreement for a map was never necessary, and district boundaries could be drawn to advantage the interests of the majority faction or party.

In Australia the opportunity to redistribute boundaries to entrench a government in power was generally only available to the non-Labor parties.\(^ {31} \) A restrictive franchise for state upper houses meant that they were usually controlled by conservative parties, and upper house members were elected on the basis of districts which were made up of several entire lower house districts so even when the Labor Party had sufficiently high levels of support to overcome biased maps and to assume government, it was unable to have a new map passed by the upper house. Unlike more conservative governments, Labor governments could not use


the redistribution power to advantage themselves, and no redistribution in any of the bicameral states ever entrenched a Labor government. While the non-Labor parties had no need to win over an antagonistic upper house they had to find agreement with their own coalition partners, and in 1962 that process failed federally when the Country Party would not give parliamentary approval for new electoral maps that threatened to deprive it of two seats.

US state legislatures also had British roots and 39 of the 50 legislatures still draw their own districts as well as their states’ congressional districts. When legislatures redistrict, they can produce biased, responsive maps, or relatively unbiased but non-responsive maps, but it is almost impossible to generate the agreement required to produce a map that will be unbiased and responsive.

Where a US legislature retains the redistricting power and one party has a majority in both houses and also holds the governorship, majority party legislators and party counsel consider themselves duty-bound to take their turn at producing a map which will advantage their party, subject only to the constraints of state and federal law. The predominant model is that redistricting by legislatures with unified government produces a map which is biased and any responsiveness will also be biased towards the majority party. Neither state nor federal law has constraints on how much partisan advantage is permissible, so agreement for a map can be managed within the majority party while the interests of the minority party are actively frustrated. The Texas Republican chair in 2001 is reported to have said of that state’s process:

[quote]
We weren’t overly sensitive to protecting anyone in particular, and particularly not Democrats. We make no bones about that. We’re the Republican Party.
[/quote]

A different kind of map is possible where the parties share control of the Houses and the governorship. When a map requires agreement between the parties, the most common path is

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32 Queensland’s zonal system which originally favoured a Labor government was only made possible by that state’s prior abolition of its upper house.

33 Unlike the earlier situation in Australia when conservative upper houses only agreed to maps that would entrench conservative governments, US legislatures which retain the redistricting power justify their biased redistricting as simply taking their turn, reversing partisan advantage previously imposed by their opponents’ maps.

34 It is not inevitable that a partisan gerrymander will be produced, and McDonald found that in the post-2000 round four legislatures with unified control did not take this opportunity, but each was an exceptional case. For example, in California a Republican threat to support a direct initiative on redistricting achieved some compromise from the Democrat-controlled legislature. McDonald 2004a, ‘A comparative analysis’, p. 389.

to nod to parliamentary precedents, recognise each house’s independence and allow each to draw its own map. Each map is passed without debate by the other house. This norm originates in the British parliamentary system. Australia’s original (1902) Commonwealth Electoral Bill would have approved redistributions of House of Representatives divisions by resolution of that House alone, on the grounds that by tradition the Senate would not have exercised its right to disallow a matter relating to the other House. That provision was said to reflect

an ordinary convention under the British Constitution that one House of Parliament does not interfere with the business of another House in matters of this kind.\(^{36}\)

David Butler and Bruce E. Cain recognised the operation of this precedent in the post-1980 round and Jonathan Winburn reported its continued existence in Georgia, Indiana and Kentucky in the post-2000 redistricting round.\(^{37}\) The arrangement makes agreement possible, but allows biased maps which advantage the majority party in each house.

Where a Governor from one party faces a unified legislature controlled by the other party, his or her authority gives the legislature’s minority party a stronger position in negotiations.\(^{38}\) To find agreement the parties typically increase the margins of incumbent members from both parties and entrench the governing party’s majority, regardless of pre-existing bias. An unbiased map may be achievable if party support is very close, but a major aim for each party will be to protect its incumbent members, so neither would agree to a map that made any of its districts competitive.

In summary, when legislatures draw partisan maps the price of agreement is that majority party competitive districts are made safer, and if competitive districts are drawn their responsiveness will be a partisan mechanism for biasing the map. Alternatively, if legislatures negotiate bipartisan maps, the price of agreement between the parties is that competitive districts held by both sides are made safer and the map is likely to be unresponsive.

Many US plans are still drawn with egregious advantage, and Thomas E. Mann considers that


changes in incentives and resources have combined to produce ever more egregious manifestations of self-dealing in the redistricting process by parties and elected officials. The redistricting world...has...strong and aggressive national parties choreographing developments in the states.39

Good governance groups campaign on two main fronts: to require more responsive maps and to appoint bipartisan or independent authorities. A common first step has been the establishment of advisory or back-up redistricting authorities.

**Advisory authorities**

In the century and a half since the establishment of the earliest Australian parliaments, each has devolved its redistribution power, initially to advisory commissioners.40 Whether drawing districts in-house or outsourcing the task and defining the options narrowly, Australian governments took the opportunity to produce biased maps as readily as US state legislatures, using the same techniques of malapportionment and bias to produce advantage for subsequent elections, and the maps did have the intended effect. For example, when the 1927 state election was fought in South Australia on a set of districts which was malapportioned against the Australian Labor Party, a Labor member called the map a gerrymander: ‘The gerrymander played a great part in it too – we got more votes than you.’ But a minister replied:

> The honourable member is entitled to all the joy he can get from that moral victory, so long as he will allow us to have the actual victory, with its occupancy of the Treasury benches.41

That malapportionment, extended on a zonal basis, was the foundation for egregiously malapportioned maps which kept Liberal and Country League (LCL) Premier Playford on the government benches from 1938 until 1965, even while Labor arguably had the support of a

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majority of voters at five elections during the period.\textsuperscript{42} Each time the maps were drawn by advisory commissions to comply with criteria set by the governing party.

Arms-length authorities are also used in several US states: four have partisan back-up commissions which come into existence if the state legislature fails to agree to a map before a deadline, and another two have bipartisan advisory commissions which produce plans for the legislature to amend or adopt. Texas’ partisan commission is an example: the members are the Lieutenant Governor (who is also President of the Senate), Speaker of the House, Attorney-General, Comptroller of Public Accounts and Commissioner of the General Land Office, all elected partisan positions. Without a need to negotiate agreement, a partisan back-up commission is expected to produce maps to advantage the majority party in each house, and indeed the Texas back-up committee of 2001 not only advantaged the majority (Republican) party but also frustrated the interests of the opposing party to the extent that on appeal one judge considered that the Board’s ‘dominant political party...treated all members of the opposing party...as if they were “enemies of the state”.’\textsuperscript{43} Indeed, it is not obvious why an advisory authority might be more effective than the legislature at gaining agreement for a map, but McDonald says that a back-up commission concentrates control of redistricting into the hands of a few partisan commissioners, often party leaders or their appointees, who are able to act outside of the prying eyes and mixed influences of state legislators.\textsuperscript{44}

Regardless of whether these authorities are partisan or bipartisan their plans need ratification by the legislature, so no matter how fair a map the authority negotiates, its implementation depends on the make-up of the legislature. In the post-2010 round Levitt reported that maps produced by the two bipartisan advisory authorities were adopted only in substantially modified form.\textsuperscript{45}

In South Australia the absence until 1976 of a strict requirement to redraw maps on a regular basis meant that if plans produced by advisory bodies were not helpful to the majority party they were simply not implemented. Maps produced by only one of the four Royal Commissions


\textsuperscript{44} McDonald 2004a, A comparative analysis’, p. 382.

\textsuperscript{45} See Maine and Vermont at All About Redistricting http://redistricting.lls.edu/index.php
appointed by the South Australian parliament in 1927, 1929, 1955 and 1963 were ever put into effect. The 1927 report proposed changes which would have been likely to cost the Liberal government two seats, and the government issued new terms of reference to the same commissioners requiring districts ‘having a community of interests.’ The commissioners found themselves unable to vary their original report and the redistribution was put aside. In 1929 another Royal Commission was established, this time with criteria which specified the establishment of metropolitan, urban and rural zones, with twice as many electors in each metropolitan district as in each rural district. That commission never met. A new Royal Commission was appointed in 1954, and its report was passed by the parliament and implemented. A commission appointed in 1962 reported in 1963 with a new map that would have entrenched the governing Liberal and Country League, but that party governed with the agreement of an independent member who would not support the new map and the proposal was not adopted. Colin A. Hughes has reported that there were 31 instances of completed federal redistributions being rejected or simply not adopted by the federal parliament from its birth in 1902 until the 1983 legislative changes which gave the federal redistribution authorities the power to order their maps into effect.

The US authorities and South Australia’s early Royal Commissions all show that advisory authorities will be able to gain the legislature’s agreement to a map only on the legislature’s terms, not the authority’s terms. As long as these maps require legislative ratification, advisory authorities are unable to generate the agreement required to have unbiased and responsive maps adopted.

46 Royal Commissions are investigative inquiries appointed by the government and working with the powers of a court. See for example the Royal Commissions Act 1917 (SA) ss. 10-11 which gives them power to enter premises, summons witnesses and require the production of documents.
49 Electoral Districts (Redivision) Act 1929 (SA).
Independent authorities

Throughout Australia, the Labor Party’s response to its inability to have redistributions passed through state upper houses was a long-held policy to abolish such upper houses, but only Queensland’s Labor government achieved that aim. When other state Labor governments were in a position to achieve change they reformed their upper houses instead, and delegated redistributions to independent non-partisan authorities whose maps come into operation without parliamentary approval, amendment or veto. The members of these authorities are non-partisan appointees; they come to agreement internally, and have no need to negotiate agreement for their maps with the parliament or the parties.

By contrast the US has no strong tradition of an apolitical public sector, and the few state legislatures which have devolved their redistribution powers to independent authorities have specifically designed them as partisan or alternatively as balanced bipartisan authorities, sometimes with an independent member. The next sections assess the way that these independent authorities can come to agreement, and the maps they can produce.

Five US state legislatures have devolved their redistricting responsibilities to partisan commissions that are independent to the extent that their plans come into effect without ratification by the legislature. When party control of the legislature and the governorship is unified, most appointments to these authorities are by majority-party officials, and the authorities operate as partisan commissions: they have no need to negotiate agreement with the opposing party or with the general public, and see themselves bound to strengthen their party’s position and to reverse partisan advantage that may have been imposed previously by the opposing party. As is the case with legislatures and also with partisan advisory bodies, there is every incentive for these authorities to produce maps which will be biased and unresponsive, and the incentive is not ignored: Michael P. McDonald reports that in the post-2000 redistricting round ‘whenever a partisan commission was convened a partisan map was adopted.’ The imperative for parties to gain advantage wherever they can prevents independent partisan authorities from generating a map which will be unbiased and responsive, but egregious maps face court challenge.

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53 Alaska, Arkansas, Colorado, Missouri and Ohio. Alaska’s appointments ‘should be made without regard to political affiliation’ but in 2011 all five positions were appointed by elected or appointed Republicans. National Conference of State Legislatures (NCSL) 2009, Redistricting Law 2010, NCSL Denver and Washington, DC. See Appendix C.

Because independent partisan authorities reliably generate partisan maps, good governance reform groups favour bipartisan authorities. Eight states have adopted independent redistricting authorities with equal representation from both parties, with an additional member who is appointed as a non-partisan or impartial chair.55 In addition, when partisan commissions are appointed at a time when there is split party control in the legislature or when the Governor represents the minority party in the legislature, those partisan commissions also operate as if they are bipartisan authorities.

Independent authorities with balanced party representation would seem to be in a good position to gain agreement for a fair map, but that understanding of fairness involves securing the position of each party’s current incumbent members, so addressing any existing bias is not possible and in the process of making incumbents’ seats safer any responsiveness in the system is reduced.56 The public interest is not well served by maps which can entrench majority parties. Neither are the parties’ own interests well served by a process that protects incumbents at the cost of spreading party support to win extra seats. Still, a bipartisan authority will at least be prevented from imposing a map that increases any existing bias.

A different outcome is possible where the balanced bipartisan commission has an additional independent member: the commissioners may accept a map which is less biased than either party would have otherwise agreed to, but again the price is likely to be responsiveness. This model provides the best opportunity for a fair map to be produced. Dixon considered that because the bipartisan with tiebreaker model ‘allows combining the population equality principle with political realities and a better informed public scrutiny’ it was ‘better than any other available device’.57

This model works to the extent that the tiebreaker can negotiate a fairer map. The parties may subvert this structure by refusing to negotiate, and in Illinois they have generally chosen not to compromise and have forced the independent member to choose between party maps.58 But that strategy will only work if both parties refuse, whereas a party has an incentive to accept small adjustments to its preferred map and have its map adopted. New Jersey’s 2001 congressional Redistricting Commission, for example, approved a map helping the two most

55 Idaho’s commission has no independent member. The others are Arizona, California, Hawaii, Montana, New Jersey, Pennsylvania and Washington state. NCSL 2009, Redistricting Law 2010, Appendix C.
vulnerable Republican members and the two most vulnerable Democrat members. Editorial opinion in New Jersey focused on the lack of responsiveness in the new map and one commentator noted that the independent member of that commission offered some spin in support of the plan, explaining how it helps both parties, but that comment alone says volumes about the state’s redistricting philosophy. The process is supposed to be designed to help voters. But this is strictly a party showdown. And why wouldn’t it be, considering the redistricting panel consists of equal numbers of Democrats and Republicans? The tiebreaking vote is invariably needed because there are invariably duelling Dem-friendly and GOP-friendly plans that make any agreement impossible.

Another columnist called the map a ‘ten year incumbent-protection plan’ and reported that the seats would all be so safe that voters had effectively been disenfranchised. By contrast, New Jersey’s legislative redistricting process, which also has a bipartisan commission with an independent member, operates differently: successive independent members have negotiated a map that would more responsive and less biased than either party would otherwise have agreed to.

A distinction could be made between the commissions of Arizona and California, where commissioners are members of the public rather than elected members or appointed party officials, and the six other independent bipartisan commissions. But in fact, the citizen commissioners are still clearly politically aligned: California’s commissioners apply – and are chosen – as Democrats or Republicans to fill party quotas on the 14-member commission, and Arizona’s commissioners are chosen by parties from lists of registered Democrats and Republicans and individuals not registered with either major party. How these bipartisan commissions reach agreement varies but it is expected to be along party lines. For example, California’s legislation specifies that a final map must be approved by at least nine of the 14

members and agreement must be broad, to include approval by at least three of the five Democrat and three of the five Republican and three of the four independent members.63

Elmendorf defined election commissions as independent only if they had both non-partisan membership and also insulation against retribution from the parties or the legislature, and this definition is also relevant to redistribution authorities.64 While all eight of the US independent bipartisan commissions can have their maps implemented without legislative ratification, that independence may come at a personal cost to the independent members. State funding was cut for university programs associated with New Jersey’s two most recent Eleventh Members, and in Arizona the public member of that state’s congressional commission was impeached by the Governor in 2011.65 In each case the independent members had given approval for a plan which was identified with one party, and then suffered at the hands of the other. Colorado’s commission can be partisan or bipartisan depending on the legislature’s control at the time, and in the post-2010 census round it was – for the first time – bipartisan with an independent tiebreaker. After he voted for a Democrat map, Republicans called him a ‘wolf in sheep’s clothing’ and a conservative pressure group called for him to be sacked from his day-job as a local television executive.66

Whether that kind of pressure actually changes how the commissioners come to agreement, and what they can agree to, will vary. Pressure may be resisted by academics with a strong sense of service to the community but it is likely to have a more powerful influence on citizen members of the Arizona and California commissions. Justin Levitt has noted that while the impeachment of Arizona’s chairwoman was overturned ‘it’s not clear whether the impeachment or the subsequent rebuke will be the enduring lesson.’67 He has warned that citizen-commissioners’ limited experience may draw them towards easily maximized, quantitative criteria for where the lines should fall or [to] rely excessively on staff with similar concerns, at the expense of more complex

63 http://www.leginfo.ca.gov/.const/.article_21
qualitative judgments that better reflect normative judgments about representation.\textsuperscript{68}

Kristina Betts has added that

\textit{[i]t makes more sense to appoint people to a redistricting commission who have been educated in or have practiced in areas of election or civil rights law or who may have had experiences that could inform their decisions as board members.}\textsuperscript{69}

To the extent that citizen commissioners do prove vulnerable to pressure from the parties, their ability to negotiate an agreed map will be threatened. Given the difficulties faced by independent partisan and bipartisan authorities, another option is possible: independent non-partisan authorities. This review of past Australian and current US redistribution structures has shown that legislatures and independent partisan authorities may find agreement for a responsive map but not for an unbiased one, and that independent bipartisan authorities may negotiate an agreement which addresses bias but at the price of responsiveness. It showed that advisory authorities may reach agreement on a fairer map but then lack the authority to have it put into effect and that in the US even maps produced by legislatures are subject to court review. The conclusion must be that for an authority to produce an unbiased and responsive map it must have a structure that gives it independence from the legislature, the parties and the courts and must then have the power to implement its map.

Colin A. Hughes and Don Aitkin have argued that Australian parliaments have a tradition of resolving political conflicts by administrative adjudication.\textsuperscript{70} That proved particularly useful

\hspace{1cm} where it was desired to protect elected governments from continuous involvement in the resolution of sharp and contentious clashes of group interest.\textsuperscript{71}

So when Australian parliaments took their second step away from controlling redistributions they devolved the responsibility to non-partisan authorities, designing them to be independent of the parties and also of the parliament to the extent that redistributions would be triggered

automatically and maps would come into effect without parliamentary ratification. By appointing a senior judge to the authority they ensured that maps would not be appealed on matters of law, and legislation generally provides that the authority’s order cannot be appealed on matters of judgment (see the ‘court review’ section of the Appendix).

Australian parliaments gave their redistribution authorities independence so that they could produce a set of districts that would not advantage either party. For example, when South Australia’s EDBC was established in 1976 it was intended that future Redistributions would ‘not be subject to political manipulation by a Government which might chance to have a majority in both Houses at any one time’ and the constitutional provisions establishing that authority were entrenched.72 Similarly, the 1983 First Report of the Joint Select Committee on Electoral Reform (JSCER), which recommended the design for the federal redistribution system, articulated each of its recommendations in terms of the independence of the proposed redistribution authority, so that, for example, Redistributions would be triggered ‘according to agreed criteria’ specified in the legislation ‘and not be subject to political decision’. Similarly, the committee recommended that the federal authority’s determination should be final, in order to

> reinforce to the maximum possible extent the independence of the commission
> and to ensure as much as possible the removal of its conclusions from the political sphere.73

When introducing the federal legislation to the parliament, the responsible minister emphasised that this independence was given in order to provide for Redistributions which would not advantage either party:

> It will not be subject to any process of approval by Parliament or any disallowance motion by either House. This has been done deliberately and after the fullest consideration of the Joint Committee’s recommendation. This government is determined once and for all to establish fair and impartial procedures for honest Redistributions. We owe this to the Australian people.74

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72 D.A. Dunstan, SAPD-HA, 30 Sept. 1975, p. 927. Changing an entrenched provision requires a majority vote in both houses and a majority vote of the public at a referendum.
Other Australian jurisdictions have established similar authorities and no Australian parliament can now draw its own districts, initiate a redistribution, or change, veto or defer a commission’s recommendations. Structurally the various authorities differ only slightly: for example, the South Australian redistribution commission draws on the state’s Electoral Commission for services but is an ongoing body and is free-standing, whereas federally the independent Australian Electoral Commission (AEC) holds both electoral and redistribution functions, and redistribution committees are appointed whenever a federal redistribution is triggered.

The Appendix summarises the legislative provisions in each Australian jurisdiction which enable redistribution authorities to generate agreement for a map that will treat the parties equally and elevate the public interest above the parties’ interests. These provisions cover non-partisan membership, insulation from political influence, non-partisan triggers for redistributions, the power to order a set of districts to come into effect without parliamentary ratification, and shelter from court review.

The Appendix shows that Australian redistribution authorities’ independence has several reinforcing components. Independence from the parliament is demonstrated by automatic triggers and the authorities’ ability to have their plans brought into effect without ratification; independence from the parties is demonstrated by requirements (explicit in some jurisdictions and assumed in others) that appointees not be current or former members of the parliament nor members of a political party, and then that appointments be made after inter-party consultation; and a degree of shelter from court review is shown by the fact that most jurisdictions appoint judges to their panels and then specify that there is no right of appeal to the courts on matters of judgment. In addition, federally it is an offence to improperly seek to influence redistribution commissioners, and in 1977 when the responsible federal minister contacted commissioners and suggested that a proposed division use an existing division’s name, that suggestion was found by a Royal Commission to have been motivated by partisan interests and the minister was dismissed.75

There is a layer of regulation which guides the commissioners towards consensual internal agreement: problems may be resolved by majority vote but a final determination requires a super-majority vote, for example. Finally, the fact that only the most senior and authoritative

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public sector executives are appointed means that the commissioners will be the most able to withstand political influence and the most capable of gaining acceptance for their new map.

In 1984 when the federal redistribution commission was established and given authority to order a new map into existence without parliamentary ratification, the redistribution panel was enlarged. Originally it had included the Chief Australian Electoral Officer (now known as the Electoral Commissioner) or a similarly qualified person, the Surveyor-General of the relevant state and a third appointee. In practice the Chief Australian Electoral Officer generally delegated his position to the Australian Electoral Officer – the most senior officer in the federal electoral organisation – in the relevant state. With the commission’s independence, the panel appointed to produce a draft proposal was boosted to four: the Electoral Commissioner and the Australian Electoral Officer in the relevant state, the Surveyor-General of the relevant state and the Auditor-General of the relevant state (or the deputies of these two state officials). As state government officials these latter two appointments can only be made if the state government releases them, and for the 1984 round when redistributions were conducted in all six states, four state governments declined to release their Auditors-General. In a subsequent review the federal parliamentary oversight committee recommended that the state governments be requested ‘in the strongest possible terms’ to make their Auditors-General available, not only because they have directly useful knowledge but because their day to day work involves a strong measure of independence from the government of the day, so their appointments were seen as particularly important in reinforcing the perceived independence of the redistribution commissions. State Auditors-General are now invariably available when required.

The 1984 legislation further augmented the federal redistribution panel at the stage which is likely to be most contentious: when objections to the proposed redistribution are considered. At this point the two part-time members of the AEC join the process: the chairman of the commission – always a senior or retired federal court judge – and a non-judicial appointee, since 1984 the Australian Statistician. All three members of the AEC are therefore members of each federal redistribution panel, the Electoral Commissioner for the full process and the part-time members for the objection stage and to conclude the process. As well as giving the

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redistribution process consistency across the country this structure gives added authority to the commission’s proposals and supports its ability to remain independent of the parliament, the government of the day and the parties. When the structure was reviewed in 1986 the only recommendation was the strong request to state governments to release their Auditors-General.

An important factor reinforcing the redistribution commissions’ independence is the fact that electoral commissioners are themselves appointed by either apolitical or bipartisan process. The chairman of the AEC is selected by the Governor-General from a list of names offered by the Chief Justice of the federal court. Appointment of the Australian Electoral Commissioner is not subject to specific legislation although in 1995 the AEC observed that

the government since 1984 has resisted any temptation to make “political” appointments to the positions, and instead has invariably appointed respected and experienced administrators.\textsuperscript{78}

In 2008 the current Commissioner’s appointment was made in accordance with a new policy on senior office holders which has strengthened the role of the federal public service agency but does not require bipartisan consultation, so it is not clear whether the change has reduced the opposition’s input into these appointments.\textsuperscript{79} Norm Kelly has shown that, in general, bipartisan appointment processes apply to state and territory electoral commissioners. South Australia has the most constrained selection process, which requires consultation with parties represented in the parliament, consultation with a parliamentary committee and a resolution by both houses of the parliament, after which the Governor, acting on the advice of the government, can make a permanent appointment. Less stringent requirements exist elsewhere – appointments can be made after consultation with a shorter list of interested parties, and most commissioners are only appointed for seven to ten year terms, albeit with the possibility of reappointment.\textsuperscript{80}

A strong redistribution authority structure to secure acceptance of – if not outright agreement with – its maps was a clear aim of the 1983 JSCER when it reported on the proposed


\textsuperscript{80} N. Kelly 2007, ‘Australia’s electoral management bodies – degrees of independence’, paper presented to Australian Political Studies Association annual conference, Melbourne, 24-26 Sept., Table 3.
structure. The Committee argued that the achievement of this degree of unanimity has doubtless enhanced the credibility and perceived legitimacy of the outcomes produced.

There have been four occasions (in NSW in 1984; in Queensland in 1992; and in Victoria in 1994 and again in 2010) where the augmented commission has disagreed with the redistribution committee and has recommended substantial changes to proposed maps, but this is seen as a useful pressure-valve rather than a sign of failure to gain consensus, and on the only occasion when the federal redistribution system was reviewed, the Joint Standing Committee on Electoral Matters (JSCEM) parliamentary oversight committee recommended no change.

In summary, Australian redistribution authorities’ structural independence from the state, territory or federal parliaments whose districts they draw is absolute and they produce plans which have the force of law and which come into effect without parliamentary ratification. In addition, there is no right of appeal to the legislature nor, in most jurisdictions, to the courts, although there remains a right of appeal on constitutional grounds. Finally, there is no obvious pressure from the parties to restore the parliament’s right to amend, reject or simply stall a redistribution.

This means that Australia’s commissions are ideally structured to balance the interests of parties and the public and to produce maps which will be unbiased and responsive. What

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82 Pers. comm. Qld Electoral Commission, 7 July 2011; Victorian Electoral Boundaries Commission 7 July 2011; NSW Electoral Commission Oct. 2011. In South Australia a decision of the commission needs the chairman’s concurrence (Constitution Act 1934 (SA) s. 80(3)).
83 Commonwealth Electoral Act s. 71 (6).
86 Mason 1998, One vote, one value’, p. 349.
makes that outcome uncertain is that most authorities understand their independence to be conditional on taking a strictly apolitical stance which precludes them from considering the political effects of the boundaries they draw. So it is these commissions’ process, not their structure, which prevents them from achieving the aim. South Australia’s commission, with a similar structure, has moved away from an apolitical approach to an impartial one and not only can, but does, aim for an unbiased and responsive map.

While Australia’s independent non-partisan redistribution commissions have structures which could produce an unbiased and responsive map, United States jurisdictions have not adopted non-partisan commissions and they are rarely proposed by reformers, because there is no tradition of senior public sector executives acting apolitically. But the US does have one set of structures where the members have authority, autonomy and a degree of protection from the parties and the legislatures, and where the members’ own political orientation may be muted to provide an impartial stance if not an apolitical one. Those bodies are the US courts.

Courts
In Australia, few appeals against redistributions have been made and none has been successful. The role of US courts in redistricting is much more active, and five states explicitly provide for court review before plans can be adopted. Across the country, courts have discerned many remedies that are within their powers, including occasionally taking responsibility for choosing from existing maps or having new ones drawn on their behalf. Court-drawn maps are not common – deference to the legislatures on this matter means that courts will assume responsibility only as a last resort – but court-drawn maps were approved in four states in the post-2000-census round and in five states in the 2010 round. They are of interest to an Australian analysis because US courts and Australian commissions stand in a similar relationship to their respective legislatures and parties – both are non-partisan, respected, authoritative and independent.

Until the 1970s, the US Supreme Court had specifically avoided making any judgments on redistricting, declaring in 1946 in Colegrove v. Green that it had no remedies and no

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87 Iowa’s Legislative Services Agency, a non-partisan public sector office, draws draft plans with the advice of a bipartisan advisory committee, for submission to the legislature.
jurisdiction because redistricting cases were political questions which were not appropriate for decision by the courts.

Having to take one side on political contests seemed likely to bring the courts into conflict with legislatures and also with the parties because they would, in redistricting, be in a position of potentially transferring political advantage; Dixon saw, for example, that ‘reapportionment cases represent judicial transfer of political power.’\(^91\) Despite this danger, in \textit{Baker v. Carr} the US Supreme Court considered an appeal against creeping malapportionment due to Tennessee’s long-term failure to update its map and decided that there were indeed avenues of redress and that the case did not present a non-justiciable question.\(^92\) Whereas in \textit{Colegrove} the court had considered that the only alternative it could provide to a challenged map would be to order elections using a single statewide electoral district,\(^93\) since \textit{Baker} the courts have ordered various forms of redress, including occasionally, as a last resort, taking responsibility for preparing a new map.

The courts do not welcome the obligation to draw a map.\(^94\) Nonetheless that obligation has fallen to them under various circumstances: when election preparations are due and there is no legal map (because the two houses of a legislature are deadlocked or the Governor cannot agree to the legislature’s map or a bipartisan commission fails to agree to a map) or if a court has invalidated a map, sent it back to the legislature or redistricting authority and found that there is no will to change it.\(^95\) In these circumstances, the court will be guided by two principles: impartiality between the parties (termed ‘neutrality’ by the US courts) and deference towards the legislature. That deference stems from the generally strict adherence to a separation of powers principle in the US. In practice the court provides the legislature or redistricting authority every chance to draw its own plan, so court-ordered plans only occur where time has run out before scheduled elections. Both parties understand the limitations of court-drawn plans, and even that understanding can influence the process, with parties conceding little until the pressure of upcoming election preparations makes agreement to a new unpalatable map seem preferable to the risk of a conservative map drawn by the court.\(^96\)


\(^95\) Hawaii’s 2011 plan was invalidated and sent back to the legislature.

Nathaniel Persily notes that courts may even allow the legislature to draw its own plan after a court-drawn plan is produced, because

[c]ompromise prior to the release of the court’s plan is often difficult if either party believes the court will draw a more favorable plan than the one its opponent is offering. Once the results of that gamble are known and the parties’ bargaining positions change, new possibilities may arise.97

An example of how the courts defer to a legislature, and the pressure of deadlines, was provided by New York in 1992 when a split legislature failed to agree on a congressional map in time for coming elections and both the federal court and the state court then drew their own. The legislature showed ‘vehement dislike’ for the federal court plan and immediately adopted the state court plan, but it needed federal Department of Justice Voting Rights Act preclearance, which can be slow. The federal court map would not need preclearance so the federal court ordered that the plan produced by its special master would operate unless preclearance for the state court’s plan was obtained by a specified date. Preclearance was obtained in time, the federal court plan’s adoption became ineffective and the state court map was used for the rest of the decade.98

While the process of drawing a map for a court imposes very real constraints on court special masters (and these will be discussed in more detail in the next chapter), the work of court appointees is facilitated, rather than constrained, by the court structure. There is no need to find agreement with the parties or the public, so when all the US redistricting authorities are considered, court special masters have the most potential for producing unbiased and responsive maps, especially because their maps need to be widely acceptable, either as court-imposed maps or as maps adopted by the legislature.99 But as is shown in the next chapter, both US court special masters and most Australian redistribution authorities are prevented from achieving ideal maps, and it is their process which precludes that aim, not their structure.

**Other models**

As an alternative to delegating power to partisan commissions, it was argued in the US almost as soon as the Supreme Court decided *Baker v. Carr* that human judgment could be removed

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99 The New York example shows that a legislature can interpret one legal court-drawn plan as more advantageous than another and can choose to adopt the one it prefers.
from the redistricting process and fair maps could be produced by the new field of computing, using only neutral criteria.

Since the computer doesn’t know how to gerrymander – because two plus two always equals four – the electronically generated map can not be anything but unbiased.\textsuperscript{100}

That idea led to another: that computers could not only help to remedy malapportionment but could help to identify gerrymanders due to partisan bias. Computers could generate a huge number of possible maps for a jurisdiction, and the number of seats each party would win under this almost infinite number of scenarios could be averaged. Maps submitted by the parties could then be seen as gerrymanders if their allocation of seats to parties was significantly different from the average. Dixon reported with some disappointment, for example, that the 1981 New Jersey process using computers stopped short of producing a very large number of maps, because of the cost.\textsuperscript{101}

Over the 50 years since the \textit{Baker} decision, computers have helped commissions make much more sophisticated analyses of plans and of the characteristics of individual districts, but Micah Altman and Michael P. McDonald have argued that fully automated redistricting has only ever produced maps ‘that did not make representational sense, and thus were not seriously considered.’\textsuperscript{102} While computers could process large amounts of data, the task would become too complex if additional criteria were specified – to produce a map informed with a community of interest, for example, or allowing one criterion to take precedence over another but only in certain geographic areas. Clemens Puppe and Attila Tasnadi have shown that both optimal partisan gerrymanders and optimal unbiased plans are computationally intractable because of the number of factors that would need to be taken into account.\textsuperscript{103} And given the variety of ways that partisan advantage can be generated, Altman and McDonald argue that

computers cannot serve as convincing detectors of excessive partisan advantage.\textsuperscript{104} More useful is semi-automated redistricting where a computerised process generates reports on the characteristics of districts as they are being drawn.

It has been argued that the widespread adoption of computing in redistricting has made more sophisticated gerrymandering more prevalent, and Micah Altman, Karin MacDonald and Michael P. McDonald accept the argument that the computer programs used by various states can provide more powerful analyses of variables, but they find that ‘current packages cannot produce even adequate redistricting plans satisfactorily, and they cannot compete with line drawing by human beings.’\textsuperscript{105} And even if a fair map could be generated by a computerised process, giving the task of redistricting to a group of computer experts has the same effect as giving it to any other advisory commission; the fairness of the map is no guarantee of its implementation.

While the most common redistribution authority structures have been considered above, individual US states have adopted variations. In Maryland the Governor proposes plans to the legislature, and in Florida and Kansas the legislature proposes plans to the Supreme Court. Various other models for authorities have been proposed, but not yet implemented. Samuel Issacharoff considers that the real harm of current redistricting practices is collusion by the parties to divide the jurisdiction between them, ignoring the public interest in having at least some competitive districts, so he argues that the courts should invalidate all plans produced by authorities which include incumbent members.\textsuperscript{106} If that proposal was accepted the states would be left in a position similar to their status post-\textit{Baker}, with almost every state needing to produce a new redistricting authority and a new set of districts. Public interest good governance groups have supported the delegation of redistricting responsibility to various authorities, all of which would be independent of the legislature and would balance (or exclude) party membership. Another proposal advocates the creation of a federal agency to assess maps if requested by a motion supported by a third of the members in a state’s largest

\textsuperscript{104} Altman & McDonald 2010, ‘Promise and perils’, p. 83.
house. The agency could invalidate maps if they were found to be partisan, but would have no jurisdiction if the redistricting was conducted by an independent commission.  

**Conclusion**

This chapter has demonstrated that redistribution authorities’ structures constrain whether they can produce an unbiased and responsive map. In both Australia and the United States these authorities have been designed to deal with partisan conflict and partisan claims for advantage, either by recognising and balancing partisan interests or by insulating the authority from partisan influence. And the authorities’ structures have been designed by legislatures, so they embody an understanding of the partisan advantage which election district boundaries can provide and the intractability of the problem of reaching cross-party agreement.

In the US, redistricting is ‘bare knuckle’ politics, and authorities are designed to produce agreement or at least acceptance in several ways: structures which will allow parties to take turns (a party in opposition may accept a partisan map on the grounds that it could be its own turn next time to draw its opponents into a corner) or which will allow parties to share power (by drawing two maps each advantaging a different party, for the two houses of a bicameral legislature) or which will allow parties to balance their interests (by drawing a single map which will favour incumbents from both parties) or which will allow parties to gamble on a court’s decision. In Australia the chosen structure keeps the parties at arms’ length and produces party acceptance of the map, more than agreement.

Australian redistribution authorities are in an ideal position to draw fair maps but instead most of them draw maps blind to their political effects, and maintain that using a fair process is the best they can do. The following chapters demonstrate that they are mistaken.

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Chapter two: The redistribution process

The previous chapter demonstrated how a redistribution authority’s structure constrains the kind of map it can produce. It showed that Australian redistribution authorities have a high degree of structural independence from party pressure, allowing them to produce a map which would treat the parties impartially and to elevate the public interest over the parties’ interests. This chapter reviews their process – its frequency, timing, transparency and accountability as required by legislation, and the impartial stance that redistribution authorities have adopted.

The process Australia’s authorities use to produce their maps does treat the parties impartially and does facilitate agreement, and is widely recognised as transparent and accountable. The AEC has argued that this enhances the parties’ acceptance of a redistribution:

the emphasis in the current scheme is very much on the legitimacy of the processes rather than specific outcomes, it being generally believed that if the mechanisms leading to a specific redistribution are acceptable, then the redistribution itself will be accepted, even by participants in the electoral process who see themselves as being disadvantaged by it.109

On the other hand this chapter shows that the frequency of redistributions could usefully be increased. Some maps stay in place for too long, compromising the aim of equal enrolments in each district at elections and also compromising incumbent members’ support for the process when redistributions are disruptive. And Australian redistribution authorities’ apolitical stance is problematic. It prevents an authority from understanding the political effect of its map. So while Australian authorities are at pains to treat the parties impartially, their apolitical stance means they produce maps which may not treat the parties equally at all.

Frequency

The previous chapter has shown that no Australian parliament can now draw its own districts, initiate a redistribution, or change or defer its redistribution commission’s recommendations, with the single exception in each jurisdiction that if the parliament passes legislation to change the size of the House, a redistribution will automatically be triggered. At the federal level, roughly half of all redistributions are now triggered by a change in a state’s

entitlement to federal seats, and the other half by the passage of seven years since the most recent redistribution. There is also a federal provision which would trigger a redistribution if malapportionment reached a specified level, but it has never operated. These provisions are summarised in the Appendix.

The states and territories have similar provisions which trigger redistributions when the number of districts is changed, or – more commonly – after the passage of time or after a fixed number of elections or if malapportionment reaches a given level. Of all the process constraints imposed on redistribution authorities – frequency, timing, transparency and accountability – the frequency with which redistributions are conducted is now the least subject to the discretion of a party in government or a redistribution authority.

It was not always so. The federal apportionment formula requires that the number of members each state can elect to the federal parliament ‘shall be in proportion to the respective numbers of their people’. But just when that calculation should be made was originally at the discretion of the federal government, and although the Representation Act 1905 specified that ‘enumeration days’ were to occur every five years, federal governments occasionally exercised a power to delay them.110 A scheduled reapportionment was cancelled in 1916 and another was postponed in 1931 (because the census was postponed), and in 1934 it was proposed that a determination should be ignored. But this time there was legal advice that an election held on the basis of the previous apportionment might be invalid because the newly elected parliament would no longer comply with the requirement that members had been chosen by the states ‘in proportion to the respective numbers of their people.’111 Geoffrey Sawer argued somewhat later that any of the various solutions proposed at the time ‘would have been constitutional; the difficulties were political.’112 But the political difficulties were real: the 1934 determination would have reduced South Australia’s federal entitlement from seven to six and a Country Party seat would have been likely to disappear, a situation the governing United Australia Party-Country Party coalition would have preferred to avoid.113

Because rural districts often had the fewest enrolled electors, even 30 years later in 1964 it

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110 Representation Act 1905 (Cwlth) s. 3.
113 The UAP was the precursor to the Liberal Party.
was the Country Party which was expected to lose when an apportionment determination reduced a state’s entitlement.\textsuperscript{114}

The power to control the timing of redistributions triggered by apportionment determinations was removed from the federal parliament by a rare example of an Australian court ruling on a redistribution matter: in the McKinlay case of 1975 the High Court decided that the Constitution’s s. 24 requirement that ‘[t]he number of members chosen in the several States shall be in proportion to the respective numbers of their people’ meant that the apportionment should be correct at the time members are chosen, i.e. at the time of each federal election. The court also found that the determination need not wait for census data – intercensal estimates were an adequate basis for making the determination.\textsuperscript{115}

To bring the Commonwealth Electoral Act into line with the McKinlay decision a newly elected Liberal-National Country Party coalition government legislated in 1977 to mandate an apportionment determination as soon as a new parliament had served for 12 months, and to mandate a redistribution if that determination changed the number of federal divisions to which a state or territory would be entitled.\textsuperscript{116}

The 1977 legislation also responded to another High Court determination in McKellar which found that for the purposes of apportioning federal divisions between states and territories the calculation of a quota should exclude the number of Senators for the territories.\textsuperscript{117} That change triggered one-off redistributions in the four largest states, and the government initiated redistributions in the smaller jurisdictions as well.\textsuperscript{118}

The 1977 legislation specified that an apportionment determination would take place 12 months into the life of a House of Representatives, and the Commonwealth Electoral Amendment Act 1977 required that a redistribution would be triggered if a state’s entitlement changed. But the legislation preserved a governing party’s power to initiate additional federal redistributions as well as the parliament’s right to delay or refuse a redistribution

\textsuperscript{114} P.A. Paterson 1968, ‘Federal electorates and proportionate distribution’, Australian Law Journal, vol. 42, no. 4, p. 129. The 1964 change amended the formula to allow a state an additional division if the apportionment calculation showed any remainder of a quota – rather than more than half a quota. That change was reversed in 1977.

\textsuperscript{115} In Attorney-General (Cth); Ex rel McKinlay v. Commonwealth (1975) 135 CLR 1, 21.

\textsuperscript{116} A determination 12 months into a three year term allows time for affected states to be redistributed for the next election. Commonwealth Electoral Amendment Act 1977 (Cwlth).

\textsuperscript{117} Attorney-General (NSW); Ex rel McKellar v. The Commonwealth (1977) 139 CLR 527, 533.

\textsuperscript{118} A.A. Street, Representation Act Ministerial Statement, APD-HR, 22 March 1977, pp. 412-13; A.A. Street, Electoral Distribution Ministerial Statement, APD-HR, 21 April 1977, p. 1096.
commission’s report.\textsuperscript{119} However, as the \textit{McKinlay} decision had made clear, states and territories must be able to elect their correct entitlement of Members to the House of Representatives at any general election, so it remained possible that a determination would be made, a redistribution would be conducted and then the federal parliament would delay its implementation or even refuse to approve it. At a general election the state would then be faced with electing its members without a valid set of divisions. In the US the solution to this problem would be a court-drawn map; in Australia the proposed solution was that members would be elected on a statewide basis.\textsuperscript{120} An election held on that basis would probably have disadvantaged the National Country Party, and that party was usually allocated the ministry covering elections whenever the Coalition was in government federally. As Geoffrey Lindell observed, the threat of an open election would have been ‘a powerful if somewhat unsatisfactory incentive to ensure that the necessary approval was given in time’.\textsuperscript{121}

The 1977 federal legislation also introduced a malapportionment trigger: a redistribution would occur if more than a quarter of the divisions in a state had elector numbers that were more than 10 per cent from the average, with a proviso that the trigger would not operate if a redistribution had been conducted within the past seven years.

In 1983 a newly elected Labor federal government appointed a Joint Select Committee on Electoral Reform (JSCER), gave it broad terms of reference and then implemented its recommendations.\textsuperscript{122} They included removing a government’s discretion to initiate redistributions or to refuse to approve them.\textsuperscript{123} A change in the number of members in the House was a rare occurrence, and the apportionment trigger looked likely to only operate occasionally (an increase in WA’s entitlement in 1980 was the only apportionment-redistribution from 1977 until the 1983 reforms). So removing a government’s power to initiate a redistribution created a need for a new trigger to provide for regular redistributions. The legislation therefore introduced the third mandatory federal redistribution trigger – the

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\textsuperscript{122} A joint parliamentary committee draws its membership from elected members of both houses. A select committee exists only until the next election whereas a standing committee is ongoing.

\end{flushleft}
passing of seven years since the last redistribution.\textsuperscript{124} It is not clear why the JSCER chose seven years as the interval. It may simply have been that the most recent major change had occurred seven years previously in 1977. Or it may have a longer history: in 1977 the \textit{Commonwealth Electoral Act} was amended to specify that malapportionment could not trigger a redistribution within seven years of a previous redistribution; that provision was removed later in the same year when it seemed likely to prevent the 1977 redistribution of WA taking effect.\textsuperscript{125} Hughes observed later that at that time redistributions after each election would have been judged

an unfortunate development, which is really why the three-election cycle was accepted I think, in the first place. There are a whole set of electoral and political relationships which are desirable and ought to be preserved and overly frequent redistributions keep breaking these down.\textsuperscript{126}

Within this framework of regular apportionment determinations and irregular redistributions triggered variously by the change of entitlements, the passage of time, possibly by malapportionment and occasionally by legislation, there is some flexibility. Federal elections can be called early and the redistribution process can take a year – the 2011-12 redistribution of South Australia’s federal divisions took 14 months from announcement to final report – so a redistribution triggered during the last year of a parliamentary term could place a redistribution committee under pressure to complete its work quickly, and a report produced too close to an election could cut the time available for candidates’ campaigns. Redistributions can take place more quickly and in 1984 redistributions of federal divisions were completed for all eight federal jurisdictions between late February (when entitlements were determined) and early October (when the last of the redistributions was finalised). Writs for a federal election in December 1984 were issued just 15 days after the last (NSW) redistribution was gazetted.\textsuperscript{127} Pressure of that kind can now be avoided by a savings clause which enables a redistribution to be postponed by a year if it should fall due ‘within one year before the date of expiry of a

\textsuperscript{124} Precisely, since the gazetral of the names and boundaries of the new divisions under s. 73(1) of the \textit{Commonwealth Electoral Act} 1918.


House of Representatives by effluxion of time’. In 2010 a federal election was called before the completion of a full three year House of Representatives term, and a redistribution of federal divisions in Victoria was underway, but there had been no change to the number of divisions in Victoria, so the state elected its correct delegation of Members even though it was done on existing divisional boundaries. The Australian Electoral Commissioner had anticipated the problem and indeed the same arrangements would have applied for Victorian divisions at the federal election of 2010 if the election date had been known, because the redistribution would had been delayed for 12 months.

But in jurisdictions without fixed election dates an early election is not predictable, so to cover the possibility of an apportionment determination changing a state or territory’s entitlement and then an early election being called before new boundaries can be put into place, Labor’s package of reforms in 1983 introduced an arrangement for states caught without a valid map. Instead of an election taking place on a statewide basis without districts, a jurisdiction gaining a division would have its two largest contiguous divisions temporarily divided into three in a very abbreviated redistribution, or a jurisdiction losing a division would have its two smallest contiguous divisions combined. Such a mini-distribution prioritises equal population numbers, and although census collection districts must not be split and divisions must be contiguous, none of the other qualitative criteria apply, nor do the public consultation provisions. That is possible because a new redistribution would take place after the election, with all normal process. Like the malapportionment trigger, the mini-redistribution provisions have never been invoked.

Table 1 shows when the federal triggers have operated since 1977, with federal election years shown in grey.

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128 Commonwealth Electoral Act 1918 s. 59(3)b.
130 Commonwealth Electoral Act 1918 s. 76.
Table 1:
Federal elections and redistributions of federal divisions by cause, 1977 to 2012

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NOTES: The Northern Territory was only entitled to one division until the 2001 federal election.

- L+1: Redistribution triggered by legislative change; jurisdiction gains one division
- A+1: Redistribution triggered by an apportionment determination; jurisdiction gains one division
- 7yrs: Redistribution triggered by the passage of seven years since the previous redistribution
- Federal election year
Table 1 shows that legislation triggered redistributions in 1977 due to the changed apportionment formula (post-Mackellar), once again in 1984 when the House of Representatives was enlarged and then again in 2003 when the Northern Territory’s entitlement to a second division was guaranteed. The 1977 legislation also incorporated changes (post-McKinlay) to the frequency of apportionment determinations which have been made on 13 occasions since 1977, and for only three of them population change has been sufficiently uniform around Australia that state and territory entitlements remained unchanged. Over the period covered by the table there were 15 redistributions caused by the seven year rule and 20 by apportionment determinations, but none due to malapportionment.

Table 1 shows the years in which federal elections were held. It makes clear that although the seven year rule applies in the context of a three year parliamentary term, maps operate for three elections, not two, before the seven year rule again triggers a redistribution. Apportionment redistributions are finalised in the last year of a three year parliamentary term so the new districts are expected to be used at elections within six months and then at three year intervals. The effect of the various federal redistribution triggers is that maps stay in place for different lengths of time in the states and territories. In the absence of legislative change, Tasmania’s maps always stay in place for three federal elections because the state cannot gain or lose a division through apportionment changes: it is guaranteed five because it is an original member of the federation but its population entitles it to only three. By contrast, for the last 20 years Queensland’s growing population has meant that maps in that state have generally operated for just one election: at six of the last eight apportionment determinations Queensland gained a division. In Chapter three the effect of those differences will be made clear: maps which stay in place for three elections cannot produce districts with equality of elector numbers when it really counts, namely, at each election.

To change federal legislation so that redistributions would be triggered in each jurisdiction after each federal election would probably imply a change to the federal redistribution authority’s structure because the task would demand more time than the Australian Electoral

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131 The change to the apportionment formula was a change to the interpretation of existing legislation. The NT entitlement was secured by s. 48A of the Commonwealth Electoral Act 1918 inserted by the Commonwealth Electoral Amendment (Representation in the House of Representatives) Act 2004 (Cwlth). The Representation Act 1983 (Cwlth) s. 3 increased the number of Senators for each state from 10 to 12, increasing the number of Members of the House of Representatives from 125 to 148.

132 These determinations have increased the size of the House (by two divisions) when quotas are rounded up.
Commissioner could be expected to make available. Redistributions are not the AEC’s main task. But changing the regular triggers to operate after every two elections would not require more than the commissioner provided in 2008 and 2009 when he chaired or participated in five redistributions. The provisions are not entrenched, so change is feasible and indeed a change was attempted in 1994 when the ALP proposed to stretch the time between redistributions.133

Electoral redistributions for state and territory districts are almost always triggered by the passage of a specified time. As is the case for the Commonwealth, all states and territories must also provide for redistributions to occur when legislation changes the size of the House, but this has rarely occurred (except in New South Wales) and the jurisdictions where maps stay in place for longer than one election cycle all have malapportionment triggers, but these rarely operate (except in Victoria). None of the states and territories has an apportionment provision because – unlike the UK or the US – electoral districts are allocated within the jurisdiction as a whole rather than initially to counties or boroughs.

Table 2 shows when state and territory triggers have operated, with election years again shown in grey. To align Table 2 with Table 1 it also begins in 1977 which was the tail end of the malapportionment era in state and territory politics in Australia. Only South Australia’s one vote, one value reforms were already substantially complete by then, including the reforms of 1975 which rescinded the parliament’s right to initiate or veto redistributions.

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133 The ALP requested that the JSCEM ‘investigate whether a more stable and less disruptive process might be established, “consistent with the necessary democratic principles.”’ Australia, Parliament 1995, JSCEM Report, p. 1.
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**Notes:** The ACT had just one (multi-member) district for the 1989 and 1992 elections.

- **OVOV L** Redistribution triggered by legislative change changing the size of the House
- **M** Redistribution triggered by malapportionment
- **E + 5yrs** Redistribution triggered by the passage of time: one election plus five years, by two elections, etc
- **L** State or territory election year
The South Australian legislation of 1975 was important and politically charged because it would entrench Labor’s one vote, one value reforms (including the redistribution provisions) in the Constitution Act 1934 (SA); changes would then require not only a majority vote in both houses but also a majority vote at a referendum. It was not a simple matter at that time to find agreement on regular triggers: there were none in any other Australian legislation and the elected members were keen that redistributions should not occur too often. Upper house support for the bill could not be compromised for the sake of less vital provisions, so the choice of trigger was conservative: a redistribution would occur five years after the first election on any new map. Premier Dunstan understood that a redistribution would occur roughly every three elections.134 That provision was amended in 1991; by then the SA lower house had changed from a three year to a four year term, which also extended the time between redistributions, and rapid population change in the outer suburbs meant that districts were becoming malapportioned but there was no malapportionment trigger. Having been the first jurisdiction to devise a regular trigger, in 1991 South Australia became the first to impose a redistribution after each general election.135

Nick Economou argues that the one vote, one value reforms were ‘primarily an Australian Labor Party project’ around Australia, and that the Dunstan reforms served as a model for the Wran Labor government’s changes in NSW in 1979.136 That package included a minor change to the frequency of redistributions, from every six years to after every second election, and the new provisions were entrenched in the Constitution Act 1902 (NSW).137 In 1990 the Greiner Liberal government added a malapportionment trigger, to operate whenever more than one quarter of the districts have more than 5 per cent fewer or more electors than the average.138 But as Table 2 shows, for some time the frequency of redistributions in New South Wales had less to do with automatic triggers than with changes to the size of the lower house. Redistributions were required after legislation was passed in 1979 (when the Wran government increased the number of members in the lower house to 99), in 1986 (when the same government increased the numbers again to 109), in 1990 (when numbers were reduced

134 Constitution Act Amendment Act (No. 5) 1975 (SA), s. 82(2)c; D.A. Dunstan, SAPD-HA, 30 Sept. 1975, p. 927.
135 Constitution (Electoral Redistribution) Amendment Act 1991 (SA). The bill was supported at a referendum.
137 The trigger was moved from the Parliamentary Electorates and Elections Act 1912 (NSW) s. 13 to the Constitution Act 1902 (NSW) s. 27. The package of reforms included a 10 per cent tolerance, an independent commission and optional preferential voting.
138 Constitution Act 1902 (NSW) s. 28A.
by the Greiner government to 99) and more recently again in 1997 (when numbers were reduced by the Carr Labor government to 93).\textsuperscript{139}

Unlike South Australia which never had a malapportionment trigger, the redistribution system introduced by Victoria's one vote, one value reforms relied entirely on a malapportionment trigger. That state's government retained the prerogative to initiate a redistribution of state electoral districts until 1982 when the Cain Labor government's one vote, one value reform legislation delegated the privilege to the new electoral commission, and put in place a malapportionment trigger. The commission was to make a redistribution after the commencement of the Act and then

as often as is necessary from time to time for the conduct of elections for the Legislative Council and the Legislative Assembly with the object of establishing and maintaining electoral provinces of approximately equal enrolment and electoral districts of approximately equal enrolment.\textsuperscript{140}

Premier Cain had originally announced that the tolerance would be 5 per cent but in the legislation it became 10 per cent, presumably because the tighter tolerance would have triggered a redistribution too quickly.\textsuperscript{141} An additional proviso in the legislation shows that redistributions were not intended to occur frequently: another was not required

unless the number of electors enrolled for the provinces or districts do not comply to a substantial extent with the requirements of this Act with respect to approximate equal enrolment.\textsuperscript{142}

Because 'a substantial extent' was not defined in the Act it was the independent commission which would need to judge when a redistribution should occur and bear the brunt of any members' objections that they had miscalled it. The commissioners would have known that, from the late 1950s to 1982, maps had been in place for three elections.\textsuperscript{143} But by 1990 after only two elections on the 1984 map, 24 of the 88 Legislative Assembly districts and three of the 22 Legislative Council provinces had enrolments that were more than 10 per cent from

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\textsuperscript{139} Constitution Amendment Act 1979 (NSW); Constitution Amendment Act 1986 (NSW); Constitution (Legislative Assembly) Amendment Act 1990 (NSW); Constitution and Parliamentary Electorates and Elections Amendment Act 1997 (NSW).
\textsuperscript{140} Electoral Boundaries Commission Act 1982 (Vic) s. 5(1).
\textsuperscript{142} Electoral Boundaries Commission Act 1982 (Vic) s. 5(3).
\textsuperscript{143} Hughes 1983, 'The changing electoral map', p. 21.
\end{flushleft}
the average so the commissioners initiated a redistribution. Districts drawn at that redistribution stayed in place for three elections before the commissioners found in late 2000 that elector enrolments in a quarter of the 88 districts (and two upper house provinces) were outside the 10 per cent limit.\textsuperscript{144} That was enough for the commission to initiate a redistribution. Because the legislative provisions were so imprecise, the Electoral Boundaries Commission was concerned that it could
to be thought that a decision to conduct a redivision has some political motivation, or that a refusal to undertake a redivision has such a motivation,\textsuperscript{145} and asked in 1991 and again in 2001 for the legislation to be made more explicit.\textsuperscript{145} The commission suggested a complex malapportionment provision that would be triggered when a combination of upper and lower house districts were out of tolerance, or more regularly after three elections.\textsuperscript{146} So in 2004 the Bracks Labor government amended the Act to require a redistribution after every second general election – perhaps choosing the shorter timeframe because the 2001 redistribution had been considered disruptive – and added a clearer malapportionment trigger which would operate if 30 per cent of the lower house districts were more than 10 per cent outside the average for two months or if a combination of lower and upper house electorates were malapportioned. However, the amending Act also specified that a general election was one in which all of the members in both houses needed to be elected, and the 2006 election was the first at which the upper house members were all elected at the same time, so the map drawn in 2001 also remained in place for three elections.\textsuperscript{147}

Queensland’s one vote, one value reforms were made well into the period covered by the table. In 1991 the Goss Labor government passed legislation in accordance with recommendations from that state’s Electoral and Administrative Review Commission (EARC) and then commissioned the EARC to conduct a redistribution.\textsuperscript{148} Further legislation passed in 1992 specified that future redistributions would be triggered after three elections or seven

\textsuperscript{145} As above, p. iii.
\textsuperscript{146} As above, p. iii.
\textsuperscript{147} \textit{Electoral Boundaries Commission Act 1982} (Vic) s. 5(5).
and a half years (whichever was later) or if more than a third of the districts had elector enrolments more than 10 per cent from the average or if the number of seats in the House was changed.\textsuperscript{149} While the changes were substantial the frequency of redistributions was a conservative choice and the provisions were not entrenched.

Western Australia’s reforms were achieved by the Gallop Labor government much later than in other states, in 2005.\textsuperscript{150} Earlier WA redistributions shown in Table 2 were initiated by the government of the day. In 1982 a redistribution had been initiated when the number of members elected to the lower house was changed from 55 to 57 and the zones redefined.\textsuperscript{151} In 1985 legislation was passed to provide for a redistribution to occur on resolution of both houses (given that a governing party would not necessarily have a majority in both houses this was a small devolution of the power to initiate a redistribution) or if at least eight districts had elector enrolments more than 20 per cent from the average, with the proviso that a redistribution could only be initiated within the first six months after an election.\textsuperscript{152} Then in 1987 the power to initiate a redistribution was devolved from the parliament to electoral commissioners and a regular trigger was provided so that a redistribution would occur after every second general election.\textsuperscript{153} The package of changes introduced in Western Australia’s one vote, one value legislation of 2005 increased the frequency of redistributions and an adjustment now occurs after each election.\textsuperscript{154}

Since 1906 Tasmania’s lower house has adopted federal electoral division boundaries as the basis for its own multi-member electoral districts.\textsuperscript{155} When this arrangement has been proposed in other states the difficulty has always been that the number of members in the lower house would be vulnerable to changes in the state’s federal entitlement, but that is not an issue for Tasmania because its population is lower than its guaranteed entitlement of five districts. The guarantee means that redistributions are triggered after seven years, and when Tasmania had a three year parliamentary term, maps stayed in place for three elections. More recently Tasmania’s lower house term was changed to four years and maps drawn

\textsuperscript{149} Electoral Act 1992 (Qld) ss. 36-9.
\textsuperscript{150} Electoral Amendment and Repeal Act 2005 (No. 1 of 2005) (WA).
\textsuperscript{151} Acts Amendment (Electoral Provinces and Districts) Act 1981 (WA).
\textsuperscript{152} Elections Amendment Act (No. 2) 1985 (WA).
\textsuperscript{153} Acts Amendment (Electoral Reform) Act 1987 (WA).
\textsuperscript{154} This legislation also removed zones for the lower house (but retained them for the upper house) and removed malapportionment by establishing a 10 per cent tolerance (but brought in an allowance for districts which cover large geographic areas). These changes are discussed in Chapter three.
at seven year intervals are now expected to stay in place for two elections.

The first two elections for the Australian Capital Territory’s Legislative Assembly were conducted under Commonwealth legislation in 1989 and then in 1992, and the Territory voted as a single multi-member district.\(^{156}\) In 1992 the ACT Assembly passed its own legislation and provided for several multi-member districts and for redistributions to occur after every general election.\(^{157}\)

The first Legislative Assembly elections after the Northern Territory achieved self-government in 1978 were conducted under Commonwealth legislation.\(^{158}\) The Territory passed its own electoral legislation in 1979 but the provisions of the Commonwealth legislation still require that district enrolments be within 20 per cent – it is not specified just when. The Territory has relatively small numbers of enrolled voters in each district (average enrolments are under 5,000) and occupational and residential mobility are high so some districts have always moved more than 20 per cent from the average number of enrolments over the four year period between Territory elections. Redistributions triggered by malapportionment were conducted in time for each election and the pattern was continued in 2004 when the Martin Labor government legislated for redistributions to occur after each election.\(^{159}\) That legislation also removed the Assembly’s power to initiate or reject a redistribution.

To summarise, when Australia’s states implemented one vote, one value legislation, the frequency of redistributions was understood to be an important factor in maintaining equality. However, incumbent members’ support for the package of legislation may have been conditional on redistributions not being too frequent. Members establish good relations in their districts with the media, local organisations and local government, and with party sub-branches which influence their preselection for another term. Potential disruption of these relationships makes redistributions seem a threat; even worse is the possibility that a change in boundaries will make the district harder to win (although it could also make the district easier to win). Speaking in the NSW parliament a member said that ‘[w]hen one mentions electoral reform a silence falls over the house because the scourge of redistribution is

\(^{156}\) Australian Capital Territory (Self-Government) Act 1988 (Cwlth).

\(^{157}\) The Australian Capital Territory (Self-Government) Act 1988 (Cwlth) was superseded by the Electoral Act 1992 (ACT).

\(^{158}\) Northern Territory (Self-Government) Act 1978 (Cwlth).

\(^{159}\) Electoral Act 2004 (NT) replacing the Northern Territory Electoral Act 1995 which had in turn repealed the earlier Acts.
raised.’ ¹⁶⁰ But redistributions conducted infrequently are more disruptive than when adjustments can be made after each election, and more recently when states and territories have reconsidered redistribution triggers they have chosen regular redistributions after each election.

The Victorian redistribution of 2001 illustrates the point. Existing districts had been in place for ten years, and although only one in four were out of tolerance, one had 34 per cent more enrolled electors than the average. Rural districts had not lost so many electors that any of them needed to be abolished, so change was a matter of adjustment, but in the city a movement of population out of the centre and into peripheral suburbs had leap-frogged the established suburbs which remained neatly within tolerance. The pattern of population shifts made the redistribution necessarily very disruptive. As Hughes noted of an earlier Victorian redistribution it was the ‘continuous bump on’ required to move boundaries so that they could take surplus voters from these outer suburbs back into the inner city areas which made the redistribution more disruptive than the number of malapportioned districts would imply.¹⁶¹ In 2001 it was reported that the proposed map abolished and replaced fully 20 of the 88 districts, including the seat of the Opposition Leader.¹⁶² Whereas the commission had received 113 written submissions prior to the initial proposal, 692 were received at objection stage.¹⁶³

The disruption caused by this redistribution indicates a special risk for jurisdictions with larger numbers of districts: unless districts are adjusted regularly, the elector deficits or excesses which build up in particular regions may not be remedied without ripple effects disrupting districts outside those regions as well. That should also be a warning of potentially disruptive federal redistributions in Victoria where the two most recent federal maps each operated for three federal elections and where there are enough federal divisions (37) that slower-growing and faster-growing divisions may not be neighbours. On the other hand, disruptive redistributions antagonising incumbent members may not be a threat at all in jurisdictions with fewer districts where adjustments can be made without extensive ripple effects. So the three-election time scale of federal redistributions may be justifiable in the smaller jurisdictions of Tasmania and the territories, and even federally in South Australia which only has 11 divisions. Whether more frequent redistributions would be justified in the

smaller jurisdictions will be discussed in terms of equality of electors, in Chapter three.

Finally, the effect of lengthening the parliamentary term may be of interest to Queensland and the Commonwealth. Tasmania showed that moving from a three year to a four year term can have the advantage of allowing members the stability of relatively infrequent redistributions while still allowing redistribution authorities the possibility of projecting elector numbers for just two elections rather than three.

Timing
Legislation which governs the redistribution process in each Australian jurisdiction specifies the time to be allowed for public submission, comment and appeal stages of the process. For example, in a federal redistribution suggestions are required by the fifth Friday after the notice of commencement, and comments on those suggestions by the second Friday after that; objections to a proposed map must be received by the fourth Friday after its release, and comments on those objections by the second Friday after that. The various stages are long enough for public and party concerns to be addressed before the final plan is issued. The redistribution authority’s own deliberations are not constrained by time limits except when a proposed map is significantly amended and an extra round of consultations is required.

An example of the many stages being used to promote public and party agreement to a proposal occurred with the 2010 federal redistribution of Victorian divisions when the Redistribution Committee’s original proposal met with strong public disagreement, especially from one rural division. The augmented commission produced a second plan, thereby extending the process to include a second round of consultations and an opportunity for even that second plan to be adjusted. That federal redistribution took 11 months from initiation to the final determination of boundaries.164

While these provisions do make it clear that public consultation must be taken seriously, legislated triggers and defined timeframes reduce the redistribution authorities’ discretion, and a recent trend is to allow for more flexibility. In South Australia, a problem occurred in 2002 when the chairman of the state’s redistribution authority judged that the Act’s requirement that ‘after commencing proceedings for the purpose of making an electoral redistribution, the Commission shall proceed with all due diligence to complete those proceedings’ gave it no discretion to meet and then adjourn for long enough to enable

population projections to be based on new census data. As a result, the commissioners used population projections they knew were inaccurate. South Australia has four year terms so the legislation has since been amended to allow the commission the flexibility to wait for up to two years after an election before beginning its proceedings. Federally, the fixed timing of each stage of the process became an issue at the 2010 federal redistribution of Victoria which was caught up in an early federal election and then a state election. When the proposed map was published Australia was two weeks into a federal election campaign, and at the parties’ headquarters the task of commenting on the proposed redistribution competed for priority with campaign work. Victorian newspapers also had their attention turned to the federal election rather than the redistribution, and there was very little coverage of the plan, even though it abolished a rural division and created a new outer metropolitan division. The abolished division was one of three along the Murray River – Australia’s largest river – and its demise was proposed at a time when federal and state agreements were being renegotiated to reduce water allocations to irrigation-farming communities. The federal member argued against the proposal, unruly protests were held when the augmented commission visited the area, and the map was reconsidered. The augmented commission proposed a different map, keeping the division, and comments were again invited but by chance the attention of the Victorian public was again diverted, this time by a state election campaign.

The rigidity of the legislated timelines for the federal redistribution process was deemed ‘ridiculous’ by the Liberal Party in its submission to the federal JSCEM which noted that

> it is reasonable to assume that those with a vested interest in the outcome of the redistribution, including candidates and political parties who wished to contest the election in Victoria, had pressing election business on their minds and would have had to concentrate their efforts on both events in order to comply with the redistribution timetable.

The Liberal Party submitted that it was ‘difficult to understand what public interest was

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165 Constitution Act 1934 (SA) s. 82(3).
166 Constitution Act 1934 (SA) s. 82(2)c.
167 The author found just five newspaper articles – including from regional newspapers – about the federal redistribution.
168 Comments were required by 1 November 2010; a state election campaign was underway and writs were issued on 2 November.
served by the redistribution taking place in 2010 rather than 2011’. They argued that

the Act should be amended to ensure that there is never any possibility of
a redistribution process happening in the third year of the life of a Parliament.

Given that there is already a provision which allows a redistribution to be delayed if it
falls due within the last year of a parliamentary term, the Liberal proposal would appear to
advocate extending that buffer period in case elections might be called early. That would
extend the life of some maps, and would be a retrogressive step from the point of view of
equality because a larger number of elections would be held on maps that are less equal than
they should be.

A different solution could occur if the normal term of the House of Representatives could be
extended, in line with regular proposals, from three years to four. That would extend the safe
period between elections when redistributions could be conducted. But the federal lower house
term is governed by the Commonwealth of Australia Constitution Act 1902, and is entrenched, so
a change would require the approval not only of the federal parliament but also of a majority of
Australian electors voting at a referendum.

On the other hand, the AEC argues that the rigidity of the process is a positive attribute of the
system and forms part of a guarantee that redistributions will be apolitical. Despite
recommending that the augmented commission stages be extended to allow more time for
public objections to be lodged, the AEC objected to changes to the triggers:

The redistribution timing provisions are fundamentally intended first to ensure
that redistributions will be conducted with sufficient frequency to limit
malapportionment and secondly, to ensure that the timing of redistributions
cannot be, or be perceived to be, manipulated for political advantage. The
legislative provisions associated with the timing of redistributions, introduced

172 Commonwealth of Australia Constitution Act 1902, s.28 governs the term and s.128 governs changes. Specifically the referendum requires the approval of a majority of all enrolled voters aggregated across
the states and territories, and also a majority of the enrolled voters in a majority of the six states. The referendum must occur at least two months, but not more than six months, after the federal vote, and
the referendum could under some circumstances be held even if one House does not approve the change.
during the 1984 legislative electoral reforms, operate to ensure that there is a clear and distinct separation between the decisionmakers’ discretion and the determinations of the redistribution process. Ultimately, they constitute an integral element of a neutral and apolitical redistribution process.\textsuperscript{173}

While it might seem contradictory to recommend flexibility in regard to time for public objections but not for triggers, the recommendations can be reconciled: if the role of the criteria is to constrain redistribution authorities’ discretion so that the map will be presumptively legitimate, and will command public and party agreement, then the criteria should enhance opportunities for public and party contributions, not constrain them. The federal parliament’s JSCEM has proposed changes that are in line with that ideal: it has recommended that a redistribution be suspended if a federal (but not state) election is announced, and resume once the election is finalised, and has also recommended an extension of time for objections at augmented committee stage, and in 2012 the government announced that it would consider legislation.\textsuperscript{174}

In New South Wales and the Northern Territory the process is similar: the proposed map is reviewed in the light of submissions from the public, and if the redistribution authority decides to make substantial changes, a new round of consultation is provided for. Other jurisdictions have adopted a shorter version of the process which simply involves an initial consultation, the authority’s proposal, further consultation and then a final determination. Victoria’s process is briefer still, with no initial public consultation period.\textsuperscript{175}

In summary, the timing of Australia’s redistribution process allows for public submissions at various stages and also for public comment to the redistribution authority on those submissions. These opportunities mean that agreement is maximised and disagreement is not taken to another forum.

**Transparency**

All Australian redistributions are conducted in an open and transparent process, although the jurisdictions vary according to just how they include the public. All now require their redistribution authorities to call for public submissions, and to allow oral submissions at public


\textsuperscript{175} *Electoral Boundaries Commission Act 1982* (Vic), s. 108.
hearings. Most authorities also make those public submissions available publicly online, so that interested parties can comment.176

All authorities must make proposed maps available publicly for a second round of comment, and some make those comments available online. Federally and in NSW and the ACT there is provision for a third round of comment if necessary.177 Finally, the authorities’ reports are publicly released, are available online and usually include some reasoning and responses to the major submissions and objections.178 Where Australian commissions do not report at length they may have seen little need to do so because there is generally little interest other than from the parties.

Authorities often mention the usefulness of local comment, principally for insights into the meaning of local geography.179 But the main reason for open hearings and allowing comment on submissions may be the practice in Australian administrative law of allowing evidence to be challenged. Speaking in support of 1965 legislation which provided for public hearings, Peter Nixon (then a backbencher but later the minister with this portfolio) noted:

I know of no arena where evidence is given to influence decisions affecting public interest where opportunity for the right to challenge that evidence is not automatic. As examples I need cite only the Tariff Board, royal commissions, courts of law or the Conciliation and Arbitration Commission. The decisions of all these bodies affect public interest, and on every occasion when evidence is given before them any individual has the right to challenge that evidence. It is only fair and just that a redistribution commission, whose decisions affect the electoral representation of this House, should also hear the evidence in public.180

Hughes has since observed

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176 Federally and in SA, the NT and the ACT submissions are available on the Electoral Commission’s website; the WA Office of the Electoral Distribution Commissioners has its own site http://www.boundaries.wa.gov.au/.
177 The Commonwealth, the ACT and the NT.
178 NSW Reports are not publicly available on a website.
179 See for example evidence from Bob Longland, Australian Electoral Officer for Queensland in JSCEM 1995, Electoral Redistributions Inquiry, Transcript of hearings, p. EM182; also ‘The material and information contained in the submissions, particularly those from the political parties, was of considerable assistance to the Commission in its work’, in (Vic) Electoral Boundaries Commission, 1991, Report, p. i.
[t]he current, and most complex, version of the federal system begins with publicly accessible written input, is followed by publicly accessible written comment on that input, holds public hearings, produces a set of proposals, receives publicly accessible written comment on those proposals, confirms or amends those proposals and, if any changes are thought to be ‘significantly different’ from the first proposed boundaries, may hold another round of public hearings.\textsuperscript{181}

If Australia’s process seems rigid, it is assuredly transparent. Public hearings are advertised, and the process requires the commissions not only to seek submissions, comments and objections but to consider them. A federal redistribution committee ‘must consider all of the suggestions and comments lodged with it’, for example, and the augmented commission must hold an inquiry into an objection unless it is of the opinion that the objection has already been dealt with at an earlier stage of the process or is ‘frivolous or vexatious’, a provision which is rarely invoked.\textsuperscript{182}

Commissions in some jurisdictions have made computing facilities and data files available to members of the public, in response to a recommendation of the federal JSCEM, although ‘very little public interest was shown in them.’\textsuperscript{183} Despite their effort, redistribution authorities expect few submissions or comments and little press coverage. The 2011 federal redistribution in South Australia generated eight submissions at the suggestions stage, another four commenting on those suggestions, three objections to the proposed map and another four commenting on those objections, and just four articles in the state’s newspapers.\textsuperscript{184} For South Australia’s redistribution of state electoral districts in 2012, just 12 submissions were received from the parties and private individuals.\textsuperscript{185} The controversial federal Victorian redistribution of 2010 generated 12 suggestions and nine comments on them, but then 129


\textsuperscript{182} Commonwealth Electoral Act 1918 ss. 64(4) and 72(3). This provision was invoked in relation to the redistribution of federal divisions in the ACT in 2005 when the only objection was that the Territory should have three seats rather than two. “The Augmented Electoral Commission formed the opinion that the objection was frivolous or vexatious because it relied on grounds that could not be considered by it, because under the Constitution of the Commonwealth of Australia and the relevant legislation they were not open to it.” Australia, Parliament 2006, Redistribution of the Australian Capital Territory into Electoral Divisions, Parl. Paper 101, Canberra, p. 4.


objections to the (controversial) proposed map and 40 comments on them, and finally 278 further objections to the augmented commission’s plan.\textsuperscript{186}

The level of public interest in an Australian redistribution seems strange when compared to the US where there is no assurance that the process will be transparent or fair. In California’s first independent commission process more than 15,000 people made submissions in person or electronically.\textsuperscript{187} New Jersey’s process is regarded as relatively liberal and the commissions which redrew state and congressional electoral district boundaries in 2011-12 conducted more public meetings than were required by legislation and posted transcripts of those meetings as well as public submissions on new dedicated websites.\textsuperscript{188} Hundreds of members of the public waited at meetings for the opportunity to make a statement, and others made submissions through the commissions’ websites. In the US even the expedited process required for a court-drawn plan attracts public submissions – two public hearings held by Nevada’s 2012 court masters at two days’ notice attracted submissions and appearances from 35 members of the public (as well the parties).\textsuperscript{189}

While some US public interest groups call for commissions to conduct their deliberations in open meetings – and that is required of California’s Citizens’ Redistricting Commission – it is not general practice in the US (nor in Australia).\textsuperscript{190} In New Jersey, commission meetings are specifically excluded from that state’s Open Public Meetings Act and in Nevada the 2012 court special masters were required to hold public meetings but then to ‘meet in private to work on the establishing of the redistricting maps.’\textsuperscript{191} In defence of a commission’s ability to work outside the public gaze, and even outside the parties’ gaze, McDonald noted that in the post-2000 round of redistricting, bipartisan commissions had been more successful than divided legislatures in finding agreement on bipartisan plans. He concluded that

the relative success of bipartisan commissions over divided government situations may lie in the ability of legislative leaders to compromise in private, without

\textsuperscript{188} http://www.apportionmentcommission.org; http://www.nj/redistrictingcommission.org.
\textsuperscript{190} The commission meetings comply with California’s Bagley-Keene Open Meeting Act.
\textsuperscript{191} Open Public Meetings Act N.J.S.A. 10:4-8; Guy v. Miller; Report of Special Masters.
interference from their legislative caucuses.\textsuperscript{192}

In summary, transparency requires that commissions show that they are open to suggestions from the public, groups with an electoral or good governance focus, and the parties. Colin A. Hughes and Dean Jaensch argued in 1979 that transparency of process would engender trust that there is no intention to advantage either party:

open hearings will not prevent those interests which believe they have suffered in the redistribution from crying “Foul!”, but perhaps they will not cry “Conspiracy!” and neutral observers at least would be reassured.\textsuperscript{193}

That does seem to have occurred. Australian commissions do operate with a very transparent process and this goes a long way towards explaining why Australian redistributions arouse relatively little public interest.

**Accountability**

Giving Australian redistribution authorities independence from the parties and the parliament meant giving them the power to bring their maps into effect without parliamentary ratification. In debate over the 1983 legislation which accomplished that change for the federal redistributions, the Coalition objected that the supremacy of parliament meant that redistributions should remain subject to parliamentary ratification, but a Labor member characterised that as

putting Dracula in charge of the bloodbank. Politicians are not the best guardians of public interest in these matters.\textsuperscript{194}

Individual Australian redistribution commissions are no longer held accountable to the parliament, but parliaments retain the power to change commissions’ governing legislation (though in NSW and SA a referendum may be required) and commissions can be held accountable to the parties and the public in several ways. The most meaningful opportunities

\textsuperscript{192} Plans which McDonald assessed as showing bipartisan compromise were produced in 10 of 17 states with divided legislatures, but seven of eight states with bipartisan commissions. McDonald 2004a, ‘A comparative analysis’, p. 390.


\textsuperscript{194} P.N.D. White, APD-HR, 9 Nov. 1983, p. 2528. Also A.G. Griffiths, APD-HR, 9 Nov. 1983, p. 2532: ‘I do not see the commissioner’s recommendations coming to parliament and being drastically altered. But I believe it is important that the Parliament, as the supreme body in this country, retains the ultimate right to change, rectify or direct to that Commission that changes be made. It is to be hoped that that power would never be used.’
to affect a redistribution proposal are provided as part of the process. All jurisdictions allow objections to a draft proposal, and the two using an augmented commission process make it possible for the objection to be heard by commissioners who had no role in producing it. That these objections are taken seriously is shown by the federal process in Victoria in 2010 where objections resulted in the augmented commission making major changes to the redistribution committee’s map, to the extent that it reinstated a division marked for abolition. The augmented commission then determined that its proposed map was ‘significantly different’ from the first proposal and extended the process to include a second objections period and a second opportunity for the augmented commission to respond.195

In the Commonwealth parliament the JSCEM can review redistribution procedures, although it is doubtful whether it would review a particular redistribution. The committee can inquire into and report on such matters relating to electoral laws and practices and their administration as may be referred to it by either House of the Parliament or a Minister. The matters that may be referred by the House include reports by the Commonwealth Auditor-General. The Committee could also inquire into matters raised in annual reports of Commonwealth Government departments and authorities.196

While the government has a majority of members on the committee (and the chairperson), other parties are represented and its 1995 report of its inquiry into ‘the effectiveness and appropriateness of the redistribution provisions of Parts III and IV of the Commonwealth Electoral Act 1918’ was comprehensive and balanced.197

Two other states – NSW and Victoria – have parliamentary Electoral Matters Committees but neither has conducted a review of redistribution provisions. Terms of reference for the NSW JSCEM preclude the Houses or the minister from referring redistribution matters; self-generated references are also excluded.198

195 Commonwealth Electoral Act 1918 s. 72 (12) d.
196 JSCEM website.
197 JSCEM membership in 2012 was 5 ALP, 1 Greens, 4 Liberal; Australia, Parliament 1995, JSCEM Report.
198 ‘The Committee inquires into and reports on matters that are referred by either House of the Parliament or a Minister relating to the administration of, and practices related to, the Parliamentary Electorates and Elections Act 1912 (other than Part 2) and the Election Funding, Expenditure and Disclosures Act 1981’ http://www.parliament.nsw.gov.au/electoralmatters?open&refnavid=CO3_1.
The Victorian parliament’s joint investigatory Committee on Electoral Matters committee is a standing committee established in 2003 to

- inquire into, consider and report to the Parliament on any proposal, matter or thing concerned with-
  - (a) the conduct of parliamentary elections and referendums in Victoria;
  - (b) the conduct of elections of Councillors under the Local Government Act 1989;
  - (c) the administration of, or practices associated with, the Electoral Act 2002 and any other law relating to electoral matters.\(^{199}\)

Victoria’s redistribution provisions are provided for under the *Electoral Boundaries Commission Act 1982* (Vic), and could therefore be considered to be an ‘other law relating to electoral matters’, but there has not been a redistribution of Legislative Assembly districts since the committee was established and it has not conducted a review of Victoria’s redistribution legislation. Neither does a self-reference in 2012 to inquire into the future of Victoria’s electoral administration cover redistributions.\(^{200}\)

By contrast with the standing committees in the federal, NSW and Victorian parliaments, state parliaments have used select committees to review redistribution legislation.\(^ {201}\) South Australia’s 1990 Select Committee on the *Constitution (Electoral Redistribution) Amendment Bill 1990* reviewed the state’s redistribution provisions and proposed the introduction of a performance criterion, which will be considered further in Chapter six.\(^ {202}\)

Parliamentary electoral matters committees do not hold redistribution authorities accountable for compliance with legislated instructions in relation to a particular redistribution process and a particular map. That could only be done through court review, and the appeal provisions which do exist in each jurisdiction (see the Appendix) have been intentionally limited, to recognise that compliance with the legislated requirements requires redistribution authorities to make subjective judgments. So unlike the US where redistribution authorities –

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\(^{199}\) *Parliamentary Committees Act 2003* (Vic) s. 9A.
\(^{201}\) Standing committees are permanent committees of the parliament, usually with a statutory basis, and in order to allow representation from both houses are constituted as joint standing committees. Select committees are established by resolution of the parliament, exist only for the term of the parliament and are dissolved when they report or if an election is called.

including state legislatures – expect court review of a new map, the redistribution process in Australia is not expected to attract court attention and is understood to be only subject to court review on constitutional grounds. There is no appeal to any Australian court against a commission’s map simply on the grounds that a better map can be drawn.

Federally, and also in the Northern Territory and the ACT, a commission’s decision

(a) is final and conclusive;
(b) shall not be challenged, appealed against, reviewed, quashed, set aside or called in question in any court or tribunal on any ground; and
(c) is not subject to mandamus, prohibition, certiorari or injunction, or the making of a declaratory or other order, in any court on any ground.\(^\text{(203)}\)

Even in Queensland and South Australia where legislation does allow appeals, the threshold is high and the grounds are narrow and exclude the commission’s application of the criteria. In Queensland a court must be satisfied that the commission has not complied with the redistribution provisions of the Electoral Act 1992 (Qld) and the effect is significant and the interests of justice require an order. In that case the court may quash the notice and order the commission to make a fresh or amended notice: otherwise, the commissioners’ decision is final and conclusive and cannot be challenged, appealed against, reviewed, quashed, set aside or otherwise called in question in any court or tribunal on any ground.\(^\text{(204)}\)

In South Australia an appeal may be made within 30 days of the order to the Full Court of the state Supreme Court on the ground that the order has not been duly made in accordance with the Act, and the Act does allow for the Full Court to ‘quash the order and direct the commission to make a fresh redistribution, vary the order or dismiss the appeal’.\(^\text{(205)}\) But in Gilbertson v. the State of SA the Privy Council held that

upon the true construction of the Act the Full Court has no jurisdiction to substitute its own opinion for that of the Commission as to where the electoral boundaries between the electoral districts should be. Section 83 and particularly paragraph (f) and the reference to “any other matters that it (i.e. the Commission) thinks relevant” make it clear that there are matters which the Commission alone is competent to decide. So any power of variation must be a

\(^{203}\) Electoral Act 2004 (NT) s. 151; Electoral Act 1992 (ACT) s. 55.

\(^{204}\) Electoral Act 1992 (Qld) ss. 46, 57.

\(^{205}\) Constitution Act 1934 (SA) s. 86.
In short, the Full Court has no power to give effect to ‘a redistribution different from that which the Commission itself had intended to make.’ The Privy Council judgment was that South Australia’s appeal provisions ‘did not confer upon an elector a right of appeal as to the merits of an electoral redistribution made by the Commission’s order.’ Instead, the only right of appeal against an order is one of law, on the grounds that the order was ultra vires the Commission by reason of some illegality in the form or contents of the order, the procedure adopted by the Commission in the making of the order, or by reason of the Commission’s failure to give consideration to matters to which the relevant statutory provisions required it to have regard, or by reason of the Commission having regard to matters that no reasonable body of persons could regard as relevant.

Australian federal redistributions are not subject to challenge under the Commonwealth Electoral Act 1918 and Orr points out that they are exempt from appeal under the Administrative Decisions (Judicial Review) Act 1977 (Cwlth) as well. But constitutional grounds for review must remain, and former High Court Justice Anthony Mason has argued that

[i]f legislation reposes in a specialist body the function of defining electoral boundaries in conformity with constitutional requirements, then determinations made by that body would be subject to judicial review so as to ensure that the determinations conformed to constitutional requirements.

As with statutory review, review on constitutional grounds ‘can only inquire into whether the redistribution commission mistook its powers or statutory duties and not into the merits of the proposed electoral map’. And given that the chairs of Australia’s redistribution authorities are almost always senior judges, the likelihood of a successful appeal on the

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206 Gilbertson v. the State of South Australia And Another, Privy Council (1977) 51 ALJR 519.
207 As above at 525.
208 As above at 520.
209 As above at 520.
211 Mason 1998, ‘One vote, one value’, p. 349.
grounds that an authority exceeded its powers or failed to take account of matters it should have considered seems remote.

Unlike US redistricting authorities which expect court challenges, Australian redistribution authorities receive objections during the process and are then effectively shielded from court appeal. No map drawn by an independent Australian redistribution commission has been challenged in court. In 1993 the South Australian Liberal Party was reported to be considering a challenge when it was not obvious that the first map drawn to comply with the SA Constitution’s new fairness criterion would really comply, but the challenge was never made. It would have been difficult then to prove the point hypothetically, and if it could only be proven after an election there would be no point in appealing at all, because the only practical remedy could be a new redistribution and that would occur automatically after the election anyway. The Liberal Party considered appeals once again after the 2010 state election when Liberal candidates had won the support of a majority of voters across the state but Labor won a clear majority of seats; once again the party refrained from lodging an appeal.

In summary, commissions are shielded from appeal in Australia, and some of the work of the US courts is done by Australian commissions themselves when they consider objections during the process. Another factor which reduces the likelihood of appeals is the frequency of redistributions. In four jurisdictions, boundaries are redrawn after each election, and it is unclear just what remedy could be found for a successful appeal if an election had already taken place. No map in any Australian jurisdiction is expected to stay in place for as long as a decade, and Orr has perceived an acceptance by the parties of what he calls ‘a “swings and roundabouts effect”: what a party loses in one division it tends to make up in another.’\(^{213}\) That observation could be extended to party acceptance that although one redistribution may seem unfair, the next may be equally likely to be helpful.

**Stance**

Of all the process constraints on Australian redistribution authorities, stance is the least discussed and the most important. Authorities other than South Australia’s EDBC work with an apolitical stance, rejecting argument offered in party-political terms and refraining from considering the partisan effect of the lines they draw. Federally, for example,

> [t]he Redistribution Committee does not take into account the voting patterns that have been demonstrated in the past. It is not provided for in the Act and we

\(^{213}\) Orr 2010, *The Law of Politics*, p. 44.
cannot take it into account.\textsuperscript{214}

Similarly, the Boundary Commission for England reports that it ‘could not take into account voting patterns or the likely political effects of proposals or counter-proposals’.\textsuperscript{215} That commission is an independent and impartial body. It emphasises very strongly that existing voting patterns and the prospective fortunes of political parties should not and do not enter its considerations during a review.\textsuperscript{216}

Even in New Zealand where two members of the commission must be members of the two major political parties, a similar view prevails:

The Commission did not base its decisions on their possible political consequences and to have done so would have meant the complete destruction of the Commission’s independence.\textsuperscript{217}

Many Members find this stance hard to understand, and a few find it hard to believe. In 1989, for example, Senator Macklin recalled a hearing in Australia’s federal parliament of the JSCER in which he asked the federal Electoral Commissioner whether the Electoral Commission took the political complexion of seats into account in redistricting and being told that it did not. Looking around the table, I did not think many people took much notice of that reply. Obviously, some account is taken in the redistribution exercise of the political complexion of the seat.\textsuperscript{218}

By contrast, since 1991 South Australia’s EDBC, in common with independent redistricting authorities in the US, has taken an impartial stance which acknowledges the parties’


\textsuperscript{215} UK, Boundary Commission for England 2007, \textit{Fifth Periodical Report: Volume 1 Report}, Cm 7032, TSO, London, p. 19. In making representations at local inquiries, Assistant Commissioners emphasised ‘ensuring that everyone who wished to make a contribution was given the opportunity to do so (with the exception that party political points were not allowed)’ (p. 18).


\textsuperscript{218} M.J. Macklin, APD-S, 26 Oct. 1989, p. 2300.
interests and attempts to balance them.

In Australia the apolitical stance has no parliamentary or legislative basis: it comes from the courts, and was adopted by the commissioners as parliaments progressively relinquished components of the redistribution power (initiation, performance of the task, review and ratification) and at each step made those authorities more authoritative and more independent. The newer commissioners understood the process as an increasing ‘judicialisation’ of the redistribution process and Hughes has observed that they learned ‘to behave and to act like judges’. In 1975, for example, South Australia’s EDBC was the first to be made fully independent of parliamentary ratification, and it adopted what Hughes has called a quasi-judicial process: taking submissions, holding public hearings in court-rooms, swearing witnesses and reporting the reasons for their decisions. By 1983 the commission reported that it had drawn on the legal rules of evidence and procedure although its proceedings and processes departed from those of a truly judicial tribunal...Thus the Commission adopted a procedure which in some respects was analogous to that observed in courts of law.

Commissions in Canada followed Australia’s lead and also took on a semi-judicial stance, and current calls from US good governance groups for redistricting commissioners to take an apolitical stance derive as much from observation of boundary readjustment of Canadian provincial ridings as from observation of their own US courts. While there has been very little academic attention paid to Australian redistribution authorities’ stance, US courts have been at pains to define theirs. Sawer considered that one of the US Supreme Court’s ‘most characteristic and long-standing doctrines’ was its refusal to determine ‘political questions’. But in the 1960s the court discovered that it did have remedies available (including remanding the case to district courts and ordering the production of plans with closer tolerances) and entered Justice Frankfurter’s thicket. In *Baker v. Carr*, the court considered that political

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223 G. Sawer 1963b, ‘Political questions’, *University of Toronto Law Journal*, vol. 15, no. 1, p. 49.
questions of various kinds were all

essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.224

During the 1970s, when the first of the Australian commissions were given the power to have their plans implemented without parliamentary approval, they were also being shielded for the first time from the courts. Meanwhile, US courts were beginning to take on the responsibility not only for oversight of redistricting but also, in rare cases, for drawing election districts. On those occasions when they accepted responsibility for providing a map, they appointed court special masters to draw maps on their behalf, and imposed an apolitical stance on them, requiring them to refrain from considering the partisan effects of the new lines. Geography professor Richard Morrill was appointed as special master to redistrict Washington state in 1972 and was required to take an apolitical stance. He was

expressly forbidden to have contact with any political figure, in or out of the legislature, or with the press; to know where any incumbent legislator might live; and to have access to any precinct, district, or other data on voting behavior – that is, all political criteria, as such, were proscribed.225

The process for producing these court-drawn plans was similar to the current redistribution process in most Australian jurisdictions – compliance with what are understood to be neutral criteria, limited tolerances and limited room for judgment – although it seems clear that court special masters have been more constrained than Australian commissioners. And courts must make the political judgments inherent in redistricting in 'in a manner free from any taint

Sawer argues that most of the problems dealt with in the US as ‘political questions’ are treated in Commonwealth countries ‘in more pigeon-hole fashion’. Certainly Australian courts show deference to parliament. In 1934 when the federal parliament seemed poised to refuse to implement an apportionment determination which would have reduced South Australia’s entitlement to federal seats, legal opinion was that the courts would be unlikely to intervene because

the courts would be bound to act on the assumption that the Parliament was doing its duty and that its approval has been withheld for some good and sufficient reason. The courts cannot impute bad faith to the parliament.

More recently, in the 1996 McGinity High Court case, Dawson J said that it was parliament, not the courts, which was ‘required to determine questions of a political nature about which opinions may vary considerably.’ A different situation would have crossed the lines between court and parliament in 1975: South Australia’s Labor government proposed to doubly entrench its one vote, one value electoral reforms by requiring that any changes to those provisions would require not only a parliamentary majority and referendum but also Supreme Court approval. The proposal would have required the court’s Chief Justice to certify that any amending bill would not effectively reintroduce malapportionment, change the frequency of redistributions or reintroduce political control over the commission. The Liberal opposition interpreted the proposal as giving

the judges a political and legislative function, in saying that certain things can happen only if the Chief Justice certifies them. Probably of the four things he is required to certify the most offensive is the last: he is required to certify that the

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227 Geoffrey Sawer argues that the political questions doctrine is ‘one of those very general notions, entirely judge-made in origin, which has a logical appropriateness in any system where the courts are called upon to consider the validity of legislation and of the activities of the higher executive authorities, and it has roots in English constitutional law’. Sawer 1963b, ‘Political questions’, p. 49. See also G. Lindell, 1972, Justiciability of Political Questions Under the Australian and United States Constitutions, Master of Laws thesis, University of Adelaide, and G. Lindell 1992, ‘The justiciability of political questions: recent developments’, in Australian Constitutional Perspectives, eds H.P. Lee and G. Winterton, Law Book Company, Sydney.
228 Mason expressed it as ‘an acceptance of parliamentary sovereignty as amounting to legislative competence except to the extent that constitutional limitations on legislative power arise.’ Mason 1998, ‘One vote, one value’, p. 345.
229 J.G. Latham, reading the opinion of Mr E.M. Mitchell KC, CPD-HR, 4 July 1934, p. 204.
bill does not ‘offend against the principle that an electoral redistribution is to be made by a Commission that is independent of political interference or control.’ In that case, particularly, he is not exercising a judicial function; he is making a political opinion that the Bill does not offend in such a way.231

When the Chief Justice objected ‘on the grounds that this is acting not judicially but in an administrative manner, and he does not think that is appropriate’, the provision was removed.232 But in the process Labor had argued that the strict doctrine of separation of powers does not operate in Australia’s parliamentary system and evidenced the fact that judges had regularly acted as redistribution commissioners or on Royal Commissions of Inquiry.233 The status of a judge acting as a redistribution commissioner was soon clarified in the Gilbertson case: when doing so, he or she is understood to be acting persona designata and ‘not purporting to act in his judicial capacity or to exercise judicial power’.234

Despite the fact that the US and Australia have differing degrees of separation between their judicial and legislative arms of government, the effect of judicial deference to the legislature was that an apolitical stance was assumed both by US courts when they took on the responsibility of redistricting and also by Australian redistribution authorities when they took on the responsibility of redistributions. Persily has observed that the US court-drawn process involves a tension between deference and impartiality and that when faced with the choice, courts ‘opt for deference and leave for another day the question of whether the deferential remedial plan is too partisan, or too incumbent-friendly, in its effect.’235 Courts involved in redistricting are still vulnerable to accusations of providing partisan advantage in their maps, and in 2006 the US Supreme Court invalidated a court-drawn plan, finding that a Texas court’s seemingly neutral directions had in fact led to the creation of a partisan map. An earlier map for Texas congressional districts drawn in 1991 had been a Democratic gerrymander ‘which entrenched a party on the verge of minority status.’236 By the time of the next redistricting round after the 2000 census, the Democrats had lost control over the state Senate and the governorship, and the legislature deadlocked over new maps. A court-drawn map was ordered.

Conscious that the primary responsibility for drawing congressional districts lies with the political branches of government, and hesitant to undo the work of one political party for the benefit of another, the three-judge Federal District Court sought to apply only “neutral” redistricting standards when drawing Plan 1151C, including placing the two new seats in high-growth areas, following county and voting precinct lines, and avoiding the pairing of incumbents.237

But in Texas, population growth areas were always likely to be Democratic because immigration is primarily from Mexico, and North American Hispanic groups are overwhelmingly Democrat supporters. By placing the two new seats in growth areas, the court-drawn plan gave the Democrats two seats. At the subsequent congressional election a wrong winner outcome occurred when Republican candidates polled 59 per cent of the two party vote but won only 15 of the 32 seats, ‘thus leaving the 1991 Democratic gerrymander largely in place’.238

While the vast majority of US redistricting maps are still produced by legislatures and redistricting authorities, the Texas case has increased pressure for court special masters’ stance to move from apolitical to impartial. Most have been given directions that preclude taking partisan balance or responsiveness into account, but they are increasingly willing – and able – to assess the partisan effects of the maps they draw. Persily has argued that they could be better able to comply with a policy of neutrality towards the parties and protect the court from ‘appearing biased or unintentionally producing a plan that is’ if they could remove the ‘veil of political ignorance’ and consider the political facts.239

For example, should the court sit idly by if, when it releases its plan, it sees that it has only paired Republican incumbents against each other, chopped up Republican districts but left the Democratic ones intact, or over-represented Democrats by creating a heavily disproportionate number of districts in which their supporters constitute a majority?240

Persily considers that ‘the decision whether to pay attention to the partisan or incumbency-related effects of a plan may be the most important decision a court makes.’241 Courts in two

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237 LULAC v. Perry, 548 U.S. 399.
238 As above.
240 As above, p. 1164.
241 As above, p. 1154.
states have accepted that argument. In New York, former judge Frederick B. Lacey was asked in 2002 to redraw the congressional map and was given standard criteria: compact and contiguous districts of substantially equal population, and compliance with the Voting Rights Act. In the absence of a prohibition on taking political matters into consideration, Lacey retained the services of Nathaniel Persily and Bernard Grofman, and asked each presenter at a public hearing about the political effect of his proposals. Lacey rejected two maps produced by the Senate and Assembly majority parties on the grounds that both maps paired minority party incumbents unnecessarily. He called for a check ‘to determine whether or not any aspects of the plan might constitute an unintentional partisan gerrymander that cancelled out the strength of a substantial political group.’

More recently, special masters appointed to draw congressional and legislative maps for Nevada in 2012 were not only required to avoid contests between incumbents but were permitted to ‘review the issue of representative fairness in the drawing of the maps, but...not to become enthralled in any representative, racial or partisan gerrymandering.’ That state’s Republican Governor had rejected maps drawn by the Democrat-controlled legislature on the grounds that they were partisan and violated the Voting Rights Act, and no alternative maps were agreed. The special masters worked towards ‘fair, impartial and representative’ districts and reported in terms of population, race and voter registrations for all three maps. The maps have not been appealed.

Despite the experience of New York and Nevada, most US courts would still require an apolitical, rather than an impartial, stance of their court masters. While the apolitical stance seems entrenched in Australia, other views are occasionally voiced. In debate on the federal electoral reform legislation of 1983, for example, a Liberal member argued that

243 ‘No objection by any party was made to the court about the judicial process to be employed or the Masters who were to be appointed.’ Guy v. Miller; Order re Redistricting, First Judicial District Court of the State of Nevada in and for Carson City. 11 OC 00042 1B, 2012, p. 5.
246 When the Connecticut court appointed Persily as special master in 2012 he had already served as assistant or special master in Georgia, Maryland and New York but even he was specifically prohibited from considering ‘the residency of incumbents or potential candidates or other political data, such as party registration statistics or election returns’. State of Connecticut Supreme Court In Re Petition of Reapportionment Commission, Ex. Rel., 2012, Available at http://www.jud.ct.gov/external/news/SC18907_010312.pdf.
although the electoral commissioners are expected to be politically impartial, the paradox is that the Electoral Commission will not be able to perform its task clearly unless it takes into account and has some regard for voting patterns. The Electoral Commission, in drawing up its plans for a redistribution, should take care to ensure that a disproportionate influence is not given to one party. Therefore, it needs to take account of overall voting patterns if changes in electoral boundaries are to bring about, from the voters’ point of view, a fair result rather than the reverse.247

But since its inception in 1983 the federal redistribution authority has consistently avoided that challenge. At the first set of redistributions after the introduction of the 1983 legislation, the Liberal Party lodged an appeal against the Western Australian map in terms of the ‘political effects’ of the redistribution. The party accepted that the commissioners were ‘individually and collectively scrupulously non-partisan public officials’, asserted that it would be ‘unrealistic for the commissioners not to be conscious of the political effects of a redistribution’ and argued that they had drawn a map which, with a 50:50 result, would be likely to give the Liberal Party just four of the state’s 13 federal seats.248 Hughes, newly appointed as Australian Electoral Commissioner, sought legal advice on whether it will be (a) in order (b) obligatory, for the augmented Electoral Commission to decline to hear arguments on ‘political effects’ at an enquiry into objections against a proposed redistribution.249

Advice from the federal Attorney General’s Department was that the Commonwealth Electoral Act neither requires redistribution authorities to consider these matters nor prevents them from doing so. It would be

open to the Commission to take these considerations into account in making a determination. Whether the Commission should take such considerations into account and what weight, if any, should be given to them is within the discretion of the Commission. The Commission is required to consider the

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Further, it was open to the Commission to take into account, for example, considerations of the political fairness of the proposed redistribution. A redistribution is carried out for the purposes of election to the Parliament and is therefore obviously carried out in a political context. To construe the legislation as preventing the Commission from having regard to considerations of political fairness would not merely be to give the legislation an artificially narrow construction, it could inhibit the objective of a ‘fair and impartial’ redistribution (cf. Commonwealth Parliamentary Debates, 2 Nov. 1983, p. 2214). Of course the extent to which the Commission has regard to considerations of ‘political fairness’ and the weight to be given to such considerations is within the discretion of the Commission.

History shows that this invitation to consider the political effects of the lines they drew was declined by the newly independent federal commission, and each of the state redistribution commissions also adopted an apolitical stance when they were brought into existence. The main challenge to that position is the adoption, since 1991, of an impartial stance by South Australia’s redistribution authority in response to a new requirement that it should consider the political effect of the lines it draws.

A different argument has been made in the US where the pool of neutral potential commissioners is limited, judges are often elected on party ballots, and impartiality is sometimes considered to be an illusion:

There is a sort of vague impression in many quarters that equality in census numbers alone produces basic fairness, that legislative district lines can be politically neutral, that something called nonpartisanship can be built into the districting process. My own experience tells me that although I may find nonpartisanship in heaven, in the real world, and especially in academia, there

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250 As above.
251 As above. Reference to the 1983 debate was to the minister’s second reading speech: ‘The Government is determined once and for all to establish fair and impartial procedures for honest redistributions’. K.C. Beazley, APD-HR, 2 Nov. 1983, pp. 2214-15.
are no nonpartisans, although there may be noncombatants.252

A similar proposition was put in Canberra in 1983 when the Liberal opposition argued that the most senior federal public sector positions were increasingly being filled by political appointments, but that argument was rejected on the grounds that ‘people within the Public Service who have political backgrounds and political biases...are not likely to be chosen for appointment.’253 Australia has a long tradition of professional and impartial public service, and public sector officials at the highest levels are expected to act in an apolitical or impartial way, regardless of their personal views.254

Even if South Australia’s experience is excluded, Persily’s arguments in favour of allowing court special masters access to political data, and the recent acceptance in New York and Nevada of an impartial stance, could inform the debate in Australia. Given the importance of their task, Australian redistribution commissions’ protection from court oversight and the necessity of generating agreement on the outcome, Australian redistribution authorities might well fear that the kind of questions they would be asked to consider – about the responsiveness, competitiveness, bias or symmetry in their plans – have no definitive answers. But as Persily has argued, not considering those questions leaves the commissions without a defence when parties argue after a redistribution that the new map will treat them unfairly or after a subsequent election that a wrong winner result means the map was biased. Public and party agreement requires an acknowledgment of a fair map as much as impartial process, and when votes do not translate into seats in a way that is recognised as fair, acceptance of a plan is weakened. Indeed, in 1995 former Australian Electoral Commissioner Hughes nominated ‘the frequency with which “the wrong answer” is being provided on the conversion of votes into seats’ as ‘the outstanding issue in respect of redistribution outcomes at present, in most of the State jurisdictions as well as the

252 Dixon 1982, ‘Fair criteria’, p. 8. More recently Justin Levitt (2011, ‘Weighing the potential’, pp. 531-2) has argued that ‘Platonic non-partisan stewards’ are hard to find and their skills are probably not apt, anyway, as a public administration background is not suited to balancing competing aims.

253 P.M. Ruddock, APD-HR, 10 Nov. 1983, p. 2574; R.E. Klugman, APD-HR, 10 Nov. 1983, p. 2575. In South Australia in 1975 an insinuation that the redistribution commissioners might be partisan was summarily rejected: ‘would members consider seriously that the Chief Justice of the Supreme Court selected by the provisions of this legislation, or the Surveyor-General or a replacement selected by the Chief Justice, or the Electoral Commissioner or his replacement, would be biased toward one Party or the other?’ D.J. Hopgood, SAPD-HA, 7 Oct. 1975, p. 1120.

254 Notwithstanding that when governments change, some heads of major departments also change.
Wrong winner results are problematic because they can indicate bias, and so long as Australian redistribution commissions refuse to consider the political effects of the lines they draw these unwelcome election outcomes have the potential to undermine their authority. On the other hand, most redistributions around Australia are not seen as biased or gerrymandered, and occasional wrong winner results are usually accepted as a function of campaign effects more than inbuilt bias. So how have Australia’s commissions managed to draw essentially fair maps while averting their gaze from the political? In practice, three factors have protected them from error even while effectively flying blind. One is path dependency. Almost all state and territory redistributions and about half of the federal redistributions have retained the existing number of districts, so the commissions could follow existing boundaries, which have a known political record. Second, the parties make submissions at the time of each redistribution and the authorities draw districts that may give each party a little of what it asks for. Third, individual commissioners (and especially the electoral commissioners) are personally politically knowledgeable. While being unaware of the measured political effects of the lines they draw, they will nonetheless know whether they have, in broad terms, drawn districts which will penalise one of the parties more than the other. Orr has concluded that commissioners know what they are doing and

the unspoken criterion in every jurisdiction (except South Australia, where it is explicit) is that redistributions ought to minimise distortion or disruption of the likely translation of votes into seats, given an essentially two-party lower house.256

A different explanation could be that wherever possible commissioners avoid changing the notional status of existing districts, on the grounds that if a seat is to change hands from one party to another it should be the voters who make that happen, not the commission.

Conclusion

Australian redistribution legislation gives the authorities substantial protection from the courts, the parliaments and the political parties. In return they are required to conduct their inquiries in a way that is transparent and accountable, and it is that process which has

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won high regard internationally. US states looking for inspiration could usefully consider this model.

But in an effort to protect their independence, Australian commissions have adopted an apolitical stance, refusing to engage with the political effect of their work. That stance is unnecessarily limiting, preventing them from balancing the party effects of their redistributions or ensuring that the new set of districts will be responsive when electors move their support from one party to the other. Rather than an apolitical stance, Australian redistribution authorities could emulate the impartial stance which US commissions apply, allowing them to consider the partisan effect of the lines they draw. When South Australia’s commission adopted an impartial stance it did not lose its independence nor become vulnerable to party-political interference.

This chapter has also shown that malapportionment triggers in Australia have been set too high to have any effect, and best practice is now for regular redistributions to be triggered after one or two elections. The next chapter shows why more frequent redistributions are necessary and why maps which stay in place for three elections should not be accepted.
Chapter three: Ensuring district equality

The previous chapter argued that the apolitical stance adopted by most of Australia’s redistribution authorities prevents them from intentionally producing an unbiased and responsive map. Indeed, the focus of almost all of Australia’s redistributions is on preventing malapportionment, and it is sometimes argued in Australia that providing equality is the most that commissions can practically do to promote fair outcomes.257 Certainly, equality is a precondition for a fair election, so the question for this chapter is how – and how well – do Australian redistributions achieve it.

All Australian states have a history of malapportionment, sometimes zonal and usually creeping. Governing parties in South Australia and Victoria used it most egregiously, entrenching themselves for long after they had lost the support of a majority of voters, and Western Australia used it for longest, retaining a malapportioned map until the 2008 state election, even when it seemed to offer little partisan advantage. At the height of this malapportionment, Victoria had a Dauer-Kelsay index of just 28.7 in 1943 and Western Australia showed 28.6 in 1947, while South Australia dipped to just 23.4 at the 1968 state election.258

But Australia did have a one vote, one value revolution which paralleled and drew inspiration from US reforms after Baker v. Carr, and that revolution did change legislation and redistribution practices around Australia from the mid-1960s. Even the Commonwealth Electoral Act, which was the Australian benchmark and had required equal enrolments since 1902, was amended during the 1970s to ensure tighter tolerances from quota, a focus on equality during the life of the map and more frequent redistributions.

This chapter does not cover the political history of malapportionment in Australia – others have done that work.259 Its focus is more practical and more immediate. It reviews equality

257 See for example Western Australia Commission on Government 1995, Report No. 1: Origin of the Commission; Our Present System of Government; Our Present Electoral System, The Commission, Perth, p. 306: ‘the removal of malapportionment, coupled with the criteria recommended…will produce electoral results that are fair to all contestants. As a consequence we do not accept that a fairness criterion is merited.’
258 The Dauer-Kelsay index is the total enrolment in the smallest half of districts. It represents the smallest possible number of electors who could control the election of a government. Data from C.A. Hughes 1977a, A Handbook of Australian Government and Politics 1965-1974, Australian National University Press, Canberra, Appendix 1.
requirements in Australian redistribution legislation, considers how redistribution authorities operationalise those requirements and assesses how well jurisdictions achieve equality when it really counts: at elections.

Equality

Australian election campaigns focus on the parties’ contest to win government. Campaigns are configured around party leaders who ask voters to elect them to govern, give them a mandate to govern, throw out a current government or at least hold it to account. Given Australia’s single member districts, none of these things are in the power of individual electors, but the focus of election contests has moved from electing local representatives to electing enough lower house representatives from one party or coalition to enable it to govern.

For each elector to have an equal voice in that contest, districts must have an equal number of electors. That was a major aim of the one vote, one value reforms which imposed the same electoral quota on districts across a jurisdiction, swept away zonal apportionment, imposed narrower tolerances at the time of a redistribution (and often even stricter tolerances during the life of the map) and mandated more frequent redistributions to combat creeping malapportionment. Coupled with the establishment of independent authorities, those reforms eliminated intentional partisan bias in Australian electoral maps.

Some remaining inequality is built into the electoral system’s structure by the federal apportionment process or by state redistribution requirements which privilege districts covering large geographic areas, and in some jurisdictions inequality still builds up over the life of a map. The following sections consider how and when that occurs, and what partisan effect it has on electoral outcomes.

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Apportionment

Australia apportions federal divisions between states and territories by quota according to their population, and divisions cannot be drawn to include parts of different states.261 Australia’s apportionment calculation divides the total population of the states by twice the number of federal senators for the states, to arrive at a quota. Each state and territory is allocated a number of quotas – representing a number of federal divisions – according to its population share, with the proviso that an original state must receive at least five divisions (Tasmania benefits from this) and the Northern Territory and the Australian Capital Territory must receive at least two.262 These two territories have also been protected by a requirement that if either is just short of half a quota, the calculation should take the census undercount into account, and when the Northern Territory still fell short of 1.5 quotas in 2004 its second seat was assured by a one-off legislative change.263 Savings provisions for smaller member states in federal systems are common: the US allocates every state at least one congressional district, and Canada has also allocated smaller provinces proportionally more federal seats than the larger provinces of Quebec and Ontario, and its current rule protects those with slower population growth by specifying that no province can have fewer seats than it had in 1976 or in the 33rd parliament (whichever is less).264

Australia’s savings provisions generate districts in Tasmania with population numbers that are well below the Australian average, and at the 2010 federal election each held about 24 per cent fewer electors than the Australian average. The guarantee of two divisions for the Northern Territory produces two divisions with even lower enrolments, 35 per cent below the average in 2010.265 The situation is reversed in the Australian Capital Territory where the two federal divisions are 32 per cent above average and the effect is that at a federal election the number voting in an ACT division is twice the number of electors voting in a division in the Northern Territory. In an electoral system which requires equality to within just 10 per cent at the time district boundaries are redrawn, differences of that size within a jurisdiction would be

261 Canada calls the allocation of divisions to provinces redistribution or reapportionment. Courtney 2001, Commissioned Ridings, p. 10.
263 The NT entitlement was secured by s. 48A of the Commonwealth Electoral Act 1918 inserted by the Commonwealth Electoral Amendment (Representation in the House of Representatives) Act 2004 (Cwlth).
265 At the time of the 2010 federal election the average number of electors in each Northern Territory division was 60,530, in Tasmanian divisions it was 71,722 and in ACT divisions it was 123,971. For Australia as a whole it was 93,912.
considered wildly excessive, but the political importance of recognising the smaller jurisdictions means that these arrangements are unlikely to be changed.

The process of apportionment by quota generates malapportioned districts in smaller jurisdictions. For example, the Australian Capital Territory’s 2.4 quotas at the most recent determination still only entitle it to two divisions, and the remaining four-tenths of a quota of population must be spread between them with the result that each elected member would represent a population about 20 per cent larger than the federal quota, a level that would be considered malapportioned elsewhere.\footnote{Determination of 29 Sept. 2011, and 2010 Federal election enrolments, available at AEC website. In fact, because the ACT has a larger than usual ratio of electors to population, the situation is even worse, and at the 2010 federal election the two ACT divisions each had 32 per cent more electors than the average across Australia.} By contrast, in a larger jurisdiction which has 12.4 quotas of population, for example, entitling it to 12 seats, the remaining four-tenths of a quota will be spread between the jurisdiction’s 12 districts, and each elected member will represent a population about 3 per cent larger than the federal quota. Allocating electoral districts by quota to regions which may only receive a few districts has caused similarly large variations in the UK, where districts have traditionally been allocated to counties, so that since tolerances have been tightened for the Fifth and Sixth Boundary Commissions they have only been able to comply by allocating some districts across county lines.\footnote{See for example UK, Boundary Commission for England 2007, \textit{Fifth Periodical Report}, and (for the Sixth Review) \url{http://consultation.boundarycommissionforengland.independent.gov.uk/about-the-review/}.}

Unless Australian states would allow members to represent divisions which crossed state and territory borders, or allowed members to have weighted voting rights in the House of Representatives, the territories’ malapportioned divisions cannot be remedied. And unless the century-old political agreement which privileges Tasmania could be amended to cut its representation from five members in the House of Representatives back to just the three its population entitles it to, some inequality will remain in the federal electoral system.

The partisan effect of the current inequality is that the ALP holds two extra (Tasmanian) divisions in the House of Representatives, though Tasmania is not a reliably Labor or Coalition state and that advantage could pass to the Coalition at a future election. But in the hung parliament after the 2010 election, when neither Labor nor the Coalition held a majority of
seats, those two divisions gave the ALP standing to negotiate with Independent and minor party members to form government.\textsuperscript{268}

There is another aspect of Australia’s apportionment calculation which still privileges representation rather than equality of voting power and which could generate partisan advantage. As in the federal systems of the US and Canada, it is based on population counts, although it could be brought into line with redistributions which use elector numbers. The original choice to use population rather than electors followed the US example.\textsuperscript{269} It also had a practical basis because at Federation the states had different franchise entitlements: South Australia had female franchise and would have been apportioned 13 members in the new 75 seat House of Representatives on an electors basis but only seven on a population basis.\textsuperscript{270} The apportionment calculation could now be based on enrolments rather than population, but the change would not have much effect: if the savings provisions for the smaller jurisdictions were retained, Queensland and Victoria would, in 2012, each have one fewer seat and South Australia, with an older population and smaller proportion of migrants, would have one more.\textsuperscript{271} Given that the states are not reliably Labor or Liberal over time, the partisan effect would probably be minimal, and there are no current moves for change.

Redistribution

While the apportionment of Australia’s federal divisions is based on total population, redistribution calculations for both federal and state/territory districts are based on the population enrolled to vote.

Australian states have a history of malapportioned districts which were either drawn by the governing party or drawn to criteria imposed by it. There were three apportionment mechanisms: zonal malapportionment, creeping malapportionment and large tolerances. Zonal malapportionment usually required that a smaller number of districts be allocated to the metropolitan zone where Labor support was strongest, and a larger number to less populous

\textsuperscript{268} Seats won at the 2010 federal election were: ALP 72, Liberal-National Coalition 73, Greens 1, Independents 4.
rural areas where Liberal or National Country Party support was strongest. Creeping malapportionment was made possible by the lack of a requirement to consider demographic change, and long periods between redistributions. A tolerance of 20 per cent at the time of the redistribution enabled the smallest districts to begin the period with half as many electors as the largest.

Measuring malapportionment before the one vote, one value reforms was relatively simple: in 1968 Joan Rydon ranked the states in terms of the relative ‘wickedness’ of their inequality and showed that South Australia and Western Australia were by far the worst. In those states, the district with the largest number of electors was more than seven times the size of the smallest, whereas that ratio for the Commonwealth was four times (presumably because of small Tasmanian districts) and in NSW and Victoria the largest district was no more than twice as big as the smallest.272 Measuring the partisan effect of malapportionment was more difficult, as long as parties only contested seats they might win and electoral commissions did not continue the count in a seat past the point where one of the candidates had a majority of the formal or valid votes. But Rydon published estimates for bias in state electoral systems and showed an ongoing bias against Labor in South Australia, where throughout the period Labor would have needed about 57 per cent of the statewide two party preferred vote to have won a majority of seats. She also found a disadvantage of that order in Victorian results at the beginning of the period but only a 2 to 3 per cent disadvantage remained by the end of it, and in Queensland Labor would have been advantaged at the beginning of the period but disadvantaged by the end of it. In NSW there was minimal partisan advantage from the relatively low-level malapportionment. More surprisingly, WA’s ‘wicked’ malapportionment, on a par with that in South Australia, gave neither party a clear partisan advantage at any point during the period of the study. Rydon suggested that the distribution of party support in NSW and WA may have been less geographically polarised than in SA, and zonal malapportionment may simply have been too clumsy a weapon to provide much advantage in WA.273 Later Jaensch and also Hughes produced similar sets of estimates, using different assumptions and more recent election results but finding roughly the same thing.274 Hughes’ data indicated that

273 As above, pp. 142-3.
Labor had won a majority of votes, but not government, at nine of the 67 federal, state or territory elections from 1949 to the end of the 1970s. He later extended the comparison and identified wrong winner election results at 17 of the 96 state and federal elections held between 1949 and 1994.

South Australia’s state elections accounted for four of those that Hughes identified as wrong winners, and Queensland’s another two, and given that these were the states with the worst malapportionment, reformers followed the US example and campaigned vigorously for an end to malapportionment. In particular, they wanted electoral zones to be abolished, future population growth areas to be taken into account, tolerances tightened and redistributions held more frequently, and these reforms have now been achieved in all jurisdictions.

The following sections review the legislative requirements which are now understood to guarantee equality around Australia. The provisions are summarised in the Appendix.

Australian jurisdictions now require that district enrolments be equal at the time of redistribution, defined as being within 10 per cent of the average enrolments at that time (or 20 per cent in the Northern Territory). Most states also have a malapportionment trigger which sets a redistribution in train if a substantial proportion of the districts are over 10 per cent from the average for more than two months, so the legislated intention is clearly that a map should begin its life with a majority of districts very close to actual equality, allowing for a few to be set closer to the tolerated allowance to recognise unusual circumstances.

Scale is relevant to understanding the meaning of these tolerances. The narrowest tolerances are federal, where districts have the highest number of enrolled voters in each district: at the federal redistribution of South Australia in 2011, the average number of electors in each division was 100,636 so the 10 per cent tolerance meant that the largest district could have held over 20,000 electors more than the smallest. The widest tolerances operate for Northern Territory Legislative Assembly districts which have relatively few enrolled voters, so

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277 In 1902 the original Commonwealth legislation included a ‘margin of allowance’ of 20 per cent, and when other state governments delegated redistributions to committees outside the legislature they adopted the same level: *Commonwealth Electoral Act 1902* s. 16.

278 Australia, Parliament 2012, *Report of the Redistribution Committee: The 2011 Proposed Redistribution of South Australia into Electoral Divisions,* Parl. Paper 73, Canberra, p. 29. The committee drew districts with variations of under 4.5 per cent, and the actual variation in enrolments between largest and smallest was just 8,693.
the 20 per cent tolerance means that the largest of the districts drawn in 2011 (which averaged just 4,838 electors) could have held 1,935 more electors than the smallest. In fact, both commissions drew districts well within the allowable initial tolerances; the federal commission’s districts were within 4.5 per cent of the average and the NT committee’s districts were within 7.5 per cent, which suggests that the initial tolerances are broader than necessary.

The most common justification for broader tolerances has always been the difficulty of representing rural districts covering very large areas, and that problem remains. Australia has remote areas where the population density is so low that compact electoral districts cannot be created within tolerance, and some of these districts are both so remote and so geographically large that they would be difficult to service without more office locations across the district and larger allowances to cover air travel. The problem is exacerbated when the districts are federal divisions: the WA federal division of Durack covers 1,587,758 square kilometres (about 613,037 square miles) and roughly 21 per cent of the entire Australian continent, and in South Australia the federal division of Grey covers roughly 92 per cent of the area of the state. There are large-area districts in state and territory legislatures as well, and in total there are 11 federal divisions and 16 state or territory districts each covering over 100,000 square kilometres (38,610 square miles). Federally, and also in South Australia and the Northern Territory, the difficulty is addressed by allocating extra resources for members representing these large-area divisions, including additional office locations and larger allowances for travel, and the NT’s 20 per cent initial tolerance also gives scope for setting larger districts low even if, in fact, that tolerance is not used.

Two states currently address the difficulty of representing remote areas by reintroducing a degree of malapportionment. In Western Australia, a state electoral district with an area of more than 100,000 square kilometres gains 1.5 notional electors for each 100 square kilometres and even then could still be set 20 per cent lower than normal at the time of the redistribution. At the most recent redistribution of the 59 state parliamentary districts, five

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281 The 2011 redistribution in the NT set the largest districts of Arafura, Stuart, Barkly and Namatjira at +7.1 per cent, -5.5 per cent, 0.4 per cent and 0.1 per cent respectively at the time of the redistribution. NT Augmented Redistribution Committee 2011, p. 25 and NT Electoral Commission website.
large-area districts were drawn, generating between 4,433 and 9,848 notional electors.\textsuperscript{282} In Queensland a similar provision allows a district covering over 100,000 square kilometres to claim two notional electors for each 100 square kilometres, and the district must then be within 10 per cent of quota at the time of the redistribution.\textsuperscript{283} At the most recent redistribution of Queensland’s 89 state parliamentary electoral districts, five large-area districts were drawn, generating notional elector numbers between 2,107 and 11,410.\textsuperscript{284} These notional electors in both Western Australia and Queensland allow a small number of very large-area districts to be set well below the normal quota: in 2008 Queensland’s largest district (Mt Isa) would have been 35 per cent below quota without the notional electors, and the 2011 WA district of North West Central would have been 57 per cent below quota.

The large-area allowance was formulated by the Queensland Electoral and Administrative Review Commission to help ensure a reasonable level of representation for these exceptionally large districts. Hughes described the intention:

> To let you into the proceedings of EARC, the five of us sat there with a referdex and worked out how long it would take, if you were the member for Gregory, to visit all towns over 500 population in your constituency – drove through at the speed limit and just shouted ‘Hi I’m your member’ as you passed through. If you drove all night you could do it in two days. That didn’t really seem representation.\textsuperscript{285}

The partisan effect of the large district allowance in Western Australia appears to be that Labor wins one and possibly two extra districts in a 59 seat House. The arrangements allow five districts where there are only three quotas of actual electors, and of the five large-area districts in WA, Labor won two in 2009, Liberals won two and an Independent won the fifth. But it is not at all clear which party benefits from the arrangement in Queensland which allows five districts where there are only four quotas of actual electors. There is a large Labor vote in remote areas and (unlike South Australia) an extra remote district does not necessarily give the

\textsuperscript{282} WA, Office of the Electoral Distribution Commissioners, 2011, \textit{Western Australia’s Final Electoral Boundaries}, The Office, Perth. The smallest of the five large-area districts in WA is Eyre with 295,533 km\textsuperscript{2}; the largest is North West Central with 656,533 km\textsuperscript{2}.

\textsuperscript{283} Queensland Redistribution Commission 2008, ‘Determination’, p. 2.251. In fact, two of the five districts would have been within quota even without the allowance.

\textsuperscript{284} The smallest of the five districts is Dalrymple with 105,337 km\textsuperscript{2}, the largest is Mount Isa with 570,502 km\textsuperscript{2}. Queensland Redistribution Commission 2008, ‘Determination’, p. 2.263.

\textsuperscript{285} Hughes 2007b, ‘The independence of electoral administration’, p. 88. A referdex is a roadmap.
Liberal-National Party an extra seat. Of Queensland’s five large-area districts, Labor won two in 2009 and the Liberal National Party won three.\(^{286}\)

In other jurisdictions the tolerance is used to set growth-area districts low and sometimes to set rural districts high in recognition of their slower growing population. This is particularly the case where redistribution authorities pay strict attention to a community of interest criterion when a district covering a new subdivision or satellite town will be set as low as the tolerance allows. In jurisdictions where maps are expected to last for two or three elections, growth can be accommodated in this way, but in several jurisdictions redistributions are conducted after each election and, if a development is delayed, a district can seem very small at the next election. South Australia’s EDBC faced this problem in 1994 when the Golden Grove development proposed a large increase in population in an Adelaide outer suburban area, but there was some uncertainty about just when it might begin. The commission split the development between two districts to hedge its bets.

A larger and clearer partisan advantage could be drawn into a map by setting one party’s districts at the low end of the tolerance, and setting the opposing party’s districts with larger numbers of electors, at the high end of the tolerance. Federal redistributions between 1977 and 1983 operated with a requirement to ensure that all districts covering 5,000 square kilometres had fewer electors than the city district with the smallest enrolment and, because the Liberal and National parties had more support in rural areas, the policy advantaged those parties.\(^{287}\) The requirement was abolished by Labor’s package of electoral reforms in 1983, but in the meantime it operated for the 1977 federal redistributions in every state and then for a second federal redistribution in Western Australia in 1980. Measuring the effect of this change would be difficult because the 1977 federal redistributions were also the first to use the tighter 10 per cent tolerance imposed in 1974, and indeed the 5,000 square kilometre rule seems to have been the price of Country Party agreement to the legislation. A covert version of this advantage was instituted by South Australia’s boundary commission in 1976. This was the first independent state redistribution commission, and was appointed to draw state electoral districts on an equitable basis for the first time, specifically without zones and with a tolerance that had just been reduced from 20 per cent to 10 per cent. But the commissioners were mesmerised still by the idea that at the boundary of the metropolitan area there was a change

\(^{286}\) A landslide election in 2012 gave two of the five districts to the Coalition, two to a minor party (Katter’s Australian Party) and one to Labor.

\(^{287}\) *Commonwealth Electoral Amendment Act 1977* (No. 14 of 1977) added subsection 19(2) to the *Commonwealth Electoral Act 1918* (Cwlth).
in communities of interest, and drew 14 districts outside the metropolitan area where only 13 quotas of electors lived.\textsuperscript{288} Because rural areas voted solidly Liberal, this gave the Liberal Party one extra seat.

Zonal malapportionment where a disproportionate number of districts is allocated to areas – usually a metropolitan zone and a rural zone – also operated in all Australian states prior to the one vote, one value reforms, and favoured the party with most support in rural districts.\textsuperscript{289} Hughes calculated Gini coefficients of inequality for the Commonwealth, where no zones were in place and malapportionment was limited, and for each state, and demonstrated significant differences in inequality between the jurisdictions. (A Gini coefficient of zero indicates absolute equality; at 1 there is absolute inequality.) Between 1949 and 1975 elector numbers in Tasmania’s state parliamentary districts, based on federal boundaries, generated Gini coefficients consistently below 0.1, indicating substantial equality, whereas South Australia’s zonal malapportionment produced coefficients that were never below 0.3 until the one vote, one value reforms began in 1968. Hughes separately estimated the Gini coefficients hypothetically assuming the districts within each zone had equal numbers of electors, and showed that

it is the existence of zones, rather than the departure of individual electorates from the zonal average or quota, which accounts for the amount of enrolment inequality prevailing at any one election.\textsuperscript{290}

On Hughes’ data, zonal malapportionment in Western Australia produced Gini coefficients above 0.2 for all of the period from 1949 to 1975, and that system remained intact until reform in 2005.\textsuperscript{291} It generated Gini coefficients of 0.18 and 0.16 at the state elections of 2001 and 2005.\textsuperscript{292} Reform reduced that level to 0.05 at the state election in 2008 but it could be lower still as South Australia’s coefficient is now regularly below 0.02. What keeps the WA measure of inequality relatively high – at a level comparable with Tasmania’s performance from 1949 through to 1975 – is the extent to which the large-area allowance is being used.


\textsuperscript{290} Hughes 1977b, ‘Malapportionment and gerrymandering’, p. 99.

\textsuperscript{291} As above, p. 98; N. Kelly 2006, ‘Western Australian electoral reforms: Labor finally succeeds’, \textit{Australian Journal of Political Science}, vol. 41, no. 3, pp. 419-26; also Robinson 2003, ‘One vote, one value’.

\textsuperscript{292} See Table 7.
Queensland also uses a large district allowance but generates Gini coefficients of 0.03 for its state elections of 2009 and 2012, suggesting that WA draws more heavily on the allowance. While Western Australia retained zonal malapportionment longest, the partisan effect of malapportionment was arguably strongest in South Australia where the geographic distribution of party support for much of the 20th century was polarised, with country areas voting strongly for the non-Labor parties, and much of the city strongly Labor.\(^{293}\) Zonal malapportionment meant that all rural districts were set low, disadvantaging Labor. Jaensch estimated that the Liberal Party retained government at five of the eight state elections from 1947 until 1968 without having the support of a majority of voters.\(^{294}\)

Australian redistribution authorities are now required to draw their districts to within 10 per cent of the average at the time of the redistribution (except in the NT and in WA where the large-area districts which can be up to 20 per cent lower than the average even once the notional electors are added) and Table 3 shows that they do achieve those targets, often with plenty to spare. The table shows, for the most recent redistribution in each state and territory, the tolerance and quota at the time of redistribution and how close the highest and lowest districts were to the quota. Federal redistribution commissioners comply with the allowable tolerance at the time of a redistribution more strictly than do state or territory authorities, perhaps not surprisingly given the advantage that the larger federal quota gives them. Without the smoke and mirrors of the large-area allowance calculation, Western Australia and Queensland could hardly be said to comply with a lower limit at all.


Table 3:
Tolerance at the time of redistribution and actual variation from quota, most recent redistributions

<table>
<thead>
<tr>
<th>Most recent redistribution</th>
<th>Quota (No. of electors)</th>
<th>Tolerance at redistribution (% from ave)</th>
<th>Largest district (% from ave)</th>
<th>Smallest district (% from ave)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commonwealth</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>NSW 2009</td>
<td>94,353</td>
<td>10</td>
<td>6.1</td>
<td>-7.2</td>
</tr>
<tr>
<td>Vic 2010</td>
<td>94,040</td>
<td>10</td>
<td>7.6</td>
<td>9</td>
</tr>
<tr>
<td>Qld 2009</td>
<td>88,343</td>
<td>10</td>
<td>9.6</td>
<td>-9.95</td>
</tr>
<tr>
<td>WA 2008</td>
<td>88,192</td>
<td>10</td>
<td>6.3</td>
<td>-7.2</td>
</tr>
<tr>
<td>SA 2011</td>
<td>100,636</td>
<td>10</td>
<td>4.2</td>
<td>-4.4</td>
</tr>
<tr>
<td>Tas 2009</td>
<td>70,441</td>
<td>10</td>
<td>1.2</td>
<td>-2.7</td>
</tr>
<tr>
<td>NT 2008</td>
<td>59,680</td>
<td>10</td>
<td>2.5</td>
<td>-2.5</td>
</tr>
<tr>
<td>ACT 2005</td>
<td>114,630</td>
<td>10</td>
<td>4.2</td>
<td>-4.2</td>
</tr>
<tr>
<td>New South Wales</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2003</td>
<td>45,986</td>
<td>10</td>
<td>6.9</td>
<td>-6.8</td>
</tr>
<tr>
<td>Queensland</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>without LDA (a)</td>
<td>2008</td>
<td>29,560</td>
<td>9.2</td>
<td>-34.5</td>
</tr>
<tr>
<td>with LDA (a)</td>
<td>2008</td>
<td>29,560</td>
<td>9.2</td>
<td>-9.9</td>
</tr>
<tr>
<td>Western Australia</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>without LDA (a)</td>
<td>2011</td>
<td>23,178</td>
<td>8.8</td>
<td>-57.4</td>
</tr>
<tr>
<td>with LDA (a)</td>
<td>2011</td>
<td>23,178</td>
<td>+10/-20</td>
<td>8.8</td>
</tr>
<tr>
<td>South Australia</td>
<td>2010</td>
<td>23,354</td>
<td>9.9</td>
<td>-9.5</td>
</tr>
<tr>
<td>Tasmania</td>
<td>2009</td>
<td>70,441</td>
<td>1.2</td>
<td>-2.7</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>2011</td>
<td>4,838</td>
<td>7.6</td>
<td>-7.1</td>
</tr>
<tr>
<td>Australian Capital Territory</td>
<td>2011</td>
<td>14,572</td>
<td>1.3</td>
<td>-2.2</td>
</tr>
</tbody>
</table>

Note: (a) LDA is the large district allowance.

If equality at the time of the redistribution is the over-riding legislative requirement in all jurisdictions, there is no reason why Table 3 should show any variations from the quota. US courts have required strict equality at the time congressional districts are drawn, so that the first election on a new map will use districts which are as equal as possible, even if enrolment and turnout differentials then vary the actual number of votes lodged in each district. For the first maps drawn after the 1964 one vote, one value judgments, US courts allowed tolerances...
of over 15 per cent.\textsuperscript{295} Australian authorities were working with 20 per cent at the time, but since then the US Supreme Court has systematically narrowed electoral districts’ population tolerances to the extent that redistricting authorities now need to show ‘a legitimate state objective’ for any deviation from equality in a congressional plan.\textsuperscript{296} In \textit{Karcher v. Daggett} it decided that a difference of under 1 per cent between the largest and smallest of New Jersey’s 1981 congressional districts was too large. The court decided that as long as challengers could offer a map with smaller variations, then all population variations needed to be justified.\textsuperscript{297} Strict equality is therefore the rule for congressional districts, and the 2012 court-drawn plan for Connecticut is not unusual in having just a one-person difference between districts.\textsuperscript{298} National Conference of State Legislatures (NCSL) data for the post-2010 census round show that 20 of the 50 states have adopted congressional district maps in which the census population of each district is either exactly the same as each other district in the jurisdiction or differs by only one person.\textsuperscript{299}

While the US Supreme Court requires strict equality for congressional districts it only needs ‘substantial equality’\textsuperscript{300} for legislative districts, and the standard now seems to be that a plan for a state legislature may not need to be justified if it has an overall variation between the largest and smallest districts of under 10 per cent.\textsuperscript{301}

Once the plan’s deviation exceeds this threshold, a prima facie case of discrimination has been established and the court must then determine whether the plan advances a rational state policy and whether the deviation exceeds constitutional limits.\textsuperscript{302}

US districts are based on population equality, not elector numbers, and there is no compulsory enrolment nor compulsory attendance to vote, so election outcomes are less directly connected to electoral district populations than in Australia, and the US redistribution system could be expected to tolerate wider disparities between districts. In fact, US courts have

\textsuperscript{297} As above.
\textsuperscript{298} \textit{In re Petition of Reapportionment Commission, ex. rel., Draft Report and Plan of the Special Master}, Supreme Court of the State of Connecticut, No. SC 18907.
\textsuperscript{299} Data available at www.ncsl.org.
\textsuperscript{300} Reynolds v. Sims, 377 U.S. 533, 579 (1964).
\textsuperscript{301} This is not quite the same as a tolerance of +/-5 per cent, because a district set at 7 per cent above the average population may be acceptable if the lowest district is just 3 per cent below the average.
\textsuperscript{302} NCSL 2009, \textit{Redistricting Law 2010}, p. 36.
tightened population tolerances because they have not been able to derive a standard for
gerrymandering from the Constitution, and inequality has been a convenient ground to
invalidate gerrymandered maps. Grofman has characterised this area of the law as well past
mature, and in fact
to characterize it as in an advanced stage of senility would not be far off. That is to
say, it repeats itself endlessly and mindlessly with no particular point, and having
largely lost track of whatever it was that motivated courts to get into the business
in the first place. The limits on acceptable limits are far stricter than what was
either foreseen (or advocated) by the early supporters of Baker v. Carr, especially
when we look at congressional districting.303

By contrast, Australian tolerances were narrowed from 20 to 10 per cent as part of the one
vote, one value reforms in order to ensure greater equality and have been held at 10 per cent
for a reason – to allow districts to be set low or high at the time of the redistribution in order
to maintain equality through the life of a map. All Australian redistribution legislation has a
requirement that population change should be borne in mind, and several jurisdictions
specifically require districts to be drawn so that they are not only within 10 per cent of the
average at the time of the redistribution but are also within a neater tolerance during the life
of the map. In 1983 Hughes, then Professorial Fellow in political science at the Australian
National University, argued against a proposal to reduce the tolerance in Commonwealth
legislation from 10 to 5 per cent. He argued that unless the frequency of redistrbutions was
also changed – perhaps to three years from seven – a lower initial tolerance would make it
difficult for federal redistribution committees to set growing areas low enough to keep them
within tolerance.304 Table 3 shows that the federal authorities have managed to work well
within the tolerance when drawing maps for the slower-growing states of SA and Tasmania but
stretch the tolerances for the faster-growing states.305

That table shows the extent to which Australian redistribution authorities choose, or feel
obliged, to take other matters into account in drawing electoral boundaries. They could follow
the US and aim for greater equality at the time of the first election after a redistribution, but

303 B. Grofman 1992, 'What happens after one person-one vote? Implications of the United States
experience for Canada', in Drawing Boundaries: Legislatures, Courts and Electoral Values, eds J.C.
Courtney, P. MacKinnon & D.E. Smith, Fifth House, Saskatoon, p. 159.
305 An alternative, used in SA in 1994, would be to divide a growth area between two divisions, at the
risk of a community of interest objection.
they have a more important focus: setting districts low or high in order to have them roughly equal at a future time.

Abolishing zones and requiring districts to be set within a fairly small tolerance of quota at the time of redistribution was a response to the harm of zonal malapportionment; the harm of creeping malapportionment is addressed by keeping districts within tolerance over the life of a map so that district enrolments will ideally be equal at the time of a future election.

Three factors work against equal enrolments at the time of any given election. First, the large district allowances in WA and Queensland prevent actual equality at the time of a future election; second, federal maps and those for the larger states are expected to remain operative for long periods, making it impossible to have enrolments equal at all of the elections within the life of the map; and third, some parliaments have not given priority to having districts within tolerance at a future time.

The pursuit of equality at a future time was not an obvious priority for redistribution authorities. It involves the use of population projections which can in turn require information on planning and development policies as well as enrolment projections. In South Australia the 1976 redistribution commission chose to ignore a requirement to consider the effect of demographic change.

[A] district with a rapidly increasing electorate should, other things being equal, be placed below quota and there should be corresponding degrees of tolerance in static or declining districts. But we have found that other things are rarely equal and other criteria may impose other solutions.  

By the time of the state election less than a year later, two newly drawn city districts were already more than 10 per cent larger than the average and three rural districts were more than 10 per cent below, and by the time of the third election the 1976 boundaries the effect was even more pronounced.

By contrast with South Australia’s 1976 state redistribution commission, federal commissions of the time had been making allowances for the possibility of population growth throwing districts out of tolerance, even without a legislated instruction. As far back as 1955 they had ‘taken into consideration proposed plans for present and future development, both industrial

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and residential’. The 1955 determination gave South Australia an extra federal division and the redistribution commissioners took account of a proposed new satellite city to set one division 18 per cent below the average – and even then the long periods between Redistributions meant that it was 73 per cent over quota by the time of the next Redistribution in 1968. The commissioners’ practice was only formalised in 1965 when the Commonwealth Electoral Act was amended to include a requirement to consider ‘the trend of population changes within a state’.

In 1977 the High Court moved the focus of apportionment determinations – and indirectly Redistributions as well – to an election date. In the McKinlay case the court considered whether the provision at s. 24 of the Commonwealth of Australia Constitution Act (‘The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth’) and its supporting provisions should be understood as prohibiting malapportionment. Plaintiffs argued that ‘chosen by the people’ in s. 24 ‘could only be given effect if interpreted to mean “chosen by the people so that each has a vote of equal value”’. In support of their argument they referred to a series of US Supreme Court cases, beginning with Wesberry v. Sanders, in which the court had interpreted the US Constitution’s similar wording to mean that congressional districts must be redrawn so that ‘as nearly as is practicable one man’s vote in a congressional election is...worth as much as another’s.’ The Australian court distinguished between the meaning of these phrases in the US and Australian constitutions on the grounds of the countries’ different constitutional histories, and refused to recognise an equality requirement in Australia’s constitution. Barwick CJ pointed out that apportionment between states and territories guarantees five divisions to the original states regardless of their population, and that the determination of each jurisdiction’s entitlement is made on the basis of population rather than electors. But he did find that apportionment

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307 Australia, Parliament 1954-55, Report by the Commissioners Appointed for the Purpose of Redistributing the State of South Australia into Electoral Divisions, Parl. Paper 64, Canberra, p. 4.
308 Calculated from data at p. 2 of Australia, Parliament 1968, Report by the Distribution Commissioners Appointed for the Purpose of Redistributing the State of South Australia into Electoral Divisions, Parl. Paper 99, Canberra.
309 Insertion of the demographic change criterion was an express statement of a factor ‘in respect of which some allowance has invariably been made by Commissioners at past distributions’, J.D. Anthony, APD-HR, 12 May 1965, p. 1430.
311 Wesberry v. Sanders, 376 U.S. 1, 8 (1964). The basis is Article I, s. 2 of the US Constitution: ‘Representatives...shall be apportioned among the several states...according to their respective numbers.’
312 Attorney-General (Cth); Ex rel McKinlay v. Commonwealth (1975) 135 CLR 1, 22, 25.
determinations made after each five-yearly census fell short of the s. 24 requirement that they be made ‘whenever necessary’.

The expression “whenever necessary” is related to the holding of an ordinary general election and not to changes in population. In my opinion, it calls for a determination to be made in each triennial parliamentary period and in time for use in an ordinary general election for the House of Representatives.313

The High Court held that states and territories were entitled to elect a correct number of Members to the House of Representatives at each general election, and as a result the Commonwealth Parliament legislated to require apportionment determinations one year after a newly elected government had begun its parliamentary term.314

In McKinlay the High Court specifically refused to recognise an implied requirement that elector numbers should be equal, but did indicate that the relevant time at which entitlements should be correct was the date of a subsequent election. That reasoning has never formally been extended to redistributions as well as apportionment determinations, but the analogy is at least arguable. A jurisdiction taking that aim seriously could be expected to have redistributions after each general election, with a legislative requirement that districts be within a narrow tolerance of the quota at the time of the subsequent election (a large district allowance would not be possible). The Appendix shows that only one Australian jurisdiction currently complies with those few requirements. Queensland and Western Australia cannot comply as long as they retain their large district allowance; NSW, Victoria and the Commonwealth retain their maps for several elections; South Australia and the Northern Territory have no legislated tolerance at the future time (although in practice South Australia does comply because the demographic change criterion is understood to require equality at a future date); and only the Australian Capital Territory legislation complies.

Elsewhere the priorities are different. Queensland’s redistribution system seems almost to have been designed to prevent elections on the basis of districts with equal enrolments. The large district allowance means that some districts will always be much smaller than average, maps stay in place for nine years so demographic change is likely to throw some districts well out of tolerance and there is no legislated tolerance at a future time. Queensland’s most

313 As above, p. 33.
314 Representation Act Amendment Act 1977 (Cwlth).
recent redistribution commission, in 2008, worked with projected elector population data for December 2014.

The demographic change criterion in Queensland’s electoral law requires a commission to consider...demographic trends in the State, with a view to ensuring as far as practicable that, on the basis of the trends, the need for another electoral redistribution will not arise under section 39 [malapportionment] before it does under section 38 [three elections or seven and a half years, whichever is later].\textsuperscript{315}

The Electoral and Administrative Review Commission’s 1990 review of the electoral system specifically reaffirmed the existing demographic change criterion, including its function to ‘maximise electoral equality over time’, but declined to recommend a tolerance for elector numbers midway through a redistribution because it was more concerned about representation of larger districts, and a specified tolerance at a future time might ‘fetter [the commission’s] discretion with adverse effects in the application of the non-quantitative principles’.\textsuperscript{316} Nonetheless, Queensland’s legislation contains an implied tolerance of 10 per cent in two-thirds of the districts because anything more would trigger a redistribution.\textsuperscript{317}

Queensland has registered rapid growth in the cities of its south-eastern corner and keeping two-thirds of its districts within 10 per cent of the average for nine years could be difficult, so a commission might be tempted to corral much of the expected growth to a few districts which could then be allowed to blow out and still not activate a malapportionment trigger. The 2008 commission resisted that option and spread the projected growth so that 14 of the 89 districts were expected to be outside the 10 per cent tolerance by December 2014, and one egregiously so (Bundamba at 46 per cent over).\textsuperscript{318}

Western Australia also has a large district allowance and a demographic change criterion without a specific requirement that districts be within tolerance at the time of the subsequent election. A malapportionment trigger cannot stand in as a guide to the level of equality required – redistributions occur after each WA general election so it is redundant.

Like WA, Victoria has a demographic change criterion with no specified tolerances. Neither state has interpreted the requirement to mean anything more than that areas which are likely

\textsuperscript{315} Electoral Act 1992 (Qld) s. 46(1)e; author’s clarification in brackets.
\textsuperscript{316} EARC 1990, Report on Queensland Legislative Assembly, p. 190.
\textsuperscript{317} Electoral Act 1992 (Qld) ss. 39, 45.
to grow more quickly should be set low. Victoria might have been expected to take this
criterion more seriously: its legislation contains an admonition that the function of its Electoral
Boundaries Commission is to divide the state for the conduct of elections

    with the object of establishing and maintaining electoral regions of approximately
equal enrolment and electoral districts of approximately equal enrolment and to
determine the boundaries thereof.319

Given that the House of Representatives has a relatively short term of office – three years –
and federal redistribution authorities draw maps for eight states and territories, it may be too
much to expect the federal parliament to provide for federal redistributions every term.
Instead, Commonwealth maps stay in place for seven years which usually means three
elections.320

Tasmania adopts federal division boundaries for its own state lower house districts, electing
five members to each district, so the difficulty of long periods between redistributions applies
equally to Tasmania’s state electoral districts. Electoral districts for the NSW lower house also
stay in place for two elections. Legislation covering both federal and New South Wales
redistributions specifically requires equal enrolments in each district at the time of the
subsequent elections to within just 3 per cent in NSW and 3.5 per cent federally. Those
tolerances are much tighter than the 10 per cent tolerance at the time of the redistribution,
and the difference indicates that the federal and NSW parliaments understand equality in
terms of electoral competition rather than representation. Indeed, the Commonwealth
requirement originally had no specified tolerance at all, and the commission adopted a
practical limit of 2 per cent which was formally adopted in the legislation in 1987 and then
increased to 3.5 per cent in 1998.321 One effect of the longer life of federal and NSW maps and
their tight tolerances midway through the life of a map is that rapidly growing districts can
need a wider initial tolerance in order to be set very low initially.

As in WA and Victoria, South Australia’s legislation has a demographic criterion without a
legislated tolerance but it is clearly focused on the date of the next general election: the EDBC
must

319 Electoral Boundaries Commission Act 1982 (Vic) s. 5(1); author’s emphasis.
320 Apportionment changes do trigger earlier redistributions, usually just in two states.
321 Commonwealth Electoral Amendment Act 1987 (Cwlth); Electoral and Referendum Amendment Act
1998 (Cwlth). Hughes said the commission considered that a judge might allow a tolerance of 2 per cent.
have regard, as far as practicable, to...the nature of substantial demographic changes that the Commission considers likely to take place in proposed electoral districts between the conclusion of its present proceedings and the date of the expiry of the present term of the House of Assembly.322

Unlike WA and Victoria, South Australia’s commission follows the original federal commission’s example and interprets that provision strictly. It was not always so. South Australia’s demographic change provision was inserted as part of the Labor electoral reforms of 1975, but the 1976 commissioners merely ‘kept this criterion in mind’ and the 1983 commission, unwilling to take responsibility for projections, considered that it was ‘virtually impossible to predict what variations’ might occur.323 But in 1991 the redistribution took place in the context of a wrong winner election and then a referendum to change the state constitution to allow more frequent redistributions, and the EDBC grasped the nettle. It was ‘fortified in its determination to apply the spirit as well as the letter’ of the equality criterion, and ‘in an effort to avoid even a slight return to the evident injustices which occurred over the 50 years prior to 1975’324 the commission drew on the demographic change criterion to focus its efforts on equality at the time of the next election ‘when each elector is entitled to enjoy, and to perceive, equality in voting power with all other electors.’325 The 1991 commission aimed for metropolitan districts which would be within 2.5 per cent of the average at the time of the next election, outer metropolitan districts within 3 per cent and rural districts within 3.5 per cent. In fact, compliance with South Australia’s fairness clause meant the commission felt obliged to draw nine of its 47 districts with projected elector numbers outside these limits; more recently the 2006 EDBC relaxed the tolerance for metropolitan districts to 3.1 per cent (and retained the 3.5 per cent limit for rural districts) at the time of the subsequent election, and managed to draw all but one of its districts within that limit.326 The 2012 EDBC aimed for a 3 per cent tolerance for city districts but allowed two large-area districts to be drawn below a 5 per cent tolerance by the time of the next election.327

The Northern Territory could come closer to the aim of equality at the time of an election; redistributions are held after each general election, and there is a legislated requirement that

322 Constitution Act 1934 (SA) s. 83(2)e.
325 As above, p. 27.
districts be ‘as near to equal as practicable’ at the time of the subsequent election, but the NT retains a 20 per cent tolerance at the time of the redistribution so it is not clear just how equal districts would need to be.

Winner in the ‘future equality requirements’ stakes must be the ACT which redistributes after each election and has a legislated tolerance of just 5 per cent at the time of the next election. It also draws just three – multi-member – districts.

While most Australian parliaments have failed to require their redistribution authorities to provide them with the basis of fair electoral competition at a subsequent election – districts with equal elector numbers – it is clear that commissions can interpret their legislation in ways that will promote equality. And they probably do. All Australian redistribution authorities do now set districts low if they are likely to grow strongly, and higher than average if they are expected to grow more slowly than the average, so even if there are a few which will always be very low, and a few which have grown wildly over time, it may be the case that electoral districts are actually equal enough at election times.

Redistribution legislation throughout Australia requires that districts will be drawn on a fairly regular basis and that a map can be adjusted if enough fall out of tolerance before a scheduled redistribution. So it is not an unreasonable question to ask how well Australian redistributions ensure equality when it really counts – at elections. It is accepted that some redistribution authorities are required to aim for equal enrolments at a point during the life of the map, and that some maps are required to stay in place for two or even three elections, so the future time for which redistribution authorities can aim to provide equal district enrolments is not always the date of a future election. An assessment of equality at the time of elections is therefore more an evaluation of how well the legislation achieves equality at the time of elections than of how well redistribution authorities achieve their aims.

Australian electoral commissions regularly report the number of electors enrolled in each electoral district at the time of state and federal elections. What is not widely agreed is how close to equality districts should be. Those redistribution authorities which aim for equality at a future time interpret it to mean being within 3 per cent of the average (NSW), 3.5 per cent (federally), 5 per cent (ACT) or just ‘as near as practicable’ (NT). South Australia’s commission aims for all districts to be within 3.5 per cent and metropolitan districts to be even closer. Certainly districts with elector enrolments of over 10 per cent from the average would not be considered equal enough, because several jurisdictions have identified 10 per cent as the level
which would trigger a redistribution on malapportionment grounds if enough districts pass that point. But in NSW even 5 per cent from the average might be considered too wide of the mark, given that under NSW legislation districts are considered to be malapportioned at just 5 per cent from the average if enough of them pass that point (see the Appendix).

In the absence of an agreed standard for equality in Australia it is open for this thesis to offer one. It is proposed that a tolerance of 5 per cent above or below the average be adopted as the maximum by which a district’s enrolment could vary from the average at the time of an election and still be regarded as equal to the average at that time. And that acceptable compliance would require that a jurisdiction should have a majority of its districts within 5 per cent of the average at the time of any election. Tables 4 and 5 show the percentage which were within 5 per cent of average enrolments at the time of recent elections in each jurisdiction.

First, Table 4 refers to equality at federal elections. It indicates when redistributions occurred, marking them with a horizontal line, so it can be understood as showing the results at elections held on particular maps. For example, in NSW the federal elections of 1993, 1996 and 1998 were all held on the same map; the seven year rule triggered a redistribution in 1999 which reported in 2000 and NSW electors voted at the federal elections of 2001 and 2004 in new divisions. In 2006 an apportionment determination reduced the state’s entitlement by one division and triggered a redistribution, so the 2007 federal election was held on a new map. Another apportionment determination in 2009 withdrew another division and again triggered a redistribution. The federal election of 2010 was fought on new division boundaries.
Table 4:

**Equality of enrolments at the time of federal elections:** percentage of divisions with electoral enrolments within 5 per cent of the average, 1990 to 2010

<table>
<thead>
<tr>
<th>Federal election</th>
<th>NSW</th>
<th>Vic</th>
<th>Qld</th>
<th>WA</th>
<th>SA</th>
<th>Tas</th>
<th>ACT (a)</th>
<th>NT(b)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990</td>
<td>66.7</td>
<td>86.8</td>
<td>45.8</td>
<td>64.3</td>
<td>84.6</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
</tr>
<tr>
<td>1993</td>
<td>84.0</td>
<td>86.8</td>
<td>80.0</td>
<td>85.7</td>
<td>83.3</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
</tr>
<tr>
<td>1996</td>
<td>90.0</td>
<td>75.7</td>
<td>61.5</td>
<td>50.0</td>
<td>66.7</td>
<td>100.0</td>
<td>66.7</td>
<td></td>
</tr>
<tr>
<td>1998</td>
<td>70.0</td>
<td>91.9</td>
<td>66.7</td>
<td>78.6</td>
<td>58.3</td>
<td>80.0</td>
<td>100.0</td>
<td></td>
</tr>
<tr>
<td>2001</td>
<td>88.0</td>
<td>86.5</td>
<td>70.4</td>
<td>86.7</td>
<td>100.0</td>
<td>80.0</td>
<td>100.0</td>
<td>100.0</td>
</tr>
<tr>
<td>2004</td>
<td>84.0</td>
<td>86.5</td>
<td>89.3</td>
<td>93.3</td>
<td>81.8</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
</tr>
<tr>
<td>2007</td>
<td>89.8</td>
<td>67.6</td>
<td>100.0</td>
<td>40.0</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
</tr>
<tr>
<td>2010</td>
<td>93.8</td>
<td>45.9</td>
<td>70.0</td>
<td>93.3</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
</tr>
</tbody>
</table>

**Notes:**
(a) In 1996 the ACT elected three members to the House of Representatives but has only elected two at any other election.
(b) Until 2001 the Northern Territory elected just one member to the House of Representatives; since then it has elected two.
Redistributions are indicated with broken lines.

It is clear that compliance in the states and territories where there are only small numbers of federal divisions – Tasmania (five), the ACT (two) and the NT (two) – will be very lumpy. One Tasmanian division growing faster than expected could reduce the proportion of complying Tasmanian divisions from 100 per cent to 80 per cent; in the ACT and NT one division growing faster than expected will change compliance from 100 per cent to 50 per cent. Given that their compliance with the 5 per cent tolerance is generally excellent, the focus should move from these smaller jurisdictions to the larger states.

For most of the period under review NSW had 50 federal divisions and it currently has 48, so one division moving out of tolerance would change the overall percentage of divisions complying by just 2 per cent. Similarly, Victoria had 37 divisions for most of the period, so one division moving out of tolerance would reduce the proportion complying by about 3 per cent. It is surprising then to see that at several elections these two large states had relatively low levels of equality. At the 1998 federal election in NSW, for example, only 35 of the 50 divisions (70 per cent) had equal numbers of electors (to within 5 per cent of the average). Much worse was the performance of Victoria’s divisions at the 2010 federal election when most would not
have been even within 5 per cent of average and so could not be considered to have been equal. The worst performance of all was that of WA divisions in 2007 when only 40 per cent could have been considered equal. WA had 15 divisions at the time, and nine of them had more than 5 per cent too many or too few electors to be considered equal to the state average.

It is clear that inequality creeps back into maps when they stay in operation for three elections. The Commonwealth legislation requires redistribution committees to aim for equality at a point half way through the expected life of the map, and indeed Table 4 shows that some maps have performed well at the second election (NSW in 1996, Victoria in 1998, WA in 2004, SA in 2007) but there are as many examples of inequality at a second election (Victoria in 2007, Queensland in 2001, WA in 1996, SA in 1996), and more recent redistributions do not seem to have been any better than earlier ones. It is also interesting to see that federal maps do often stay in place for three elections. If an election is held soon after a redistribution, there is likely to be time for two more to be held within the life of the map. There is another reason, too: sometimes the life of a map is extended because of the savings provision which delays a redistribution by one year if it would fall due during the last year of a three year federal parliamentary term. The Victorian redistribution of 2010 shows the wisdom of a provision which delays redistributions if they might be completed too close to an election to allow candidates to campaign effectively, or if the commissioners’ deliberations might be rushed to meet an approaching election, but the effect of this sensible provision is nonetheless that districts stay in place past their use-by-date and equality is compromised when it really counts, at an election.

It is accepted that a map could be judged differently if it has many districts just over the 5 per cent tolerance, compared to one with a few districts which are well out of tolerance, even egregiously so. To illustrate the overall extent of equality in each jurisdiction’s federal districts at the time of federal elections, Table 5 shows the Gini coefficients of federal enrolments.

The Gini coefficients give the territories a much poorer score for equality than the states, essentially because of the lumpiness of change where there are only a few divisions. Once again the focus should rather be on the states. The Gini coefficients do show that equality was lower (and to roughly the same extent) in Victoria in 2010 and WA in 2007 but what is most obvious from Table 5 is that the coefficients are nowhere near the levels of 0.2 and 0.3 that Hughes found when he calculated Gini coefficients for elector equality for the period from 1949 to 1975: his calculations produced coefficients between 0.1 and 0.2 for Commonwealth
elections. Given that there had never been egregious malapportionment under the Commonwealth system, the improvement is likely to have been due mostly to the 1983 reforms, particularly tighter tolerances, aiming for equality midway, and more regular redistributions.328

Table 5:

Equality of enrolments at the time of federal elections: Gini coefficients for electoral enrolments within each jurisdiction, 1990 to 2010

<table>
<thead>
<tr>
<th>Federal election</th>
<th>NSW</th>
<th>Vic</th>
<th>Qld</th>
<th>WA</th>
<th>SA</th>
<th>Tas</th>
<th>ACT</th>
<th>NT</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990</td>
<td>0.04</td>
<td>0.00</td>
<td>0.00</td>
<td>0.01</td>
<td>0.03</td>
<td>0.05</td>
<td>0.02</td>
<td></td>
</tr>
<tr>
<td>1993</td>
<td>0.02</td>
<td>0.02</td>
<td>0.02</td>
<td>0.02</td>
<td>0.02</td>
<td>0.05</td>
<td>0.25</td>
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<tr>
<td>1996</td>
<td>0.02</td>
<td>0.02</td>
<td>0.03</td>
<td>0.04</td>
<td>0.03</td>
<td>0.05</td>
<td>0.13</td>
<td></td>
</tr>
<tr>
<td>1998</td>
<td>0.03</td>
<td>0.02</td>
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<td>0.02</td>
<td>0.03</td>
<td>0.05</td>
<td>0.25</td>
<td></td>
</tr>
<tr>
<td>2001</td>
<td>0.02</td>
<td>0.02</td>
<td>0.03</td>
<td>0.02</td>
<td>0.01</td>
<td>0.05</td>
<td>0.25</td>
<td>0.25</td>
</tr>
<tr>
<td>2004</td>
<td>0.02</td>
<td>0.02</td>
<td>0.02</td>
<td>0.02</td>
<td>0.02</td>
<td>0.05</td>
<td>0.26</td>
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<tr>
<td>2007</td>
<td>0.02</td>
<td>0.03</td>
<td>0.01</td>
<td>0.04</td>
<td>0.02</td>
<td>0.05</td>
<td>0.26</td>
<td>0.26</td>
</tr>
<tr>
<td>2010</td>
<td>0.02</td>
<td>0.04</td>
<td>0.03</td>
<td>0.02</td>
<td>0.02</td>
<td>0.04</td>
<td>0.25</td>
<td>0.25</td>
</tr>
</tbody>
</table>

Notes:
In 1996 the ACT elected three members to the House of Representatives but has only elected two at any other election. Until 2001 the Northern Territory elected just one member to the House of Representatives; since then it has elected two. Redistributions are indicated with broken lines.

Still, it is disturbing to see the relatively low equality scores – either in terms of compliance with a 5 per cent tolerance or in terms of Gini coefficients – when a federal map reaches the end of its life. If a federal redistribution commission must aim to produce a set of districts that is equitable half way through the life of a map, to within just 3.5 per cent of the average number of electors, should maps that cannot even have a majority of divisions within a 5 per cent tolerance be accepted? Commonwealth redistributions were always the gold standard while Australia’s states clung to malapportionment, and the 1983 reforms ensured even

328 Wright and Haber give the example of Victoria’s division of Bruce which at the 1966 federal election held four times as many enrolled voters as the Victorian division with the fewest electors. The introduction of a legislative requirement in 1965 that Commonwealth redistribution authorities consider demographic change would have cut that overhang back considerably at future redistributions. J. Wright & E. Haber 1978, ‘Equal electorates, unequal votes – 1977 House of Representatives election aftermath’, *Australian Quarterly*, vol. 50, no. 2, p. 94.
greater equality for Commonwealth Redistributions, but the states now do better than the Commonwealth: Table 6 shows the equality of state and territory districts at the time of the elections in each jurisdiction.

Table 6:
Equality of enrolments at the time of state and territory elections: percentage of districts with enrolments within 5 per cent of the average, 1996 to 2012

<table>
<thead>
<tr>
<th>Election</th>
<th>NSW</th>
<th>Vic</th>
<th>Qld</th>
<th>WA</th>
<th>SA</th>
<th>Tas</th>
<th>ACT</th>
<th>NT</th>
</tr>
</thead>
<tbody>
<tr>
<td>1996</td>
<td></td>
<td></td>
<td></td>
<td>40.9</td>
<td>0.0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1997</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1998</td>
<td></td>
<td></td>
<td></td>
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<td>91.4</td>
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</table>

Note: Redistributions are indicated with broken lines.

Once again, when reading down the columns, the horizontal lines indicate that a redistribution has taken place between elections. Once again the jurisdictions with only a few districts (Tasmania with five multi-member districts and the ACT with three) either comply perfectly or have problems – in small systems one district can create large effects moving in or out of compliance. And once again equality suffers badly when maps are in place for three elections: Victoria and Queensland have both conducted elections with barely 40 per cent of their districts within 5 per cent of the average number of electors.

This table of state and territory districts differs from the federal table in several ways. The Northern Territory now has more useful data because it has 25 electoral districts for Territory elections. The results for WA prior to the redistribution of 2008 record the last elections under zonal malapportionment anywhere in Australia. It is clear from the table that WA has not, even
now, managed to achieve equality, but Queensland and Victoria perform poorly too. It might be argued that WA and Queensland cannot comply because their large district allowances mean that there will always be about five districts below 5 per cent of the average, but the levels of compliance with a 5 per cent tolerance shown in the table are far wide of that mark. At the first election after Queensland’s 2008 redistribution of state district boundaries, five districts were outside the 5 per cent because of the large district allowance, but so were another 23 of the state’s 89 districts. By the time of the next election in 2012, 30 had too few or too many electors to be within 5 per cent of average enrolments. While these levels are a substantial improvement on the performance of the previous map, they show that the large district allowance has influenced the redistribution authority to the extent that it places a lower priority on compliance with equality for other districts as well.

Western Australia’s state districts were redrawn radically in 2007 after the passage of that state’s one vote, one value legislation, and the subsequent election in 2008 was the first held without malapportionment. Five districts were drawn very low with the assistance of the large district allowance but another 11 were also too low and 15 were too high. In a jurisdiction of 57 districts, setting just the large-area districts outside a 5 per cent tolerance would mean compliance of 91 per cent, but WA managed just 56 per cent.

Victoria’s current map could, with a generous impulse, have been thought to comply (74 per cent) when it was first used but at its third election it certainly did not, with only 41 per cent of its districts recognisable as equal to the average. Victorian electors were poorly served by their district boundaries at both state and federal levels in 2010; neither the state map nor the federal map had a majority of districts that were within 5 per cent of the average. Redistribution of state district boundaries is planned for 2012-13.

New South Wales has been successful in recent years but the second election on its previous plan had 30 of its 93 districts more than 5 per cent from the average number of electors. That was a particularly poor result given that the NSW legislation is the most stringent of any in Australia: it requires the commission to aim for districts that will be within 3 per cent of the average at the next election. The current map was better and a new redistribution will now occur.

South Australia has consistently out-performed all other jurisdictions, with over 90 per cent compliance at any given state election. The combination of a focus on equality at a future time and redistributions after each election might account for much of that success but there is
another factor which is likely to explain a lot. When legislation was amended to include a fairness requirement, the community of interest criterion was specifically downgraded in importance so that equality and partisan fairness could be given priority. That has left no support in South Australia for arguments that community of interest should over-ride equality.

The results for Tables 4 and 6 indicate that malapportionment triggers in Australian legislation are set at a level that is too high to be useful. Western Australia went into the federal election of 2007 with elector numbers in only 40 per cent of its federal divisions within 5 per cent of the average, and at the next election only 46 per cent of Victoria’s federal divisions were within 5 per cent of the average for that state. But the federal malapportionment trigger does not cut in until the level reaches 33 per cent of districts and even then it applies a much wider tolerance of 20 per cent from the average (see the Appendix). At state level Queensland had a map which operated for three elections and barely scraped past 50 per cent compliance with a 5 per cent tolerance at any of them, but the malapportionment trigger, set in the same way as the federal requirement, did not operate. Victoria went into its state election in 2010 with enrolments in only 41 per cent of its districts within 5 per cent of the average and its trigger – so complicated that it seems designed to avoid operation – was not activated.

Perhaps most troubling are the districts produced for Western Australia’s election in 2008. Even after the introduction of one vote, one value legislation and a new map, only 56 per cent were within 5 per cent of average enrolments. There is no malapportionment trigger in WA because maps are redrawn after each election. But this low level of equality is not likely to be corrected by the next map because it is generated by the redistribution commission prioritising community of interest considerations over equality, and another map may be expected to have the same effect.

The Gini coefficients for state and territory district equality are shown in Table 7.

Tables 4 to 7 show clearly that maps can produce equality for one election and perhaps two but not for three; and that when states continue to privilege representation over equality (through community of interest arguments and large district allowances) the deficit in equality is measurable and much greater than is generally acknowledged.
Table 7:
Equality of enrolments at the time of state and territory elections: Gini coefficients for electoral enrolments within each jurisdiction, 1996 to 2012

<table>
<thead>
<tr>
<th>Election</th>
<th>NSW</th>
<th>Vic</th>
<th>Qld</th>
<th>WA</th>
<th>SA</th>
<th>Tas</th>
<th>ACT</th>
<th>NT</th>
</tr>
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<td></td>
<td>0.16</td>
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<td></td>
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<td></td>
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<td></td>
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<td>0.01</td>
<td>0.05</td>
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<td>0.02</td>
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</tbody>
</table>

Note: Redistributions are indicated with broken lines.

For those jurisdictions which do aim for equality at the time of an election, achieving the aim depends on the quality of elector projections, which depend in turn on the mechanics of population projections as well as on the comprehensiveness of the electoral roll. Projection methodology produces estimates that will be closest to actual population when the timeframe is short, so jurisdictions where a redistribution is conducted after each election work with more accurate estimated elector numbers at a future time. Australian redistribution authorities are advised on population and enrolment projections by outside authorities: the Australian Bureau of Statistics produces enrolment projections for federal redistributions ‘using AEC enrolment data and a cohort-component method to project the enrolment of each CCD’.  

329 Australia, Parliament 2011, 2010 Proposed Redistribution of Victoria into Electoral Divisions, Parl. Paper 29, Canberra, p. 4. (A CCD is a census collection district, the smallest geographic unit for censuses prior to 2010; the smallest unit is now known as a mesh block).
information, and then converts population to electors; the 2008 Queensland redistribution data were sourced from that state’s Department of Infrastructure and Planning.330

One current difficulty with elector projections is that the ratio of electors to population has been changing. Australia’s electoral roll operates for both federal and state elections and is maintained by electoral commissions at both levels of government so that it can operate continuously. Legislation all around Australia originally made it an elector’s responsibility to enrol and to update his or her enrolment with a current address whenever moving house, but electoral management bodies have never been able to rely on electors complying with this responsibility so they have instituted various methods to check and update the roll, including door-to-door checks by electoral staff, mail-outs to targeted population groups, education programs in schools, electoral officers attending citizenship ceremonies and advertising prior to elections. Electoral Commissions around Australia made a major effort to encourage enrolment prior to the 2007 federal election (the Enrol to Vote Week campaign) and designated 2012 as the Year of Enrolment to focus on enrolment-related activities.

Even these programs fell short of generating full enrolment and keeping electors enrolled at correct addresses. In 2012 the AEC estimated that 1.5 million people, or roughly 9 per cent of the eligible population, were missing from the electoral roll.331 One difficulty was that electors who were enrolled at an incorrect address were removed from the roll if they refused contact, because it must be maintained in a correct state.

The AEC estimated in 2012 that 94,000 electors were missing from the electoral roll in South Australia. The EDBC, conducting its 2012 redistribution of the 47 House of Assembly district boundaries, could not include those electors, yet they would add another four districts’ worth of electors. Similarly, the Northern Territory Redistribution Commission noted in its 2011 final report that the ratio of electors to population had declined due to problems in keeping people on the roll. The quota was only 4,838 per district, yet 5,000 people had been cleared from the roll because their addresses were no longer correct.

331 Australian Electoral Commission 2012, Media Release: ‘AEC launches national campaign to find 1.5 million missing Australian voters’, 29 May.
Whilst the removals used information extending back for more than two years and was essential for the accuracy of the rolls, the countervailing activities to maintain enrolment numbers were not effective.  

In 2010 New South Wales followed a Canadian example and implemented a system of updating the roll using data-matching from trusted-source government agencies, changing enrolment maintenance from an opt-in to an opt-out process, notifying electors that their enrolment details have been changed and allowing them to object to the change. Victoria adopted the NSW system in 2010 and the Commonwealth parliament legislated to follow in 2012; the enrolment gap in those jurisdictions is expected to fall quickly to a steady-state level of perhaps 2 per cent but, until the program comes to fruition, actual elector numbers at state and federal elections in NSW, Victoria and federally can be expected to be higher than projected, and this may have a partisan effect because the missing voters are generally thought to be mostly young and more inclined to vote Labor than Liberal.

It is not clear that the state of the roll has had much effect on the ability of redistribution authorities to produce districts that are equal at the time of an election. It seems much more likely that the problem lies in accurately projecting just which suburbs and localities will attract population growth over the life of the new districts. The Victorian federal map produced in 2002-03 operated for the federal elections of 2004, 2007 and 2010 and the commission used population projections that were unhelpful. On the understanding that population in three established capital-city districts – Gellibrand, Jagajaga and Wills – would not grow as fast as the rest of the state, the commission set them all more than 5 per cent above average at the time of the redistribution (2002) and by the time of the 2010 federal election they were all very close to the average – within 2.5 per cent. At the other end of the scale, the commission set six outer suburban districts ringing the state capital – McMillan, Lalor, Calwell, Holt, Gorton and La Trobe – low, in anticipation of growth. In particular McMillan was set almost 10 per cent below the average. It grew no faster than the state average and at the time of the 2010 state election the number of electors in that division was 8 per cent below the state average; on the other hand the number of electors in La Trobe was 22 per cent above the state average, Gorton was

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333 Parliamentary Electorates and Enrolment Amendment (Automatic Enrolment) Act 2009 (NSW); Electoral Amendment (Electoral Participation) Act 2010 (Vic); Electoral and Referendum Amendment (Maintaining Address) Act 2012 (Cwlth) and Electoral and Referendum Amendment (Protecting Elector Participation) Act 2012 (Cwlth); Canada’s enrolment system is at Description of the National Register of Electors http://www.elections.ca/content.aspx?section=vot&dir=reg/des&document=index&lang=e.
18 per cent higher and Holt 13 per cent higher than the state average in 2010. A rural district, Mallee, had been set high but grew unexpectedly and was 20 per cent above average by 2010. The redistribution did not produce an egregiously malapportioned set of districts but by the third election on that map only 17 of the 37 districts were within 5 per cent of average enrolments. The problem was not projecting how many electors there would be on the roll – the redistribution committee’s projection for March 2006 was roughly correct at the 2007 federal election – but rather just where the extra electors would be living.

Projections over a shorter term can be much more accurate because estimation errors have less time to exert a cumulative effect. Queensland’s 2005 redistribution is a good example. The AEC determined that the state was likely to have its entitlement increased again after the next federal election so the 2005 federal redistribution commission for Queensland worked with a future date for projections that was just two years ahead. Despite the fact that Queensland’s population was changing more rapidly than elsewhere in Australia, the projections were accurate enough that at the next election all divisions were within 5 per cent of the state average of enrolments, whereas previous maps had far fewer that could claim equality. The federal process is capable of producing equal divisions: it is the longer time between federal redistributions that works against equality.

**How is equality used?**

As noted earlier, the variation from equality that is permitted for US redistricting is tiny by Australian standards but, given that US jurisdictions do not focus on equality at a future time, there is no need to be able to set districts high or low to accommodate population change. But in reality there is another reason why US tolerances are so tight. The US Supreme Court’s progressive tightening of population tolerances has provided a way for it to reject plans which were obvious partisan gerrymanders without having to produce a test for gerrymandering. The court has been unable to derive a standard from the Constitution that would enable it to distinguish egregious partisan gerrymandering from the kind of advantage that can be expected to occur when legislatures construct the maps, so it has invalidated partisan plans on population grounds (and minority vote grounds) instead, and when legislatures have drawn maps within the allowable population tolerances but with egregious partisan benefit the court

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has increasingly tightened the population tolerances. It has now exhausted that option in relation to congressional maps.

The over-riding criterion in both countries is now equal population numbers (in the US) or equal elector numbers (in Australia). Strangely, although the population requirement for US congressional districts is absolute equality – and that is regularly achieved – Australia’s emphasis is arguably tighter when considered in terms of providing an equal value for each vote at the time of an election. Australia’s use of electors rather than population, use of forward projections to the time of an election or at least forward into the life of the map, as well as more frequent redistributions, compulsory enrolment and compulsory attendance to vote, all combine to emphasise equality of each vote at the time of an election. By contrast, US maps are drawn to equalise population rather than electors, there is no mechanism to allow for population change (at least for congressional maps), maps stay in place for ten years, and both enrolment and turnout are voluntary.

One vote, one value reforms abolished egregious malapportionment around Australia, and instituted these relatively tight requirements – albeit fairly recently in Western Australia – and state election districts are not now drawn with many times more enrolled voters than the average. The previous section proposed that Australian electoral districts might be regarded as equal if they are within 5 per cent of the average at the time of an election, and then showed that most jurisdictions have not had even 85 per cent of their districts within that tolerance at the time elections have been held. If voters still go to elections on districts that do not have equal elector numbers, it is possible that even now parties gain a partisan effect from districts that have too few or too many electors at the time of an election.

Table 8 shows that under the zonal malapportionment which existed in Western Australia until the 2008 election, Labor support was concentrated in seats with more electors than the average, and in 1996 the party won four seats which had elector numbers too low to be considered equal to the state average but many more – 16 – with elector numbers too high to be considered equal to the state average. Labor was at a disadvantage in making effective use of its vote, while National Party candidates won seats with fewer electors than the average.
Table 8:  
Equality of enrolments at the time of state and territory elections, 1996 to 2012:  
number of seats with enrolments that were too low or too high, by which party won them

<table>
<thead>
<tr>
<th></th>
<th>Districts won by ALP</th>
<th>Districts won by LIB / LNP / CLP</th>
<th>Districts won by NAT</th>
<th>Districts won by IND / Other</th>
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</thead>
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<td>too high</td>
<td>too low</td>
<td>too high</td>
</tr>
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<td>4</td>
<td>2</td>
</tr>
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<td>Vic 2010</td>
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<td>6</td>
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<td>16</td>
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</table>

Note: Redistributions are indicated with broken lines.
The one vote, one value reforms which came into effect at the 2008 WA state election ameliorated the effects of malapportionment, but the pattern remains: Labor won more districts with too many electors than with too few, while the Nationals continued to win more with fewer electors than the average. More troubling is that the Liberal Party had not been disadvantaged under the old system but was disadvantaged in 2008, with its vote tied up in districts that have too many electors, not balanced by a similar number that have too few.

Table 8 indicates that the other states and territories are free of the kind of partisan bias that systematically sets one party’s seats low and another party’s seats high. In Victoria in 2010 the Liberals won a startling increase in the number of districts with small enrolments but the most obvious conclusion to be drawn from Table 8 is not that one party systematically wins many more districts with low than high enrolments, but simply that maps which stay in place for several elections produce many more districts that are out of tolerance.

C.S. Soper and Joan Rydon pointed out more than 50 years ago that

[i]f all electorates were the same size, and if the percentage votes actually polled still applied to these equalized electorates, then one party’s overall percentage vote would equal the simple average of that party’s individual electorate votes. Thus the deviation between the overall and the simple average vote represents the effect of differences in the size of electorates.337

As will be seen in Chapter five, this measure is widely used to show how much bias is generated by malapportionment. Because a party’s statewide (or territory-wide) two party preferred result is calculated using the total of all its votes (on a two party preferred basis) across the jurisdiction and without account of districts, it is the most accurate measure of a party’s support in the jurisdiction. If every district had the same number of electors, then the simple average of the ALP two party preferred results in each of the districts in a state should be the same as the statewide two party preferred vote; if it is not, the difference must be due to one party’s support being made less effective through winning districts with larger numbers of electors. Using this measure, Western Australia’s results at the state elections of 1996, 2001 and 2005 under the old malapportioned districts show a bias against Labor of 0.6, 1.1 and finally 1.6 percentage points. That can be understood as the equivalent of a swing: Labor’s support in districts with larger numbers of electors meant that it would have needed to win

swings of these sizes just to begin the electoral contest on an equal footing with the Liberal/National Party. When understood in this way, an advantage of 1.6 per cent is an appreciable advantage, because most jurisdictions would have at least one and more commonly two seats below 51.6 per cent on either side of the pendulum, whereas an advantage of 0.6 per cent at state level is likely to mean no more than the possibility of one seat.338 The WA map used at the 2008 election was the first under one vote, one value legislation and appears to have advantaged Labor by a tiny margin of 0.3 percentage points.

Tables 7 and 9 indicate that if the election result in any other jurisdiction might be similarly affected by malapportionment it would be Victoria at the state election of 2010, when only 41 per cent of districts were within 5 per cent of the average number of enrolments and the Liberal Party won 20 districts that were very low and only six that were high, indicating some advantage to that party. But the Soper and Rydon measure of that advantage is very small – only 0.3 percentage points.

This chapter began with a review of apportionment rules in Australia and showed that the entitlements of Tasmania, the Australian Capital Territory and the Northern Territory continue to generate some malapportionment at federal elections. To come full circle, the Soper and Rydon measure can be applied to the results of recent federal elections to show whether that malapportionment has a partisan effect. The outcome is that in 2004 and 2007 there was no advantage at all – the two party preferred result across Australia in 2004 was 52.7 per cent to the Liberal-National Coalition and the simple average of the two party preferred results across all divisions was exactly the same, and once again in 2007 the Australia-wide two party preferred was 52.7 per cent Labor and so was the simple average of the two party preferred results across all 150 House of Representatives divisions. But in 2010 these calculations show an advantage of 1.3 percentage points to Labor – the two party preferred vote Australia-wide was 50.1 per cent but Labor actually achieved, on average, 51.5 per cent in the 150 divisions.339 Labor won seven divisions with a margin of under 1.5 per cent, and while it would be difficult to justify an argument that each was won purely because of malapportionment, there was a measurable effect. As well, the results at that election were very close (it was several days

338 Considered in terms of the WA pendulum going into these elections. The pendulum is a diagram widely used in Australia showing each district ranked in an elongated semi-circle from safest Labor to the Liberal (or Liberal National Party Coalition). Reading across the pendulum shows Labor and Liberal districts which are held by the same margins; reading from top to bottom moves from the safest to the most marginal. A uniform swing would move all districts around the pendulum in one direction. The pendulum diagram was produced and popularised by Malcolm Mackerras: M. Mackerras 1974, ‘Labor would take a caning’, The Bulletin, 21 Sept., pp. 15-16.
339 The difference is rounding error.
before one party gained the support of a majority of the Independents and was able to form government) so it is reasonable to assume that the apportionment rules did have an impact on the outcome of the 2010 federal election.

Conclusion
Equality of election district enrolments is the primary requirement of all Australian redistribution authorities, but in fact, when elections occur, enrolments are often not even close. This chapter proposed that districts be regarded as being equal if their enrolments are within 5 per cent of the jurisdictions’ average and found that jurisdictions perform very differently. South Australia regularly manages over 90 per cent compliance but in some jurisdictions the redistribution legislation permits inequality – legislation in Queensland and Western Australia allows a few districts covering large geographic areas to be set very low, and encourages the redistribution authority to focus on representational values rather than equality. That has provided justification for the commission to set other districts wide of equality.

Another cause of inequality is that maps stay in place for too long. Federally, and also in New South Wales and Victoria, population change strains the ability of authorities to draw districts that will remain equal for the life of the map. This leads to a conclusion that a tighter focus on equality at both federal and state levels is warranted. In particular, redistributions should not allow maps to stay in place for more than two elections, and if malapportionment triggers are to be retained at all they should be set low enough to be meaningful.

Still, the foregoing tables and calculations have shown that even if district enrolments have been unequal at recent federal, state and territory elections, that inequality has not – with the exception of Western Australia’s districts prior to 2008 – predictably advantaged one party more than another.

Australian redistribution authorities are justifiably proud that they have implemented a process which is independent of the parliament and the parties, and which treats the parties impartially. Their focus on equality means that malapportionment can no longer bias maps towards either party. But US experience has shown that equality is no guarantee that a map will treat the parties impartially. In that country, maps drawn to comply with very tight population tolerances can still advantage one party, and the most egregious examples newly-drawn after each census have led the Supreme Court to gradually tighten its tolerances to a point where, for congressional maps, no differences at all will be accepted without
Australian parties might also be thought capable of making redistribution submissions which would comply with equality requirements and still provide themselves with some partisan advantage.

Apart from South Australia’s commission, Australian redistribution authorities do not consider the political implications of the lines they draw. Instead, a map drawn in compliance with their statutory criteria is presumptively fair. The next chapter shows that in fact those criteria are not neutral at all but have biasing effects.

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340 Kirkpatrick v. Preisler 394 U.S. 526 (1969). ‘The Kirkpatrick opinion specifically rejected the suggestion that there is a point at which population differences among districts becomes de minimis and held that, insofar as a state fails to achieve mathematical equality among districts, it must either show that the variances are unavoidable or specifically justify the variances’ (NCSL 2009, Redistricting Law 2010, p. 26). In Karcher v. Daggett 462 U.S. 725 (1983) the population of the largest congressional district was less than 1 per cent more than the smallest, but the map was invalidated because the New Jersey legislature which had drawn it could not justify the variations as being due to a legitimate state objective.
Chapter four: The traditional criteria

When a redistribution authority draws up a set of electoral districts, many different options would deliver equality of elector numbers in each district at the required point in time. Legislation guides the authority’s choices by specifying criteria, variously known as traditional, subjective, subordinate or qualitative. Of themselves, the criteria are regarded as neutral guidelines which will ‘constrain the commissions’ discretion.’

Australian jurisdictions apply a varied list of criteria (summarised in the Appendix) of which community of interest and respect for existing boundaries are the most honoured. Others relate to the feasibility of good representation in the new districts: communication and travel within the district, and physical features of the area. As discussed in Chapter three, a demographic change criterion is also common and functions as a requirement for population equality at a future time.

When a map is challenged in the US, compliance with traditional criteria can be used as evidence that deviations from strict population equality are required to effect a ‘rational state policy’ or a ‘compelling interest’, rather than an attempt to generate partisan advantage. Similarly, a change which affects minority voters may be defended if it is in accord with traditional criteria which the Supreme Court has recognised; these include compactness, contiguity, preservation of counties and other political subdivisions, preservation of communities of interest, preservation of cores of previous districts, protection of incumbents and compliance with s. 2 of the Voting Rights Act.

There is an extra group of criteria which relate to the way that the map will perform at subsequent elections: these are considered separately and extensively in Chapters five and six.

In Australia the criteria are widely accepted as politically neutral guidelines. In the US they are seen as race-neutral principles whose application has become so complex it is ‘both a

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344 When the federal JSCEM inquired into the redistribution system in 1995, none of the submissions argued that the criteria should be changed, and the committee itself made no recommendations for change. JSCEM 1995, Report.
science and an art’. What is well understood in the US, but not recognised in Australia, is that the criteria are not neutral at all but instead inevitably generate partisan effects.

**Priorities**

Electoral systems are defined by how they balance one vote, one value considerations against arguments in favour of representation, and the balance is played out in redistributions as a choice between population equality and community of interest. Canada and the UK emphasise the representational relationship between individual members and their constituents, and require their redistribution authorities to preference a community of interest criterion, whereas Australia and the US preference equality of population for each district in order to avoid malapportionment, and only then consider how individual members will be able to represent a new district.

But then balancing the subordinate criteria requires judgment, and Hughes has made the point that Australian legislation never has provided guidance.

> [T]he statute, and this applies to the state legislation as well as the federal, never assigned weights to the criteria it listed, nor required each division to be approximately equal in merit in the application of the qualitative criteria – or in demerit for failure to apply them, or how far in proximity to or distance from the limits set by the quantitative criteria. Nor did it say whether Parliament thought it preferable to have one dog’s breakfast of a division and the rest nearly perfect in

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compliance, or for each to have a similar number of defects. A hundred years on, redistribution commissioners are no better placed.349

This ambiguity helps to build acceptance of the map. Redistribution authorities are entitled to expect acceptance of their maps when they do make judgments after public consultation, precisely because the nature and use of the criteria are only loosely defined. Ron Levy argues that Canada’s complex process gains trust from its ambiguity and Hughes has himself argued that the criteria are so vague and potentially contradictory in application that it would be impossible to say with any authority that a particular boundary breached a certain criterion.350

Cain argues that it would be impossible to order the criteria in a way that everyone would always consider to be fair because each of the criteria can be controversial and will conflict with others under particular circumstances.351

Ambiguity also protects Australian authorities against objections to a particular redistribution. Their judgment on qualitative questions is final and they will not engage with submissions or objections about the political effect of their maps. But the 1995 JSCEM inquiry into the federal redistribution process did provide a different forum to air complaints about the partisan outcome, and two emerged. One federal member alleged that the augmented commission conducting a redistribution of federal divisions in Victoria had been supplied with estimates of the political effect of their proposed map.352 Another alleged that the Australian Electoral Officer for Queensland had manipulated population projections for the state in order to make it possible for a larger number of Labor-held divisions to be made more marginal.353 The AEC

351 Cain 1984, The Reapportionment Puzzle, p. 74. Also Butler & Cain 1992, Congressional Redistricting, from p. 82.
352 While one divisional returning officer had made estimates for his own division, those figures had not been supplied to the augmented commission, and a former Australian Electoral Commissioner stoutly denied that the augmented commission had received any estimates, Cox 1995, Supplementary Submission No. 16, pp. 278-86.
353 ‘It is his aim to achieve the maximum number of marginal electorates in Queensland...This creeping marginalisation is directly targeted at Government electorates with the clear intention of influencing [the] final result in an election.’ G. Gibson 1995, Submission to the Inquiry into the effectiveness and appropriateness of the redistribution provisions of parts III and IV of the Commonwealth Electoral Act 1918, pp. 2, 3.
defended itself against both allegations, the aggrieved members’ parties gave them no support and the inquiry rejected both matters.\textsuperscript{354} The members apologised and withdrew their allegations.

What is remarkable about these few instances is that specific accusations are so rare.\textsuperscript{355} Richard L. Engstrom has observed of Australia’s process that the redistribution authorities’ compliance with their criteria is ‘expected to be, and widely accepted as, free of partisan referents’.\textsuperscript{356}

**Community of interest**

Community of interest is the criterion referred to most commonly at public hearings, and other criteria are often folded into it.\textsuperscript{357} An argument that a district boundary should be moved to include a complete suburb or local government area is more likely to be articulated in terms of the closer community of interest which will then exist than in terms of respect for other political boundaries, for example. But community of interest covers a multitude of meanings.

On the one hand, it has been viewed as a prescription that divisions should ideally be internally homogeneous, and given the wording of the Act this is probably the correct view. On the other hand, however, it has been seen as a prescription that boundaries should not be drawn which divide clearly defined communities between two or more divisions.\textsuperscript{358}

Understood so broadly, community of interest can be used in Australia to articulate political arguments to a commission which cannot consider political points. When parties argue that particular communities should be drawn into a district, what they intend is that groups with a particular voting history be moved into the district.

\textsuperscript{355} General accusations that a map will favour one party are routine after any redistribution, but if a party did not claim to be disadvantaged it would be considered smug. Aitkin noted in 1969 that ‘[i]t is safe to say that no redrawing of boundaries has ever passed without charges that those responsible had shown partisan bias of one sort or another’, D. Aitkin 1969, ‘Notes: Electoral redistribution in Australia’, *The Parliamentarian*, vol. 50, no. 1, pp. 33-4.
Morrill has suggested that two US criteria which are used in a similar way – ‘natural geographic boundaries, and integrity of cultural groupings’ – could be replaced with a simpler term: meaningful regions. That could easily apply to community of interest.

The Commonwealth Electoral Act requires federal redistribution authorities to ‘give due consideration’ to ‘community of interests within the proposed Electoral Division, including economic, social and regional interests’, and state legislation is consistent, but just which shared interests should be recognised has always been a matter of judgment. For South Australia’s first federal redistribution in 1903, Commissioner William Boothby understood interests in economic terms and studied census data on industry and occupation. His intention, like that of committees which had drawn boundaries for the South Australia’s colonial parliament, was to draw divisions that would allow separate representation for the agricultural sector, the pastoral industry, mining, fishing and manufacturing, as well as the ‘mercantile interests’ of the city. Even now, the shared interest within rural electoral districts is understood in terms of the major industry of the area, and no distinction is thought too fine to be irrelevant: one gentleman objected that ‘his area had no community of interest with the rest of the division because he grew fine wool and the rest of the division grew coarse wool.’

In Australia it is generally accepted on community of interest grounds that regional centres which have roughly the right population for a single district should be kept intact rather than split between two districts, and in the Northern Territory that policy has produced Australia’s only doughnut districts. The regional centre of Katherine has one NT Legislative Assembly district and another district entirely surrounds it, taking in the surrounding pastoral areas. Similarly, the three electoral districts in the city of Alice Springs are completely surrounded by a single pastoral district. The alternative option would have been to split the regional centre and attach some of the surrounding hinterland to each part. That might seem reasonable in Victoria where population densities even in the rural areas are high enough that these composite districts would be reasonably compact, but it would seem artificial in the Northern Territory.

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360 A federal workshop on the definition of the term yielded ‘no clear, unambiguous view that everyone holds of what is community of interest.’ Evidence from Michael Maley (AEC), JSCEM 1995, Transcript of hearings, p. EM29.
361 Australia, Parliament 1903, Report of the Commissioner (Mr WR Boothby) Appointed to Distribute the State of South Australia into Divisions, Parl. Paper 20, Canberra.
Territory (or in Canada’s northern territories, for example) and could arouse suspicion that the districts had been drawn for partisan advantage.

A common dilemma arises when a regional city has more than one quota, but not two. That problem confronted a federal redistribution authority redrawing Queensland’s federal divisions in 2009. The committee considered whether to split the regional city of Townsville in two and add some hinterland areas to each half, or whether to keep one city division intact and add the remaining portion to a district with more rural characteristics. The committee decided to keep the majority of Townsville in the division of Herbert and move a small part of the city into the neighbouring division of Dawson, which stretches south along the coast for almost 400 kilometres. Approximately 450 objections were lodged, and the augmented commission ‘listened very hard to and has considerable understanding of the arguments that the individuals were putting’, but it was ‘simply impossible within the current requirements of the Commonwealth Electoral Act to propose boundaries for the seat of Herbert which include all of the Townsville City Council’.

As time moves on from the one vote, one value campaigns, the general population has less appreciation of the over-riding importance of elector equality in redistributions, and members of the public see community of interest as the most important criterion. As well as listening to their submissions, the commissions could consider their public hearings as a two-way process, an opportunity to inform those public-spirited citizens who are sufficiently interested in the process to lodge an objection. As for the partisan effect which arises when areas need to be split, that will depend on the number of votes being moved and how different they are to the receiving district. In the case of Townsville, the change did not move enough votes to make a real difference to Herbert or Dawson.

In relation to smaller regional centres which cannot claim an entire district, it has been argued on community of interest grounds that these should be linked, rather than drawn as the centres of separate districts with hinterland areas to top up their elector population. That choice may depend on how close the centres are to each other. Successive South Australian redistribution commissions have been urged to unite the three ‘Iron Triangle’ cities of Whyalla,

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365 At the subsequent federal election in 2010 a swing to Labor left both divisions as marginal coalition seats. Dawson voted for the combined Liberal National Party (LNP) 52.4 per cent on a two party preferred basis and Herbert voted 52.2 per cent LNP.
Port Augusta and Port Pirie if not in one district then in two, because they are industrial centres associated with steel production and heavy manufacturing and are all remote from the state’s capital city. They are Labor heartland, while their rural hinterland is strongly Liberal. Currently, each of these three cities stands as the centre of a state electoral district which includes agricultural or pastoral areas and, in order to bring the three districts up to tolerance, their hinterland stretches out to the far corners of the state. The districts are internally polarised: for example, at the state election of 2010 voters who attended polling booths located in Whyalla voted 71 per cent ALP on a two party preferred basis, but the district’s hinterland areas voted marginally Liberal (55 per cent on a two party preferred basis), and the district overall is safe ALP (62 per cent on a two party preferred basis). The districts which include Port Augusta and Port Pirie are similar. Combining any of these cities would produce one safer Labor district and one safer Liberal district, and both major parties would favour that choice, which they argue on community of interest grounds. What has prevented South Australia’s EDBC from agreeing to an argument made by both parties is that this commission is not only able to consider the partisan effects of the lines it draws, it is required to do so, and combining Port Augusta with either Whyalla or Port Pirie would increase the proportion of Liberal support tied up in excessively safe districts.

An attempt to reduce the over-concentration of Liberal support over-ruled community of interest considerations in 1991 when the EDBC attached Kangaroo Island to the electoral district which covered the Eyre Peninsula rather than to its traditional district based on the Fleurieu Peninsula (which was not only closer but supported the only regular ferry link to the island). The commission decided that the problem of bias due to an over-concentration of Liberal support in excessively safe districts could only be solved by the creation of a marginal district in the mid-north of the state, and for that to occur the Eyre Peninsula needed more electors, who could only come from Kangaroo Island. While the islanders objected bitterly, the

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366 From Adelaide, Port Pirie is about 200 km, Port Augusta is another 80 km and Whyalla is the same distance further.
367 At the state election of 2010 the electoral district of Stuart’s Port Augusta booths recorded an ALP two party preferred vote of 55 per cent, the hinterland voted 61 per cent Liberal on a two party preferred basis and the district is safe Liberal (two party preferred vote of 57 per cent). In the electoral district of Frome, the Port Pirie booths voted 70 per cent ALP and the hinterland 66 per cent Liberal, and the district is notionally a knife-edge (50.1 per cent) Labor district, but in reality an Independent candidate holds the seat.
368 The operation of that criterion is considered at length in Chapter six.
commission was resolute that the equality and fairness requirements over-ride community of interest.\textsuperscript{369}

A similarly unpopular decision, this time generated by competing communities of interest, was made by the federal redistribution committee in Victoria in 2011 when it proposed two electoral divisions along the Murray River which would predominantly include irrigation agriculture communities. The alternative was to retain the existing three divisions, each of which included a hinterland of dry-land farming areas. That choice was particularly politically charged because a review of water allocations was likely to impose major changes on the irrigation communities, and it was argued on the one hand that three representatives would be more effective than two, and on the other that the primary community of interest of the region was irrigation agriculture, not the mixed farming of the areas further from the river.\textsuperscript{370}

The Liberal Member for Murray mounted a strong campaign for her seat to be retained and the commission received 129 objections of which the majority were opposed to the seat’s abolition. The augmented commission then proposed a different map, reinstating the division of Murray, and received 278 objections, mostly concerns about other aspects of the new map.\textsuperscript{371} At a public hearing the Australian Electoral Commissioner made its concern clear:

> there does seem to be a tension...between the demands to unite those water districts into a single electorate versus your proposition...of splitting them. I think we see that tension, and of course both sides have got equally valid arguments.\textsuperscript{372}

The partisan effect of the first proposed change was to replace one strongly Liberal division (Murray) with a new outer metropolitan division (Burke) which would have been safe Labor, but other consequent changes would have left both parties’ seat totals intact.\textsuperscript{373}

\textsuperscript{369} EDBC 1991, \textit{Report}, pp. 40-6. Population changes over the next four years made it possible for the island to be transferred back to link with the Fleurieu Peninsula, where it has since remained.

\textsuperscript{370} Member for Murray Sophie Mirabella argued that ‘if you got a dozen of these irrigators in here and you asked them what the top 10 priorities were to fix their problems, I don’t think any of them would list being in the same federal electorate as the solution to these problems.’ Australian Electoral Commission (AEC) 2011, \textit{2010 Redistribution of Victoria into Electoral Divisions: Hearings of the Augmented Electoral Commission, Melbourne 15 October and 8 November} 2011, AEC, Canberra, 8 November, P-15.


\textsuperscript{372} As above, P-15.

\textsuperscript{373} Labor would also have gained Aston and would have lost Corangamite and McEwen to the Liberal Party, so there would have been no net loss of seats. See J. Newton-Farrell 2011b, \textit{Submission to the Redistribution Committee for Victoria on the Proposed Redistribution}, Objection No. 129, Australian Electoral Commission, Canberra.
did put an extra Labor seat within Liberal reach — within a 2 per cent swing — so the Liberal Party was not wholeheartedly supportive of the member for Murray’s campaign, and when it succeeded and the new map put that seat further out of reach her career was not enhanced.

In Australia the importance of scale has been rarely raised, but a member of the federal parliament’s JSCEM, Senator Nick Minchin, questioned whether it was realistic to expect to find a community of interest within a group of people as large as a federal division (roughly 100,000 electors). 374 A community of interest criterion may be more meaningfully operationalised at state level where the number of electors in a district is smaller and districts could be drawn around something which is shared, whereas community of interest considerations in relation to larger federal divisions may need to be confined to ensuring that identifiable groups are not split between divisions. Regardless of the size of districts, operationalising a community of interest criterion may be more difficult in the city, partly because they house a wider range of economic interests and partly because a more mobile population may feel a weaker sense of community. In Canada, John Courtney observed that

   in parts of the federal district of Vancouver Centre, where the voter turnover between elections is in the order of 50 percent, there would be far less likelihood of attachment to a community than in a more stable rural setting.375

In fact, an enormous range of factors are used to support arguments on community of interest grounds. The parties refer to media markets, shopping patterns, government service districts, school districts and ethnic community housing patterns. Coastal communities argue for their districts to spread along the beaches rather than inland; in South Australia wine regions generally remain intact. Commuter transport routes are commonly used to justify the orientation of metropolitan districts in one direction rather than another, an example being the ALP submission for federal seats in Victoria in 2010:

   If you look at the Division of Deakin, currently it contains eight railway stations...of the Ringwood line. The commission has added a ninth railway station, that of Croydon, to the Division of Deakin. The ALP objection by placing Box Hill in Deakin would give you 10 railway stations in Deakin. If ever you needed proof of the east-west nature of Deakin, you can see it by the fact that there are currently eight railway stations running east-west. The Commission makes it nine. We make it 10.

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Plus, you’ve got the Maroondah Highway and Whitehorse Road running east-west at the top end of our proposed Deakin...We say the nature of the communities in those divisions run more east-west than the north to south way in which the Commission has proposed.\textsuperscript{376}

In this case, the ALP’s east-west districts would have produced two marginal ALP districts (Deakin would have been 53.2 per cent ALP in 2010 and Chisholm 55.1 per cent ALP) whereas the augmented commission’s north-south districts would have made Deakin riskier for the ALP (50.8 per cent) and Chisholm still marginal (55.9 per cent).\textsuperscript{377} The partisan effect of the ALP winning this argument would probably have meant the ALP retaining Deakin.\textsuperscript{378} A recent change to the census units of geography has introduced a new unit, the SA4, which broadly delimits labour markets by being based on journey to work patterns. With a population of about 100,000, each SA4 is bigger than a local government area but smaller than a state, and in future a party’s proposed electoral districts may conceivably be articulated in terms of broad alignment with census SA4 districts.\textsuperscript{379}

These examples in Australia demonstrate that arguments which encourage strict adherence to a community of interest criterion generate a map with safer seats, because that criterion unites groups with similar partisan support. People who live and work in similar circumstances and are affected by policy changes in similar ways often share political attitudes. That was the experience of members of the Arizona Independent Redistricting Commission in their post-2000 round when they drew districts with a strict emphasis on equality of population, compliance with the Voting Rights Act and community of interest, and found themselves unable to comply with a subsidiary legislative requirement to produce competitive districts. Chairman Steve Lynn reported that

communities of interest and compliance with the Voting Rights Act are the enemy of competitive districts. I don’t mean that pejoratively in terms of the first two; I think they’re noble goals. It’s just that they counterbalance one another. So, the


\textsuperscript{377} Calculations based on results at the federal election of 2010 by booth.

\textsuperscript{378} A swing of up to 6 per cent may be expected at an average election, and up to 10 per cent at the kind of election when a government is changed. These figures are based on past elections and are built into the characterisation of seats as marginal (would change hands with a swing of under 6 per cent), safe (would be retained even with a swing of 10 per cent) and fairly safe (those in between).

more competitive you wish to be, the less you’ll be able to do the other two. You have to decide or you’ll accomplish nothing.380

On the other hand, the degree to which partisan support is geographically polarised does vary between states. In South Australia the metropolitan area of Adelaide has wide sweeps of suburbs which have similar housing, where the residents show similar socio-economic characteristics on any survey and where the vote is reliably Labor; these areas are matched by groups of suburbs which reliably vote Liberal. It is difficult to differentiate between alternative boundaries on community of interest grounds, and they inevitably produce several safe seats. Indeed, it would be impossible to draw a set of districts for Adelaide that were all marginal without producing contortions US mapmakers might envy, and it would be equally difficult to produce marginal districts in the Liberal-voting rural areas outside the state capital and the regional centres.

That is not the case in Queensland, where Charles Richardson reports that the south-east of that state,

where most of the seats are, is more socially homogeneous than Sydney or Melbourne. It doesn’t have the substantial concentrations of working-class votes that provide downside protection for Labor in the other states, or the exclusive affluent suburbs that do the same for the Liberals.381

Richardson argues that party support is more geographically integrated in south-east Queensland, creating many marginal districts which, when they swing, give disproportionate numbers of seats to the winning party.382 What is different about Brisbane and this south-eastern corner is not so much the absence of a working class but its integration due to the hilly terrain and the pattern of early settlement. In the late 19th century successful professionals lived

381 C. Richardson 2012, ‘Queensland lopsided result makes the case for reform’, Crikey online, 5 April.
382 Optional preferential voting may also be responsible for the larger swings in Queensland at the state elections of 2001 and also 2012, and even the NSW state election of 2011, where protesting Labor voters gave their first preference to other parties and failed to return their votes to Labor by refusing to allocate subsequent preferences.
on the extreme summits of the numerous hills, while their less successful brethren, together with the smaller business people, occup[ied] the slopes, and the industrial classes the valleys and flats.\textsuperscript{383}

That established what Ronald Lawson called ‘segregation by elevation’, a pattern which has largely continued through to the present. Electoral maps cannot link these non-contiguous areas of higher or lower socio-economic status, so the area is characterised by homogenous districts.

Contrasting with the geographically differentiated distribution of party support in Adelaide, and also with Brisbane’s vertically differentiated pattern, is the homogenous pattern outside Adelaide and the state’s regional centres. In rural South Australia party support is solidly Liberal, and unless districts are drawn to include portions of the regional centres they over-concentrate the party’s support in excessively safe seats. In the US, it is said of the state of Iowa that it is so ‘square and homogeneous [that] no matter how you slice it, you have Iowa’.\textsuperscript{384} That could be said of South Australia’s rural areas too.

It is clear that the geographic distribution of party support needs to be taken into account by redistribution authorities, because it certainly is taken into account by the parties:

- Partisan gerrymandering can have little effect in a politically homogenous state since almost any map would naturally favour the dominant party; more opportunities to group voters strategically exist in heterogeneous states.\textsuperscript{385}

Unlike the US where compliance with the Voting Rights Act 1965 is the second most important requirement for redistricting authorities, Australia has not specifically protected the voting rights of ethnic or racial minority groups. The community of interest criterion could be invoked. That was proposed in Canada by the 1991 Royal Commission on Electoral Reform and Party Financing which considered that community of interest might facilitate

the possibility of crafting seats with minority representation in mind. For some who looked to ways of increasing the number of natives elected to Parliament, community of interest served to justify the creation of Aboriginal electoral


\textsuperscript{384} A. Greenblatt, 2011, ‘Can redistricting ever be fair?’, Governing the States and Localities, online edition, Nov.


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districts that would be separately constructed and whose members would be separately elected from Canada’s other parliamentary seats. 386

By contrast, the Voting Rights Act 1965 prohibits any US state from introducing an electoral change which would deny or reduce the right of a minority group to participate in elections and elect a representative of their choice. 387 It also specifically requires that any change to the electoral system – including redistricting maps – made in relation to 16 states (or parts of these states) must be approved by the federal Department of Justice or the District Court for the District of Columbia before they can come into operation. 388 The effect of this provision (s. 5 of the Act) is that maps from those jurisdictions can be invalidated by the department if districts have been drawn in a way that will reduce minority voters’ existing ability to elect the representatives of their choice or to influence the election of those representatives. 389

The Act prohibits impeding a person’s right to vote on grounds of race, colour or status as a member of a language minority group, and the Supreme Court has established that it is violated when districts are drawn so that Black or Hispanic communities cannot elect, or influence the election of, candidates of their choice. The NCSL judges that the Act has been successful to the extent that it has

accomplished what the 15th Amendment to the U.S. Constitution and numerous federal statutes had failed to accomplish – it provided minority voters an opportunity to participate in the electoral process and elect candidates of their choice, generally free of discrimination. 390

In the same way that compliance with a community of interest criterion depends on the geographic distribution of groups with similar socio-economic characteristics, protection of the voting rights of minorities depends on the geographic distribution of their members

who manifest their discreteness and insularity by being concentrated, whether by social confinement or by choice, in particular voting districts. These minorities may be either a majority in that district or a substantial enough minority to make

387 This is the s. 2 requirement.
388 For a list of the jurisdictions see NCSL 2009, Redistricting Law 2010, pp. 80-2.
389 This is the s. 5 requirement. The 1982 amendments made it clear that intent to discriminate was not required to be proven.
it necessary for any putative winner to take their interests into account. It is a fundamental assumption behind so called “safe districting” racial apportionment that blacks are generally not dispersed randomly throughout the territorial boundaries of states or even cities. Instead, their concentration makes it possible consciously to design districts intended to bring about victories by black candidates for office.\(^{391}\)

During the 1990s the US Department of Justice encouraged the 16 states subject to preclearance to draw the largest possible number of majority-minority districts (those where most people were members of a minority group). But in order to link pockets of minority population, some of these districts were necessarily strangely shaped and were then attacked as racial gerrymanders potentially denying white voters an equal right to vote. Because both Black and Hispanic Americans reliably vote Democrat, the partisan effect of creating as many majority-minority districts as possible is to bias the electoral result against the Democratic Party by over-concentrating (‘stacking’) its vote in a few districts.\(^{392}\) So in the Shaw line of cases the US Supreme Court struck down maps the Department of Justice had approved, ruling that the predominant purpose of those maps had been racial.\(^{393}\) However, because the court has never found a way to strike down a gerrymander, a map which appears to be a racial gerrymander might pass scrutiny if it took account of traditional criteria and is just a partisan gerrymander.

A racial gerrymander challenge will fail if race was a factor, but the predominant purpose was to advance the cause of a party, as in the creation of a safe Democratic district by including Black voters because they more reliably support Democratic candidates.\(^{394}\)

In many jurisdictions which are not covered by s. 5 of the *Voting Rights Act 1965*, white voters – especially Democrats – will now reliably vote for their party’s non-white candidates, and Democrats in these states argue in favour of ‘influence districts’ drawn with a large enough share of minority population that they can influence the outcome of the primary or general election but are not over-concentrated inefficiently. On the other hand, the Republican Party


argues for strict compliance with the intent of the *Voting Rights Act* and with community of interest criteria. Representatives of minority communities are encouraged by the parties to argue both cases, so that for example in the 2011 New Jersey Apportionment Commission hearings representatives of the Latino Leadership Alliance of New Jersey argued in favour of districts where Latino communities constitute a majority of the population (majority-minority districts) whereas representatives of the Latino Action Network argued in favour of spreading the Latino communities between several districts, thereby creating a larger number of ‘influence’ districts.395

In Australia there are areas of the state capital cities where Aboriginal and migrant communities together make up a significant proportion of the electorate, especially in states where the number of electors in each district are relatively small. But it is rare for a single minority community to constitute a majority, except in outback areas of northern Queensland, northern Western Australia and the Northern Territory where Aboriginal communities are a significant proportion of the population. In the Northern Territory the redistribution authority is required to take account of areas of Aboriginal Land Councils established by or under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth). In addition the NT redistribution authority must not split identifiable communities between divisions if practicable and must make the demographic and geographic nature of each division as uniform as practicable. The combined effect of these criteria impels the commissioners towards a policy which makes some divisions characteristically Aboriginal divisions, and in US terms the criteria would be understood as requiring a single majority district in preference to several influence districts, or ‘stacking’ rather than ‘bleaching’.396

As observed earlier, the Northern Territory regional centres of Alice Springs and Katherine are surrounded by large areas of very dispersed population, mostly Aboriginal. The criteria steer the redistribution commissioners away from a possible choice to segment the regional centres and add a large pastoral hinterland to each segment.397 The commissioners’ solution is to draw one electoral division for the regional centre of Katherine, sitting completely within the much

395 Both the Alliance and the Network testified at several hearings. See New Jersey Apportionment Commission 2012, *Transcript of Public Meetings*, The Commission, Trenton, NJ.
396 ‘Stacking’ refers to a redistribution authority’s choice to concentrate a minority population in one district rather than ‘cracking’ it between several districts (and given that the Hispanic population also constitutes a widespread minority population in the US, where cracking involves reducing the proportion of black voters in a district the practice is sometimes referred to as ‘bleaching’). See for example M. Pizarro 2011a, ‘The word of the hour: bleaching’, *PolitickerNJ* online edition, 9 Feb.
397 In the UK this is referred to as the sandwich method, but the new districts would look more like pizza slices.
larger electoral division of Stuart covering the surrounding remote pastoral communities and Aboriginal settlements. Similarly, all three of Alice Springs’ districts (Braitling, Greatorex and Perkins) sit entirely within the division of Namatjira, which again covers the surrounding remote pastoral communities and Aboriginal settlements.\footnote{NT, Augmented Redistribution Committee 2008, \textit{Report}; NT, Augmented Redistribution Committee 2011, \textit{Report}.}

At the time of the 2010 census the population of the NT pastoral district of MacDonnell was 76.5 per cent indigenous and Stuart was 75.2 per cent indigenous. Aboriginal communities reliably vote Labor (although there was some divergence from this trend at the 2012 Territory elections) and the partisan effect of the NT legislation is to assure Labor of two safe seats. At the NT elections of 2008 the two party preferred result in the pastoral district surrounding Katherine was 65.1 per cent ALP, and the district of MacDonnell (now renamed Namatjira) surrounding Alice Springs was so safe for Labor that the Country-Liberal Party (CLP) did not contest it. In the regional cities the two party preferred results were 58.4 per cent CLP in Katherine, 70.3 per cent CLP in Braitling, 66.5 per cent CLP in Greatorex and 74.7 per cent CLP in Araluen. Had the legislation encouraged the commission to draw districts with a greater mixture of communities, there might be two marginal districts in the Katherine region which could change hands at any given election, and four fairly safe CLP districts in central Australia, including Alice Springs. So under either approach the CLP would be assured of winning four seats (and could win six) whereas Labor would only be assured of winning its two seats if districts are drawn according to the community of interest requirements.

An argument for unifying indigenous communities within a few districts is also made in South Australia, again on community of interest grounds. It is argued that whichever electoral district contains the Pitjantjatjara lands in the far north-west of the state near the border with Western Australia and the Northern Territory should also contain the towns of Ceduna, Koonibba and Yalata far to the south on the Great Australian Bight because the Aboriginal communities move between these two locations.\footnote{See for example EDBC 1991, \textit{Report}, pp. 38-9.}

At the 2010 census fewer than 3 per cent of Australians identified as Aboriginal or Torres Strait Islanders, and it is not possible anywhere in Australia to draw federal divisions that will have a majority of minority voters. The current division with the highest proportion (about 43 per
cent) of indigenous Australian electors is Lingiari (NT) and it would not be possible to draw that division in a way that would increase this share.\textsuperscript{400}

In contrast to the US, Australia’s minority groups have smaller numbers and more diverse origins and it is not possible to draw districts with a majority of any one minority group, but it is accepted that groups should not be split between divisions. Even then just which group is recognised can be a matter of judgment. At the 2010 federal redistribution in Victoria an incumbent member and an elder of the Somali refugee community in Melbourne argued against a particular boundary because it would move most of the Somali community from one division into another.\textsuperscript{401} It was later alleged that the argument had a party-political basis – a candidate for ALP preselection had enrolled people from this community as party members in the existing division and did not want to lose their support in the contest.

In Canada language use is another defining characteristic of communities which must be respected, and Louis Massicotte has pointed out that because Francophones and Anglophones vote differently the effect of drawing districts along linguistic lines has sometimes been to produce so many safe seats that the map is a ‘linguistic gerrymander’.\textsuperscript{402}

Australia has simply not had a debate about electoral boundaries’ effect on minority voting. When indigenous electors are considered as a group, the argument is articulated in terms of community of interest and it is likely that an attempt to articulate it directly would be seen as racist. John Chesterman has remarked, for example, that

\begin{quote}
[w]e are all too aware of the susceptibility of the Australian psyche to fears of the non-white Other threatening the supposed Australian way of life. It has rarely taken much effort for this kind of fear to be mobilized for political benefit, as the 2001 ‘border protection’ federal election attests.\textsuperscript{403}
\end{quote}

Cain has argued that the

\begin{itemize}
\item \textsuperscript{400} Lingiari and Solomon are the only two federal divisions in the NT; 43 per cent of Lingiari’s electors and 10 per cent of Solomon’s were indigenous (2012 census data).
\item \textsuperscript{402} L. Massicotte 1995, ‘Eclipse et retour du gerrymander linguistique québécois’, in \textit{L’Espace Québécois}, eds A. Gagnon & A. Noël, Québec/Amérique, Montreal, pp. 227-44.
\end{itemize}
underlying rationale of community of interest in reapportionment [is that] the mandate to represent distinct geographic interests in single member systems is clearer when the districts are more homogeneous.  

Similarly, Courtney has noted that the community of interest requirement is particularly important where turnout is not compulsory:

[j]t has been demonstrated that political participation, as measured by voter turnout statistics, is positively affected when boundary readjustments leave voters in a riding with which they share a strong community of interest. 

Making districts more homogeneous also makes them safer. Because Australian legislation leaves community of interest undefined it has occasionally been argued that shared political views constitute a shared interest. Independent candidates and candidates for minor parties all have a much greater chance of winning districts if the areas of their strongest support can be concentrated in one or two districts rather than split between many, so they can be expected to encourage a redistribution authority to recognise a community of interest that is contiguous with their support base. But recognising political support is not possible in most Australian jurisdictions because the authorities’ apolitical stance prevents them from considering it. An argument was made before the augmented commission redrawing Victoria’s federal districts in 2009 that the commission had drawn the six urban divisions north of the Yarra River with projected elector numbers that were all roughly 3 per cent higher than average, and the five divisions below the river each with about 3 per cent fewer projected electors.

[G]iven that it’s no secret that political behaviour is different in the northern suburbs to the southern suburbs, where you have an imbalance that is as evident as that, I think it does somewhat undermine the credibility of the resulting boundaries.

But the authority could not recognise that argument, and the districts were within the allowable tolerances and helped the commission to reinstate the division of Murray which

was, on balance, ‘necessary to address the important community of interest issues raised in relation to Victoria’s irrigated “food bowl” region’ and no adjustment was made.\textsuperscript{407}

Even South Australia’s 1991 legislative changes which allow political support to be recognised only require the state’s commission to consider fairness between the two groups which might win government. So when a smaller unaligned party, the Australian Democrats, argued that they could win a seat if the district boundaries didn’t divide their support base, their plea for consideration failed because they were too small to win power in their own right and refused to align themselves with either of the parties which could.\textsuperscript{408}

A few US legislatures have accepted that political outlook is relevant to community of interest. In Virginia a legislative committee resolution from 2001 requires that

\begin{quote}
[d]istricts shall be based on legislative consideration of the varied factors that can create or contribute to communities of interest. These factors may include, among others, economic factors, social factors, cultural factors, geographic features, governmental jurisdictions and service delivery areas, political beliefs, voting trends, and incumbency considerations.\textsuperscript{409}
\end{quote}

Minnesota also allows communities of interest to include ‘groups of Minnesota citizens with clearly recognisable similarities of social, geographic, political, cultural, ethnic, economic, or other interests.’\textsuperscript{410}

**Existing boundaries**

Most jurisdictions have a requirement to respect existing political subdivisions so that electoral district boundaries will follow other established boundaries (of suburbs, local government bodies, government service delivery areas) where possible. Australian federal redistribution authorities keep local government areas intact where possible, but the smaller scale of state and territory districts cannot always accommodate local government areas so state authorities aim to keep suburbs or rural localities intact.\textsuperscript{411} This criterion is a variation on community of

\textsuperscript{407} Australia, Parliament 2011, 2010 Redistribution of Victoria, p. 4.
\textsuperscript{409} Committee Resolution No. 1, adopted by the Virginia Senate and House Committees on Privileges and Elections, April 3, 2001 (emphasis added), in NCSL 2009, Redistricting Law 2010, p. 213.
\textsuperscript{410} NCSL 2009, Redistricting Law 2010, p. 192 (emphasis added).
\textsuperscript{411} The Federal Redistribution Committee charged with redrawing NSW divisions in 2009 considered that local government areas were less relevant in metropolitan areas and provincial centres than in rural areas. Australia, Redistribution Committee for NSW 2009, Proposed Redistribution of New South Wales into Electoral Divisions, AEC, Canberra, p. 21.
interest and may come from an ideal that electoral districts should be easy to understand, though both the parties and the redistribution authorities also argue that local government areas indicate communities of interest.412

The requirement to respect boundaries of other political units (counties and municipalities) is more meaningful in the US because parties’ organisational structures are county-based, elections are conducted by county officials (and often for county officials as well) and voters are required to lodge a ballot in the voting precinct for which they are enrolled. Therefore most states require commissions to respect county and election precinct boundaries: Alabama, for example, requires its commission to preserve cores of existing districts as long as that is consistent with other criteria, and if counties must be split then ‘district boundaries should follow as closely as practicable local voting precinct boundary lines in order to minimise voter confusion and cost of election administration.’413 New Jersey’s Constitution requires its legislative redistribution authority to keep municipalities and counties intact, and only the need to comply with equal population and contiguity requirements can over-ride that requirement.414

There is another effect of keeping local government areas intact, at least within the smaller Australian state electoral districts: it helps local government mayors to build up their personal recognition within a single legislative district. In South Australia all of the candidates who have built up a strong enough personal profile to be elected to the state parliament without major party preselection have been former mayors within the districts they have contested.415 Federal divisions normally span more local government areas so this effect is not strong at federal redistributions, and those Independent candidates who have won federal divisions have generally established a reputation by having been elected to state parliament first.

The version of the existing boundaries criterion which has more effect at both state and federal levels is a requirement that the boundaries of existing electoral districts be retained where possible. Legislatively it is not a strong requirement: the Commonwealth Electoral Act

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412 The Federal Redistribution Committee charged with redrawing SA divisions in 2003 ‘resolved to be guided by the boundaries of Local Government Areas (LGAs), wherever possible, as indicators of community of interests.’ Australia, Redistribution Committee for SA, 2003, Proposed Redistribution of South Australia into Electoral Divisions, AEC, Canberra, p. 6. See also the Liberal Party of Australia (NSW Division) 2009, Suggestions to the Redistribution Committee for New South Wales, AEC, Canberra, p. 4.
414 New Jersey State Constitution 1947 (as updated), s II, paras 1, 3.
specifically states that community of interest, means of communication and travel within the new district, and the physical features of the district should all be considered before retention of the boundaries.\textsuperscript{416} South Australia has abolished its existing boundaries criterion and Victoria has never had one. Other Australian jurisdictions mention existing boundaries well down their list of criteria without assigning it a particular priority (see the Appendix). But in reality no map is drawn as a \textit{tabula rasa} and all redistribution authorities use the existing map as a basis for the new one, hoping to simply amend existing districts to allow for population changes because that will be likely to generate the greatest acceptance from the parties and the general public.

Members often argue for retention of existing boundaries on the grounds of avoiding voter confusion, but that argument is thin.\textsuperscript{417} In Australia the ongoing electoral roll enables voters to lodge a ballot at any booth in the state or territory (and usually outside it as well), and the vast majority of electors would probably struggle to name their member or their electoral district, let alone specify its geographic limits. It is in the interests of incumbent members, not their constituents, to conserve electoral district boundaries: it helps to build up a modicum of name recognition over time. So every redistribution authority’s desire to change districts as little as possible will have a bipartisan effect of protecting the existing electoral margin in each district, and a partisan effect of protecting each incumbent member against challengers. The size of these effects will vary between elections and members, but remaining unchanged may be more important for marginal districts than for safe ones. Where incumbent members can appeal to voters in their own right rather than as endorsed candidates for a party, they may be able to withstand swings against their party and, at any election when the government is unpopular, incumbent candidates’ campaign literature will avoid linking them to the government or the Premier or Prime Minister. In the US Cain has observed that this personal vote combined with a weaker attachment to parties has meant that ‘incumbency removal can be more important in determining who wins a redistricted seat than changes in district partisanship per se.’\textsuperscript{418}

Most US jurisdictions require that candidates live in the districts they contest, so when a member is ‘kidnapped’ by a boundary change drawing his home into a new district he must

\textsuperscript{416} Commonwealth Electoral Act 1918, ss. 66(3) to (3A).
\textsuperscript{417} For example: ‘The critical factor in metropolitan areas is drawing a boundary that is easily understood by constituents.’ Liberal Party of Australia (NSW Division) 2009, \textit{Suggestions to the Redistribution Committee for NSW}, p. 4.
either move house or compete against a neighbouring incumbent. In Australia there are no
candidate residency requirements, so members are rarely required to move, but any boundary
change will mean that a member will need to contest an area in which he or she has not
established a strong media profile and is less well known in the party branches. That is less
problematic for members in city districts at state level where districts are smaller and media
markets overlap, and more problematic for federal members in rural districts where their
media profile may not have been established in the new area. Still, rural districts are usually
safe districts, so rural members may be able to afford the disruption more than those likely to
face very tight contests.

An alternative justification for conserving existing electoral district boundaries is based on
representation rather than election performance: it maintains continuity of representation.
Butler and Cain have argued that frequent redistricting caused by the ‘goal of strict population
equality, now a settled principle in the United States, may be at variance with the values of
efficient representation and simple handling of constituency problems.’419 Isobel Redmond,
long-standing member for South Australia’s district of Heysen, would agree. She has
highlighted the difficulty faced by residents of the township of Mt Compass who were planning
a long-term transport project when their area was moved from the district of Finniss into
Heysen and then four years later back into Finniss. Fortunately the elected members for both
Heysen and Finniss were from the same party, and records of how they had been assisting this
project could be shared.

The existing boundaries requirement has another practical effect: it constrains the inevitable
ripple effects to fewer districts. This means that truly disruptive redistributions are uncommon,
especially in those jurisdictions where redistributions take place frequently and population
adjustments can be made incrementally. South Australia’s redistribution of 1991 needed to be
disruptive so that the commission could address existing bias, so parliament repealed the existing
criterion that electoral district boundaries be left undisturbed as far as practicable.420
The commission reported of that redistribution that ‘it was only rarely that boundaries could
be left undisturbed’ but that ‘[a]s a matter of common sense, the Commission has not
disturbed boundaries unnecessarily.’421 Since then the proportion of electors moved out of

419 Butler & Cain 1992, Congressional Redistricting, p. 69.
420 Constitution Act 1934 (SA) former s. 83(c).
their old districts has been moderate: 9.3 per cent in 1994, 17.3 per cent in 1998, 3.1 per cent in 2003, 6.1 per cent in 2007 and 5.4 per cent in 2012.422

Despite the fact that the existing boundaries criterion assists incumbent members and Independent candidates, and has been abolished or relegated to a subordinate position in several jurisdictions,423 it underpins redistributions in Australia for a very practical reason: it is the guarantee, as far as one can exist, that redistribution authorities drawing maps blind to their partisan effect will not introduce partisan advantage into them. Apart from South Australia’s EDBC, all of Australia’s redistribution authorities work with conflicting ideals: an apolitical stance and an unstated belief that if seats are to change hands it should be the voters who make the change, not the redistribution authority. So a criterion which limits change will reduce the probability that the authority will unwittingly transfer seats – and therefore political power – from one party to the other. Understood in this context, the existing boundaries criterion is a fundamental practical requirement. Orr has also observed an ‘inertial acceptance of the inherited pattern of boundaries’ in the Australian redistribution process. He perceived that it was due to an

unspoken criterion in every jurisdiction (except South Australia, where it is explicit)...that redistributions ought to minimise distortion or disruption of the likely translation of votes into seats, given an essentially two party lower house.424

US court special masters share Australian authorities’ apolitical stance and are almost always required to conserve the existing map as far as possible, in recognition that the legislated power to draw a map does not lie with the court and that the existing map embodies the ‘rational state policy’ of the legislature or of a redistribution authority. That policy backfired in 1972 when a court-drawn map for Connecticut designed to make only such changes as would bring the existing map into population tolerance was so helpful to the Democratic Party that the special master, Robert Bork, was later congratulated by the state Democratic Party chairman.425 But Cain has observed that court-drawn plans have generally ‘tended to preserve

422 Calculated from data provided with the EDBC 1994 and 1998 Reports, and published as Appendix 11 of the 2003 Report and Appendix 9 of the 2007 Report.
423 Victoria has never had an existing boundaries criterion but does ask its commission to draw districts that will establish and maintain districts with equal enrolments (Electoral Boundaries Commission Act 1982 (Vic), s. 5 (1)).
all incumbents and have resisted the temptation to rearrange the political landscape tabula rasa.\textsuperscript{426}

The central importance to Australian redistribution authorities of using the existing map as a basis can be seen most clearly when they are challenged by an apportionment determination which changes the number of divisions to which a state is entitled. As was shown in Table 1, half of the federal redistribution committees since 2001 have not been able to begin with the assumption that it will be possible to retain existing boundaries. Queensland gained a division in 2003, 2005 and again in 2009, New South Wales lost one in 2005 and 2009 and South Australia lost a division in 2003. The potential disruption of these redistributions is greatest in the smallest jurisdictions and when divisions are lost rather than gained.

The redistribution of federal divisions in South Australia in 2003 is an ideal example. An apportionment determination reducing the state’s entitlement from 12 to 11 meant the new quota was 9 per cent higher than the existing quota. Enrolments in every division were suddenly too low, so wholesale change was required. Labor was vulnerable, having won only three of the 12 divisions at the previous election, and the party took a tactical view:

the ALP determined that it will not attempt to use the process of the Federal Redistribution as a partisan tool. It will not attempt to achieve that which has not been achieved in recent general elections, i.e. gaining requisite [notional] support in a marginal Liberal-held seat. Equally, the ALP has an expectation that its electoral outcomes in marginal seats will not be diminished noticeably.\textsuperscript{427}

Even so, Labor recommended that the seat to be abolished should be the Liberal division of Wakefield.\textsuperscript{428} The National Party recommended that the division of Mayo (held at the time by a Liberal minister in the federal government) be divided between its six neighbours.\textsuperscript{429} The Liberal Party, holding most of the divisions, refused to choose.\textsuperscript{430} The committee ‘sought to bring about as little disruption as possible.’\textsuperscript{431} It started at the borders of the state and worked inwards, adjusting each existing division to take in new enrolments from neighbouring divisions, and reported its changes in community of interest terms. That process resulted in

\textsuperscript{426} Butler & Cain 1992, \textit{Congressional Redistricting}, p. 112.
\textsuperscript{427} As above.
\textsuperscript{429} As above.
\textsuperscript{431} Australia, Redistribution Committee for SA 2003, \textit{Proposed Redistribution of South Australia; Report of the Redistribution Committee}, AEC, Canberra, p. 6.
the abolition of the safe Labor division of Bonython but made subsequent changes which made the Liberal division of Wakefield notionally Labor. Both parties were appeased: both had lost a safe division, the Labor Party losing Bonython but gaining Wakefield in notionally Labor form to replace it; the Liberal Party had lost Wakefield but two of Labor’s seats were now within reach of a small swing whereas only one had been vulnerable before. And each of the new divisions retained a recognisable core.

Two federal redistributions in New South Wales, just four years apart, support this point that Australian authorities work from the existing map. In 2005 a federal apportionment determination reduced the state’s entitlement from 50 divisions to 49. A federal redistribution had not been undertaken in that state for six years and wide-ranging change was required. Two existing divisions were already more than 10 per cent bigger than the average, and the projection data showed that once the quota was calculated for 49 divisions rather than 50 (and enrolments in each existing district stood 2 per cent lower), 23 would have been too low and another 10 too high to come within a 3.5 per cent tolerance in three and a half years’ time.\(^{432}\)

The redistribution committee reported that

\[\text{[b]roadly speaking, enrolment in the west of the State and in greater Sydney is slowly declining, while the north coast and the south coast show slight growth.}\] \(^{433}\)

The ALP began its suggestion with a statement that ‘the current boundaries are the most biased against the ALP in the entire history of Australia’ and asserted that Labor would have needed 53.4 per cent of the two party preferred vote in New South Wales to have won a majority of that state’s federal divisions.\(^{434}\) While the existing map was indeed biased against Labor, neither the committee nor the augmented commission responded to the point, and the new map not only increased the bias but reduced responsiveness as well.\(^{435}\)

Both the Liberal Party and the National Party proposed that the seat to be abolished should be Blaxland, a safe Labor division in Sydney with low enrolments. The ALP suggested abolition of Riverina (safe National Party) and also offered up its own safe division of Reid to accommodate the creation of a new division centred on Liverpool which would have been safe for Labor. Two

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\(^{432}\) Calculations from data at p. 16 of Australia, Redistribution Committee for NSW 2006. Proposed Redistribution of New South Wales into 49 Electoral Divisions, AEC, Canberra.

\(^{433}\) As above, p. 9.


\(^{435}\) When results from the federal elections of 2001 and 2004 in the existing districts are adjusted to a hypothetical 50:50 outcome, Labor would have won just 23 of the 50 divisions, implying a two seat bias against Labor.
suggestions from individuals showed how the commission could redraw Sydney divisions to maintain seven rural divisions west of the Great Dividing Range.

The redistribution commission paid due respect to all of the statutory criteria, and ‘in proposing new electoral boundaries, the committee sought to keep electors in their existing divisions wherever it could be equitably achieved.’\textsuperscript{436} It amalgamated the two which had the smallest enrolments and slowest projected growth, Parkes and Gwydir. These were also the divisions which covered the largest geographic area in the state and both were safe for the National Party.\textsuperscript{437} The change released some enrolments near divisions which were low, and pulled the outer metropolitan division of Macquarie further out from Sydney, so that the committee reported that ‘[a]s a result of this strategy, the committee was able to maintain the number of divisions with major rural composition, despite a declining enrolment share.’\textsuperscript{438}

But if ‘divisions with major rural composition’ was code for districts the Coalition might win, the committee was mistaken. The move made Macquarie notionally Labor whereas it had been safe Liberal, and in return gave the Coalition Parramatta, a marginal district which had changed hands several times at recent elections. Both seats would have changed hands with a swing of under 1 per cent, so losing Gwydir and gaining Macquarie was hardly a win for the Coalition. Neither was Labor pleased: the changes affected responsiveness in the most marginal Liberal divisions and instead of three Liberal seats within reach of a 2.2 per cent swing there was only one.\textsuperscript{439}

Four years later an apportionment determination again reduced the number of federal divisions for NSW. The 49 existing divisions were not markedly out of tolerance but calculating the quota with just 48 divisions meant that average enrolments again needed to rise by roughly 2 per cent, and suddenly most rural divisions had enrolments which would be too small to come within 3.5 per cent of the average in three and a half years’ time.\textsuperscript{440} This time the enrolment projections suggested that growth in Sydney’s inner city divisions would be

\textsuperscript{436} Australia, Redistribution Committee for NSW 2006, \textit{Proposed Redistribution of New South Wales}, p. 17.

\textsuperscript{437} In 2004 Gwydir was 68.4 per cent National and Parkes was 64.4 per cent National.


\textsuperscript{439} AEC webpages \textit{The Official 2004 Federal Election Results}, and \textit{Electoral Newsfile 13}.

relatively high, reducing in the outer metropolitan areas, further reducing in the provincial cities and being slowest in rural areas.441

The map was still biased against Labor, but this time the party made no comment and recommended abolition of the marginal Liberal division of Macarthur in the greater Sydney area, and the Liberal Party also suggested changes to Macarthur that would in practice have produced ‘a similar outcome, with the Labor and Liberal-voting parts of the Macarthur region being cleanly divided between safe seats for both parties’.442 Then the Liberal Party submission followed the 2006 committee’s reasoning and proposed that the rural divisions of Hume (Liberal) and Riverina (National) be combined. The National Party suggested abolition of Labor’s metropolitan division of Banks.443

Having collapsed the two divisions with smallest enrolments in 2006, and in receipt of a large number of submissions from electors in the rural division of Riverina, the committee chose a different option in 2009 and abolished a metropolitan division with larger enrolments than required (Labor’s safe seat of Reid). That allowed the freed enrolments to be channelled through outer metropolitan areas to lower-growth rural divisions inland. The committee drew divisions which once again retained recognisable cores – to the extent that only one division was so different it needed to be renamed – and once again noted that it had retained the existing number of rural divisions.444

These redistributions where states lost a division highlight the importance of existing boundaries in orienting redistribution authorities as they redraw Australian maps without considering the partisan effect, but nonetheless attempting to ensure that if divisions do change hands it has not been because the commission has given a division to either of the parties. The lowly status of the existing boundaries criterion, relegated to subsidiary status federally and absent completely in Victoria, belies its importance to the commissions. Perhaps that is because if it were given more credence, redistribution authorities could be hamstrung when change is required. If that situation needs to be clarified, it would be appropriate for

441 As above, p. 14.
444 Australia, Redistribution Committee for NSW 2009, Proposed Redistribution of New South Wales, p. 21.
Australia’s redistribution authorities to be able to say, as many US jurisdictions do, that they had respected the core of existing districts.\textsuperscript{445}

Criteria of shape

All Australian redistribution authorities are required to consider the physical features and area of their proposed districts, but these requirements are as subjective as any other. In South Australia, for example, the Murray River forms a barrier between districts where there are no bridges and is generally used as a boundary between electoral districts, with the exception of the state electoral district of Chaffey where there is a bridge and where substantial irrigation-farming communities are established on both sides of the river. Even for state electoral districts within Adelaide, the Torrens River unites some communities and is used as a boundary between others. On a much larger scale, in New South Wales the mountain country of the Great Dividing Range has traditionally been understood as forming a barrier, impeding transport, dividing agricultural communities and separating the two major drainage basins of the state, but in 2006 the federal redistribution committee saw the Southern Highlands, Blue Mountains and Hunter regions as connecting rather than dividing.\textsuperscript{446} Considering the area of proposed divisions restrains redistribution authorities from enlarging districts which already cover broad geographic areas, but the existence of the criterion does not prevent large divisions from being drawn.

All Australian jurisdictions have another criterion which relates to communication and travel within the district. In the Northern Territory, where some districts are remote from the capital, there is a further requirement to consider disadvantages arising out of remoteness. As with the criterion related to area, these requirements discourage commissions from drawing districts which are difficult to represent. Queensland and WA adopted their large-area district allowances (Chapter three) in response to these concerns but in other states the criteria have lower priority. In South Australia the south-eastern region and the Riverland communities are quite distinct economic regions with only one major highway connection, through the regional centre of Murray Bridge, so the transport criterion means that any election district which included both communities would need to include Murray Bridge. Similarly, when Kangaroo Island was attached to the Eyre Peninsula rather than to the Fleurieu Peninsula, it was argued that the district failed the test of easy transport and communication, because the island was


\textsuperscript{446} Australia, Redistribution Committee for NSW 2006, \textit{Proposed Redistribution}, p. 18.
linked by ferry and direct flights to the Fleurieu Peninsula but there were no direct commercial links at all to the Eyre Peninsula.

The degree to which these criteria have a partisan effect varies between the states and territories because the geographic distribution of party support varies. The large district allowance advantages the Liberal National Party in Queensland but has limited partisan effect in Western Australia, and the NT requirement that districts should contain one community as far as possible advantages the Labor Party. When Kangaroo Island was moved it removed the Eyre Peninsula’s long-term National Party incumbent from the parliament because there was no National Party branch structure on the island.

Where US redistricting legislation and guidelines have shape criteria – usually compactness and contiguity – the aim is to prevent districts being drawn with contorted shapes in order to gain partisan advantage.447 Contiguity is interpreted in various ways, although islands are attached to the nearest mainland point and parts of districts may be contiguous if they are ‘connected together by either land or water.’448 It was argued for one New York map that areas were contiguous if they were connected by bridge or a subway line under the Hudson River.449 In addition to contiguity, legislatures in 36 states have a compactness criterion for legislative districts (though only about half of them also require compactness of their congressional districts).450 A difficulty with these criteria is that districts may be drawn with contorted shapes to create competitive districts or, more commonly, to unite dispersed segments of a minority community to comply with the Voting Rights Act. Pennsylvania’s new 7th congressional district (drawn in the post-2010 round) was drawn to unite minority communities and is so contorted that it has been named ‘Goofy kicking Donald Duck.’451

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447 ‘A compactness criterion is generally regarded as a major and necessary safeguard against gerrymandering.’ Morrill 1973b, ‘On criteria for redistricting’, p. 850.
Persily has shown that US courts interpret compactness in terms of gerrymandering (‘non-compact districts with shapes unexplainable on grounds other than race may violate the Equal Protection Clause of the Fourteenth Amendment’) or in terms of compliance with the Voting Rights Act (‘only compact minority communities that can constitute a majority in a single member district have a potential entitlement to an opportunity district’). So while new maps routinely report several measures of compactness for each district, what is actually considered is whether the district looks contorted.

Daniel Lowenstein and Jonathan Steinberg argued in 1985 that the distribution of partisan support in the US at that time meant that a compactness criterion would consistently advantage the Republican Party, because

> [t]he typical distribution of political strength in the United States, especially in the larger industrialized states, includes inner-city areas with overwhelmingly Democratic majorities, and suburban and rural areas that are largely Republican but by margins that are not nearly so great. If districts must be compact, there will

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453 The most used measures in the US are the Reock and Polsby-Popper measures; Maptitude software generates compactness ratings on eight measures. For a comprehensive review see K.A. Kemper 2003, ‘Application of constitutional “compactness requirement” to redistricting’, ALR 5th, vol. 114, pp. 311-85.

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be a tendency for the districts to coincide with these inner-city, suburban and rural divisions. The result is tailor-made for Republican partisans.454

The absence of a compactness requirement in Australian redistribution legislation does not mean that districts are inevitably compact, nor that their shape is irrelevant. But non-compact districts inevitably ignore local government boundaries and are unstable, often being changed at the next redistribution. A case in point is the NSW federal division of Macarthur which had such an awkward shape for the elections of 2001 and 2004 (see below) that both major parties recommended major changes in 2006 and it was extensively reshaped.

Conclusion

It has been widely considered in Australia that having an independent commission draw districts blind to their political effects is the only way to ensure that neither party will be advantaged by a new map and that agreement will follow, but this chapter has shown that applying the subsidiary criteria does have partisan effects.

It has been shown that strict compliance with community of interest creates more districts which are politically as well as socially homogeneous, whether the community of interest is geographic, racial or cultural. It was argued in Chapter one that Australian redistribution authorities’ apolitical stance leaves them without a way to judge whether the set of districts

454 Lowenstein & Steinberg 1985, ‘The quest’, p. 24. That distribution of support was common in Australia too until the post-war baby boom generation moved from the inner cities to the outer suburbs, and Rydon considered that it biased the federal map against Labor. J. Rydon 1957, ‘The relation of votes to seats in elections for the Australian House of Representatives, 1949-1954’, Political Science (New Zealand), vol. 9, p. 61.
they draw will advantage one party or another. This chapter has argued that Australian authorities believe that if seats change hands it should happen when the voters decide, not as a result of a redistribution. Reconciling the two is problematic, especially where marginal seats are involved, and this chapter has shown that in practice the authorities rely on retaining existing boundaries where possible. That is difficult for them to be open about because the existing boundaries criterion has been relegated to a subsidiary position in order to provide the freedom to make changes when it is necessary. This chapter suggests that Australian authorities could find it useful to articulate their aims in terms familiar to many US jurisdictions – retention of the core of existing district boundaries.

The overall effect of the Australian authorities’ apolitical stance and their application of the existing criteria is to encourage a set of districts which runs the risk of over-concentrating one party’s support or which are mostly safe on both sides of the pendulum. The process currently used by most authorities guides them towards a biased or unresponsive map.

One solution to that conundrum would be to change the apolitical stance to one which would allow redistribution authorities to consider the partisan effect of the lines they draw, and allow a check to be made. How could a map’s potential performance be assessed? And what standards would be appropriate? How fair would a map need to be? Performance criteria are used in two jurisdictions – South Australia and New Jersey – and the following two chapters look at how they have answered these questions.
Chapter five: Performance criteria and standards in New Jersey

Every ten years New Jersey’s bipartisan Apportionment Commission draws a new set of districts for the state legislature. Five Democrat and five Republican representatives are appointed to the commission and attempt to win some benefit from the map, and the role of the commission’s independent Eleventh Member is to move the parties towards the fairest possible map. To do that, the independent member needs a way to assess the various maps offered by the parties. Meanwhile, South Australia asks its independent EDBC to produce a map that will be fair, and that commission has also needed to develop assessment methodology. Just how New Jersey’s redistribution process has been extended to include performance criteria is the subject of the present chapter, and how South Australia’s EDBC has operationalised that state’s fairness criterion will follow in Chapter six.

Performance criteria address the unfinished business of the one vote, one value reforms. The ideal which empowered those who campaigned for an end to malapportionment was a democratic one: they believed that a party with majority support should assume majority status (in the US) or form government (in Australia). In both countries malapportionment was the largest cause of distortion in the way that the electoral system translated votes into seats, so reformers worked to change the redistribution process, making equality the most important criterion and relegating other criteria to a subordinate role. But partisan advantage can be built into a map even with districts of equal population if boundaries are drawn to allow one party to win districts more efficiently or if one party’s voter support is naturally more efficiently distributed. So in the US the most common response has been to balance the parties’ opportunity to generate maps in their own favour, and a few states also require a minimum level of responsiveness. In New Jersey successive independent members appointed to the bipartisan commission to redraw the state legislature’s districts have developed methodology to allow them to give their support to a fair map and each of these Eleventh Members has considered similar questions: Should the aim be to provide fair competition between the parties or fair election outcomes? How is party support best measured? How can a map be assessed before an election has taken place? How fair is fair enough?

New Jersey

New Jersey has voluntary voter registration for citizens aged 18 or over and voluntary attendance to vote. Elections for the state legislature are held every two years; 80 members are elected to the General Assembly (the lower house) and two members are elected to each of its 40 districts. A single ballot paper is used to vote for the General Assembly and (in
relevant years) State Senate and Governor. Electoral district boundaries are adjusted every ten years, after each federal census.

New Jersey adopted a bipartisan commission process to redraw districts for its state legislature after the US Supreme Court’s 1964 one vote, one value judgment in Reynolds v. Sims made it clear that both houses of a state legislature must be correctly apportioned. A case before the New Jersey Supreme Court, Jackman v. Bodine, then invalidated the state’s county-based electoral districts because they were still malapportioned.\textsuperscript{455} Reock has documented New Jersey’s 1966 Constitutional Convention which proposed the Apportionment Commission, as well as the commission’s early history including court challenges to its first maps during the 1960s and 1970s.\textsuperscript{456} To briefly summarise, the convention instituted a balanced bipartisan commission which could implement a map without legislative approval, and provided for the appointment of an independent member if the commission could not reach agreement. The convention originally proposed that a deadlock would be resolved by appointing a Superior Court judge to produce a court-drawn plan, but it was changed in response to ‘complaints…that the courts should be kept out of the process as far as possible.’\textsuperscript{457} Now the Eleventh Member is appointed if the commission is deadlocked 30 days after receiving the census data. The commission is required to draw 40 districts, each to elect one state Senator and two members of the state General Assembly, keeping counties and municipalities intact as far as possible.

The commission’s independent status and bipartisan structure are intended to provide a fair map. At a public hearing in 2011 one mayor advocated

a politically fair map that represents the political leaning of the state, has historical precedence and just makes common sense. After all, fairness is why our

\textsuperscript{456} E.C.J. Reock 2003, Unfinished Business: the New Jersey Convention of 1966, Rutgers University Center for Urban Policy Research, New Brunswick, NJ. In the US the term for redrawing districts for state legislatures is redistricting, and apportionment refers to allocating districts between states, and by extension to drawing congressional districts. New Jersey’s Constitution reversed the terms and named the commission to draw the state’s legislative commission the Apportionment Commission. Nonetheless, in New Jersey the exercise of redrawing either state or federal districts is known as redistricting.
state has a nonpartisan Commission rather than an executive- or legislative-driven process as other states have.\textsuperscript{458}

Chairmen of the two major parties each appoint five members to the New Jersey Apportionment Commission. If this commission deadlocks, the Chief Justice of the state’s Supreme Court appoints an additional member. That position has been filled five times. Dean Marver H. Bernstein of the Woodrow Wilson School of Public and International Affairs at Princeton University was appointed as Eleventh Member in 1967; no appointment was made in 1971; the appointed member in 1981 and again in 1991 was Dean Donald E. Stokes, also of the Woodrow Wilson School of Public and International Affairs at Princeton University. Eleventh Member in 2001 was Professor Larry Bartels, at that time Donald E. Stokes Professor of Politics and Public Affairs at Princeton University, and the appointed member in 2011 was Professor Alan Rosenthal, Professor of Public Policy and Political Science at the Eagleton Institute of Politics, Rutgers University.

Eleventh Members appointed to the last four commissions have understood their role in terms of assessing the parties’ proposals and drawing the parties towards a map which would be fairer than either would have otherwise agreed to. To do that, they have needed a way to assess a map as fair, so in 1981 Donald E. Stokes adopted two outcome criteria which are satisfied only by a map that is responsive and unbiased between the parties. New Jersey’s balanced bipartisan process, assisted by the Eleventh Member and free of the need for the legislature’s ratification, is acknowledged to produce a map which is fairer to both parties and to the voters than would emerge from a different process. And there is an additional benefit: in a country where maps are regularly appealed and overthrown by state and federal courts, a redistricting process which attempts to draw a fair map has the courts’ respect.

\textbf{Adopting performance criteria}

Only once — in 1971 — have the ten party-appointed commissioners found agreement on a map without the assistance of an independent member. An Eleventh Member has been appointed to each of the more recent commissions, and in 2011 the ten appointees did not even meet to discuss a map before the Eleventh Member was appointed. The role of the Eleventh Member

\textsuperscript{458} M.T. Khairullah, New Jersey Redistricting Commission 2011, \textit{Transcript of Public Meetings}, Newark, 11 Oct., p. 3.
requires him and his counsel and methodology advisors to understand just what the partisan effect of a map is likely to be.459

New Jersey’s legislative districts must comply with requirements of the US Constitution for equal population,460 the state Constitution for contiguity, compactness and respect for county and municipal boundaries, and the federal Voting Rights Act 1965 for non-dilution of existing minority voting rights.461 In addition Donald E. Stokes adopted two performance criteria which require that the map will be responsive and unbiased. Successive Eleventh Members have adopted these criteria and have added standards for determining how much responsiveness is required and how much bias will be permitted. The two standards which have been applied are a fairness at a 50:50 test and more recently a partisan symmetry standard. Eleventh Members have also specified additional good governance criteria – 2001 Eleventh Member Larry Bartels focused on expanding minority representation but aimed simultaneously to minimise voter disruption ‘so as not to deny too many New Jersey citizens the opportunity to vote for incumbents who had served them well or against incumbents who had not done so.’462 For similar reasons 2011 Eleventh Member Alan Rosenthal aimed to preserve continuity of representation and at least the cores of existing districts.

As in any other US state, maps approved by New Jersey’s Apportionment Commission have been regularly challenged in court, and the two which were developed by agreement in 1967 and 1971 were disallowed.463 None of the maps developed after the appointment of an Eleventh Member has been disallowed. That seems to be partly due to a 1973 decision of the

459 Pers. comm. Prof. A. Rosenthal, Eagleton Institute of Politics, Rutgers University, 10 May 2011.
460 For legislative districts the US Supreme Court may allow an overall range of up to 10 per cent (e.g. a tolerance of 3 per cent above and 7 per cent below the average).
US Supreme Court, *Gaffney v. Cummings*, which found that when redistricting was conducted in accordance with a political fairness principle the courts should accord the map a presumption of legitimacy:

plainly, judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so.\(^{464}\)

That judgment gave some protection to the Apportionment Commission’s revised map in 1974 in *Davenport v. Apportionment Commission* and again in 2011 in *Gonzalez v. State of New Jersey Apportionment Commission* when the courts recognised that the process is intended to be fair to both parties as evidenced by the fact that the commission has equal numbers of Democrat and Republican members and is not subject to approval by the legislature.\(^{465}\) More importantly for recent appeals, since 1981 each of the Eleventh Members has worked to bring the parties closer to an unbiased map. But in 2011 the methodology supporting the Eleventh Member’s fairness criteria was challenged in the New Jersey courts by a Tea Party appeal which argued that the 2011 map was

built upon ‘academic principles’ which were allowed to trump the redistricting requirements of the New Jersey Constitution.\(^{466}\)

The New Jersey Superior Court referred to *Gaffney* and *Davenport II* and rejected the argument:

Drawing district lines in recognition of a bipartisan political system or for other such political considerations does not run afoul of any constitutional provision.\(^{467}\)

In summary, New Jersey’s performance criteria are not specified by the state constitution or legislation, but they enable the independent member to give agreement to a proposed map if it can be assessed as providing for fair electoral competition. In addition, because the process

aims to provide a map that will not disadvantage either party, the courts do accord the maps a presumption of legitimacy.\textsuperscript{468}

\textbf{An impartial stance}
With ten of its 11 members appointed by the major party chairmen, the New Jersey Apportionment Commission is neither apolitical nor independent of the parties, but its map comes into effect without ratification by the legislature. Dixon judged that

the New Jersey bipartisan commission-plus-tie breaker process….guarantees that reapportionment will be achieved and also guarantees that it will be achieved on as informed a basis as possible.\textsuperscript{469}

The Eleventh Member could simply choose one of the party plans, but Stokes considered that siding with one party would politicise his appointment, so the role has become that of a neutral negotiator acting in the public interest to negotiate a map that would be fairer than either party would have preferred.\textsuperscript{470} Because of this role Stokes championed the New Jersey redistricting process as ‘one of the few practical formulas for reapportionment in the public interest that has ever been devised in the U.S.’.\textsuperscript{471}

The commissioners are appointed to advance their parties’ interests. Jay Webber, Republican chairman in 2011, reported:

we sat down and said, ‘Dr. Rosenthal, tell us what you want us to do – what we can do. And all we want to do, doctor, is we want to have a fair map.’ He said, ‘No, you want a chance to have control.’ He goes, ‘You want control of the Legislature, and the Democrats want control of the Legislature.’ I said, ‘Doctor, we just want

\textsuperscript{468} The 2011 Democratic Party team did consider that the Gaffney ruling meant that New Jersey’s process would be to some extent protective. Pers. comm. B. Castner, Democratic counsel, 24 May 2011, Trenton, NJ.
\textsuperscript{469} Dixon 1968, Democratic Representation, p. 339. Stokes also praised the New Jersey model as allowing “the practical political wisdom of the parties to flow into the redistricting process while constraining the process to meet clear tests of the public interest”. D.E. Stokes 1998, ‘Is there a better way to redistrict?’, In Race and Redistricting in the 1990s, ed. B. Grofman, Agathon Press, New York, p. 345.
\textsuperscript{471} As above, p. 2.
to have a *chance* for control.’ And his response – he was very candid – he said, ‘And they don’t even want to give you that.’

The process places a heavy responsibility on the Eleventh Member. Alan Rosenthal, Eleventh Member in 2011, anticipated detailed and sensitive negotiations.

Given the constitutional provision in New Jersey that establishes the Apportionment Commission in the process, it is clear that a major, if not the major role of the 11th member is to help resolve differences between the Republican and Democratic Commissioners and arrive at a settlement that is fair to both sides. My objective is to help the Democrats and Republicans, the Commissioners, reach agreement on a single map – I hope – that meets the standards just specified. If they reach agreement, we can assume that it is fair in partisan terms. That objective may not be achieved, but then I would like to see two maps that meet the standards just specified, two maps that are not far from one another – and that both are fair in partisan terms and meet the constitutional and legal requirements. In that circumstance, I want it to be very difficult for me to decide which map I’m going to vote for. Either way, we will all be striving to produce a plan that is constitutional, that fairly represents the populations in New Jersey, and that makes sense as public policy. I’ll have the special job of ensuring partisan fairness that neither party comes out ahead of the other party in this enterprise.

The Eleventh Member’s task is made more onerous by public scrutiny. And each has interpreted the task in terms of his own expertise. In 2011 Patrick Murray observed that Princeton professor Donald Stokes – the independent member in 1981 and 1991 – developed his partisan fairness argument. Alan Rosenthal emphasized continuity and stability...If you wanted to win, you had to meet his standards.

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474 Rosenthal had previously been appointed as the independent member on New Jersey’s congressional Redistricting Commission and he commented that the intensity of public scrutiny was much greater for the legislative Apportionment Commission. Pers. comm. Prof. A. Rosenthal, Eagleton Institute of Politics, Rutgers University, 4 May 2011.
None of the commission members is paid and they are not shielded from potential retribution after the commission ends. Eleventh Member in 2001, Professor Larry Bartels, agreed to a Democrat map and later that year the Republican-controlled legislature cut a state budget allocation to his University (Princeton). Eleventh Member in 2011, Professor Alan Rosenthal, decided that the Democrats’ proposal came closest to his ideal map and later that year a state budget allocation associated with his Rutgers University program was vetoed by the Republican Governor. Neither Bartels nor Rosenthal interpreted the cuts as retribution, but the press and the parties have done so.\textsuperscript{476}

**Commission process**

In 2011 the members of the Apportionment Commission held an initial scheduling meeting, four public hearings in cities around the state before the appointment of the Eleventh Member, two private methodology meetings and another three public meetings in various locations as an 11-member commission and then a final public meeting for commission members to vote publicly on the map. But the partisan nature of the New Jersey process means that the full commission does not meet to discuss a particular proposal, and 2011 Eleventh Member Rosenthal conducted the sensitive political negotiations with each party at separate meetings with their commissioners.\textsuperscript{477}

By Australian standards the New Jersey process is short. Commissioners are appointed by party chairmen in mid-November of the census year, the census data become available early the next year (3 February in 2011) and the ten-member commission then has 30 days to report or signal deadlock. Then the Eleventh Member can be appointed and the full commission has 30 days to find a majority vote on a map. The timeframe is constrained at one end by the release of census data and at the other by the deadline for candidates’ nomination petitions for primaries for state elections in November of that same year – in 2001 the map was finalised only 12 days before petitions were due.\textsuperscript{478} By comparison South Australia’s EDBC process takes about six months and federal redistributions take a year, and both have consultation stages once the commission adopts a proposed map, whereas the New Jersey


\textsuperscript{478} New Jersey gubernatorial and state legislature elections are run in odd-numbered years whereas presidential and congressional elections are conducted in even-numbered years.
map is final when it is first made public. Still, any US map is subject to court appeal which can extend the process for years.

Assessing fairness
US redistricting commissions may come to internal agreement on the basis of a wide variety of measures and political assessments, and trade-offs with other policy objectives may be involved as well – support for a particular district’s lines may be traded for support in a budget debate, for example. But New Jersey’s Eleventh Members need to develop agreement without any external incentives and their assessment methodology must help. It must be impartial and also defensible in court. Successive Eleventh Members and their teams have adopted or developed measures of party support and for partisan disadvantage, and a standard for assessing how fair each map is likely to be.

As soon as the Eleventh Member was appointed in 2011 two private meetings were held with commissioners, legal counsel and methodology consultants associated with both parties and the Eleventh Member’s own advisory team to establish common ground on measures and legal interpretation. In a subsequent public meeting Eleventh Member Rosenthal listed his criteria for assessing a map: equal population, contiguity, compactness, recognition of social and ethnic communities of interest, retention (and perhaps expansion) of the number of competitive districts and partisan fairness.479

Each of the parties’ methodology teams and the Eleventh Member’s team need to differentiate between changes in support and campaign effects, and establish an expected range of support (and turnout) for future elections, so that they can assess any proffered map prospectively.480 The parties will also make a party-political interpretation of a map.

Early redistricting methodology was constrained by technology as much as by methodology. In 1981 Eleventh Member Stokes assessed the parties’ proposed maps (and his own) against results from the most recent election. More recently Eleventh Members and their teams have had the benefit of greater computer assistance, and have used several elections.481 This indicates the performance of the map given different campaigns and different turnout levels. That prevents the map from reacting to campaign effects as if they are permanent changes in

480 Participants in the process also include a small group from the Office of Legislative Services at the NJ State House who organise the website, public meetings and transcripts.
support, as Charles Backstrom, Leonard Robins and Scott Eller had highlighted in 1978. No party, they wrote, should be penalised or ‘accused of seizing an undue advantage when it should be congratulated for recruiting outstanding candidates and conducting a first-class campaign for the legislature’. The aim is to assess a map against an expected level of support, given an average campaign.

As court special master, Persily also attempted to construct the “normal vote” for an area. Ideally several elections will need to be aggregated together to get an idea of how the average Democrat or Republican candidate will perform in the district, holding all other qualities of the candidate or unique characteristics of the election equal. The political parties develop for themselves (and keep tightly guarded) intricate models of political performance that they use when drawing their plans. Time constraints can prevent courts from developing similar statistics, but looking at the last few competitive statewide elections or downballot races as proxies for political performance can provide a rough idea of the advantage, if any, that a party will have in a particular district.

In New Jersey ongoing voter support for the Democratic Party is widely understood to be stronger than for the Republican Party, but the numbers are not clear. In 2011 Eleventh Member Rosenthal understood survey data as showing that approximately 35 per cent of voters supported Democrat candidates, 40 per cent were Independent and 25 per cent supported Republican candidates. Monmouth University Polling Institute data from late 2011 confirm the Democrat lead, with voters’ orientation towards the parties closer to 30 per cent Democrat, 20 per cent Republican and 50 per cent Independents oriented equally towards the major parties.

But voter support may not translate into an election result, because both enrolment and voting are voluntary and voters turn out at different rates depending on what the election is

484 Averaging the statewide two-party vote over the five elections from 2001 to 2009 gives a two-party vote for Democrat candidates of just 51.4 per cent.
for. Turnout rates for a state election are highest (about 40 per cent of registered voters) when it includes a gubernatorial contest, and lowest (about 30 per cent) when it is simply for the General Assembly.\textsuperscript{487} So expected outcomes at a given election take turnout into account: for example, when a Monmouth University/NJ Press Media Poll conducted prior to the 2011 General Assembly and State Senate elections found only about 30 per cent of respondents were engaged, the analysis concluded that the coming (non-gubernatorial) election would not change parties’ positions in the legislature from the 2009 non-gubernatorial election.\textsuperscript{488}

While US courts have been reluctant to recognise a map as biased unless it can be shown how it has performed at an election, Eleventh Members need to assess maps prospectively. They use a uniform swing assumption, allocating past results to each district and adjusting them by a regular amount to bring the overall two-party vote to a 50:50 result.\textsuperscript{489} The method is widely used in academic literature and by the parties, if not the courts.\textsuperscript{490} Given a 52 to 48 per cent statewide two-party result for the Democrats, for example, the Democratic vote in each district would be reduced by 2 per cent, the Republican vote would be increased by 2 per cent and the number of districts both parties would win at the resulting hypothetical 50:50 result would be found.

Uniform swings occur if parties can attract independents – unattached voters – and encourage their turnout. But in reality changes in turnout are not uniform across the jurisdiction and sometimes they are decidedly non-uniform: an example is New Jersey’s election result of 2009 when the Republican Party improved its vote in districts it already held, and a wrong winner election outcome occurred. There are two ways to deal with this problem: considering the probability of a given result or assessing a map against the results at several previous elections which together indicate the range within which a future election is likely to fall. Gary King, Andrew Gelman and Robert Browning have developed stochastic (probability) models to predict the number of seats that would change hands with a swing of a given size. The more developed versions allow incumbency, bias and responsiveness to vary, and do not require uniform swings.

\textsuperscript{487} Pers. comm. Prof. P. Murray, Monmouth University Polling Institute, 23 May 2011.
\textsuperscript{488} Monmouth University/NJ Press 2011a, Media release: ‘NJ legislative election outlook is status quo’, Monmouth University, West Long Branch, 18 Oct.
\textsuperscript{489} Stokes 1998, ‘A better way?’, p. 354. Eleventh Member in 2001 Larry Bartels testified that ‘[b]ecause none of these recent elections actually produced a statewide “tie,” the observed results had to be normalized to reflect a 50-50 election’. \textit{Page v. Bartels}, ‘Certification of Bartels’, p. 4.
Thus, when some national force impinges on all districts in the state, we no longer assume that the districts move together in lockstep. Instead, as the expected value (mean) shifts, only the shape of the distribution of district vote proportions must remain the same. Individual districts are free to vary randomly within this shape, with or without uniform partisan swing.\textsuperscript{491}

New Jersey uses the alternative approach: maps are assessed against several elections, but just which elections will be used can be a contested point. In 2001 Eleventh Member Bartels ‘relied primarily on election results from recent legislative contests including 1997 and 1999 General Assembly contests and 1997 Senate contests.’\textsuperscript{492} In 2011 the Democrats argued for data from all state elections held on the 2001 district boundaries (and perhaps federal results as well), whereas the Republicans wanted to use just the 2009 wrong winner lower house results. Eleventh Member Rosenthal chose upper and lower house data from the three most recent state elections, one of which had high turnout because it was also a gubernatorial election.\textsuperscript{493}

Because ten of the 11 Apportionment Commissioners are appointed by the parties, their assessment of any map will be informed by inside knowledge. There is a level of political judgment which the parties can apply to assessing the maps, and which is sometimes shared with the press, but which is necessarily subjective. It takes into account the incumbent member’s intention to run again, his or her ability to raise funds for a campaign, personal popularity within the wider community and association with higher-profile candidates. The press can report their assessments in terms of political effects: on the parties, individual incumbents, candidates, minority candidates and women incumbents.\textsuperscript{494} An example of this kind of reporting occurred when New Jersey’s 2011 congressional map drew a Republican and


\textsuperscript{492} \textit{Page v. Bartels}, Certification of Bartels, p. 5.

\textsuperscript{493} Pers. comm. Emeritus Prof. E.C.J. Reock, Center for Government Services, Rutgers University, 5 May 2011. New Jersey’s five elections in the preceding decade were: 2001 General Assembly, State Senate and Governor; 2003 General Assembly and State Senate; 2005 General Assembly and Governor; 2007 General Assembly and State Senate; 2009 General Assembly and Governor.

a Democrat into a new congressional district which was very marginal and had pockets of both conservative and Jewish residents:

Both men are well funded with war chests of over $1.5 million. Garrett is the most conservative member of the delegation with strong Tea Party support. Rothman, who counts strong support among the Jewish community, was the first New Jersey politico to throw his support behind President Obama in the 2008 presidential race.\(^{495}\)

In 2011 the nature and strength of these political factors were occasionally revealed to the Eleventh Member and his team when they received comments from one party on suggestions from the other party.\(^{496}\) These factors may mean that a district that appears marginal will be quite safe if a given candidate is running, which is clearly what Republican counsel Dale Oldham meant when he told NCSL conference delegates that gerrymandering was ‘all about drawing a map for your own districts that won’t move and a map for your opponent’s districts that will’.\(^{497}\) But unless these political advantages have a measurable effect they cannot be taken into account by a redistricting authority, and successive Eleventh Members have not been able to consider them – neither would the parties consider it appropriate.\(^{498}\)

In 1973 Edward R. Tufte proposed two performance criteria for a ‘minimally democratic’ map. First, it should be responsive to changes in votes, so that if citizens shift their votes from one party to another, then so should the seats. Second, the map should treat Democrats and Republicans alike and in this way should be relatively unbiased. Tufte considered that his approach could be ‘useful for evaluating the consequences of redistricting plans, and might well be used for that purpose by the courts’.\(^{499}\) The courts have not adopted them but his approach has formed the backbone of redistricting methodology in relation to partisan advantage.

\(^{496}\) Rosenthal considered that it would have been very useful to have had been able to have a party viewpoint which was neutral but whenever he did receive a party viewpoint he had to assume that it was partisan. Pers. comm. Prof. A. Rosenthal, Eagleton Institute of Politics, Rutgers University, 4 May 2011. One commission member used this kind of political assessment to demonstrate why several proposed competitive seats would, in fact, be safe for the opposing party: Pers. comm. Emeritus Professor E.C.J. Reock, Center for Government Services, Rutgers University, 5 May 2011.
\(^{497}\) National Conference of State Legislatures Workshop on Redistricting, National Harbor Maryland, 23 Jan. 2011.
It seems clear that New Jersey’s earliest commission adopted several plans because its first plans were rejected by the state Supreme Court in several cases all run as *Jackman v. Bodine*. The court noted of the 1969 map that ‘the parties acknowledge that the plans were developed without any awareness of the political complexion of the proposed districts.’

Dixon reported that in 1971 the next Apportionment Commission contracted with a computer firm for a number of ‘politically blind plans’ and then adopted one, having made ‘no informed assessment of political fairness – the constitutional function of a bipartisan commission – before it adopted one of the plans presented’.

But in 1981 the next Eleventh Member, Donald E. Stokes, devised two performance criteria apparently based on Tufte’s requirements, and those have been adopted by subsequent Eleventh Members.

Stokes expressed the first criterion as:

*Unbiased between the parties.* The first is that when the two parties are evenly divided in popular votes across the state as a whole, there should be no reason for believing that one of the parties is more likely than the other to win a majority of the seats – _although accidental factors will usually keep the actual division of seats from being exactly even._

This first test asks whether the parties would be equally likely to win a majority of the seats if they were to win the same share of voter support across the state: it later became known as the fairness at 50:50 test. Stokes noted that while a map may be prospectively assessed as fair in these terms, a subsequent election may still produce a wrong winner outcome because _accidental factors will usually_ distort the translation of votes into seats.

Stokes adopted Tufte’s measure of partisan advantage as the difference between the twoparty vote in the median seat and across the jurisdiction as a whole. This measure includes partisan advantage from all causes, including gerrymandering, bias due to over-concentration of one party’s support in excessively safe districts, or the effects of particular campaigns.

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502 Stokes reported that the 1981 commissioners could not articulate how they would assess a map as fair between the parties; presumably their counterparts would not have been able to do it in 1971 either. Stokes, 1998, p. 351.

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Gerrymandering manipulates the geographic distribution of party support so that it translates into seats in a more efficient way for one party.\textsuperscript{505} The translation of votes into seats may also be biased unintentionally when one party’s support is geographically concentrated or as a consequence of compliance with other requirements (for example, when majority-minority districts over-concentrate Democrat votes).

In New Jersey partisan support is over-concentrated in some areas – suburban areas can be Republican strongholds whereas urban areas where minority groups form a large proportion of the population are likely to be safe Democrat districts. In particular, bias against the Democratic Party can be generated by over-zealous compliance with the federal Voting Rights Act 1965 requirement that electoral changes must not result in ‘the denial or abridgement of the right to vote on account of race or color.’\textsuperscript{506} The largest minority groups in New Jersey are African Americans and Hispanic Americans, and the central question is whether their right to vote is enhanced or reduced by drawing majority-minority districts.\textsuperscript{507} That can be a complex question when the communities are diverse: for example, the largest influx of Puerto Ricans into New Jersey occurred 50 years ago, so that community is now in its third generation, whereas other South Americans and Mexicans are more recently arrived and have quite different needs and different proportions of their population eligible to vote.\textsuperscript{508}

New Jersey’s 2001 Apportionment Commission drew fewer majority-minority districts than was strictly possible, on the grounds that when the ‘totality of circumstances’ were considered minority groups would benefit from more ‘influence districts’ (in which the minority can influence the outcome of an election even if its preferred candidate cannot be elected) or ‘crossover districts’ (in which enough majority voters will support the minority’s preferred candidate). The map was appealed in Page v. Bartels by a coalition of Republican commission members and minority group leaders,\textsuperscript{509} who argued that drawing minority areas in the city of Newark into four influence and crossover districts instead of the existing three majority-minority districts would dilute the voting strength of African Americans in the area. The court


\textsuperscript{507} Appeals against a map on Voting Rights Act grounds need to show that voting is racially polarised, so ‘Testimony by witnesses who are familiar with local politics and voting behavior generally is presented in conjunction with statistical evidence to corroborate or contradict statistical findings.’ NCSL 2009, Redistricting Law 2010, p. 64.

\textsuperscript{508} Pers. comm. I. Reed, Eagleton Institute of Politics, Rutgers University, 19 May 2011.

accepted evidence that both Hispanics and whites often voted for African American candidates, the appeal failed and at the subsequent General Assembly and state Senate elections all of the minority incumbents in those districts with allegedly diluted minority voting strength were re-elected.\footnote{E.J. Leung 2003, ‘Page v. Bartels: a “total effects” approach to evaluating racial vote dilution claims’, \textit{Law and Inequality}, vol. 21, no. 1, pp. 192-214.}

In 2011 minority representation was a central theme of both parties’ arguments to the Eleventh Member. Republicans again supported maximising the number of majority-minority districts and Democrats argued that the intention of the \textit{Voting Rights Act 1965} had been better served by influence and crossover districts, as evidenced by the fact that more minority group candidates had been elected since the change in 2001. Eleventh Member Rosenthal was reported as having asked both parties to provide ‘two majority Hispanic districts and one majority black district’\footnote{This request was made part way through the process to draw the parties towards a fairer map. M. Pizarro 2011b, ‘The man between the maps: Rosenthal still stuck with submissions that don’t match up’, \textit{PolitickerNJ} online edition, 29 March; M. Pizarro 2011c, ‘Breaking: Rosenthal chooses Democratic map’, \textit{PolitickerNJ} online edition, 2 April; Pers. comm. Emeritus Prof. E.C.J. Reock, Center for Government Services, Rutgers University, 5 May 2011.} and although the final map had just one of each it had ten influence or crossover districts, thereby ensuring that the minority vote was not over-concentrated.

The 2011 Apportionment Commission was confronted by a second potential source of over-concentration of one party’s support after a state Supreme Court ruling that it must comply with a state Constitutional provision that cities not be split more than necessary.\footnote{New Jersey State Constitution Article IV, Section II para. 3: ‘Unless necessary to meet the foregoing requirements, no county or municipality shall be divided among Assembly districts unless it shall contain more than one-fortieth of the total number of inhabitants of the State, and no county or municipality shall be divided among a number of Assembly districts larger than one plus the whole number obtained by dividing the number of inhabitants in the county or municipality by one-fortieth of the total number of inhabitants of the State.’ The McNeil cases are summarised in Reock 2003, \textit{Unfinished Business}.} Because the city areas are Democrat heartland, that decision required the commission to draw several very safe Democrat seats in Newark and Jersey City and, to avoid biasing the map, several equally safe Republican districts in other areas of the state.\footnote{Pers. comm. Prof. A. Rosenthal, Eagleton Institute of Politics, Rutgers University. 4 May 2011.}

The author’s assessment of the final 2011 map, using an average of the 2005, 2007 and 2009 Assembly results and also the 2007 Senate results, shows that at a hypothetical 50:50 outcome the Republicans would have won 17 districts but not 20, indicating a minimally responsive map but not a fair one. But these estimates did not make any adjustment for the ratio of electors to population. That adjustment has been routinely made since 1981 Eleventh Member Stokes
assessed various maps against results adjusted for the effect of districts with fewer voters.\textsuperscript{514} The assessment is made because districts are drawn to equalise population, not voters, and districts with strong Democrat support generally have fewer enrolled voters – because they have more non-citizens and children – than those with strong Republican support. Even with the same proportion of eligible voters turning out, Democrat districts would record fewer votes than Republican districts. Stokes considered that the calculation

removes the effects of the differences in demography and participation between Democratic and Republican districts, and the graph of the relationship between votes and seats will pass through the 50-50 point under a fair plan.\textsuperscript{515}

The assessment is made by calculating the statewide two-party vote as the average of the 40 district two-party results, rather than as the total vote each party receives across the state as a whole. When districts were routinely malapportioned this was a recognised method to assess the partisan effect of malapportionment.\textsuperscript{516} But the calculation has largely fallen into disuse since districts have been required to have the same population, and it was a source of contention in 2011: Republican commissioners portrayed it as a ‘thumb on the scales’ and members of the public objected to it in the public meetings.\textsuperscript{517} One said: ‘In America, we hold elections where each vote counts. And those who don’t exercise their right to vote don’t get counted. The map you adopt should reflect that reality.’\textsuperscript{518} Another argued that ‘[a]veraging nonvoters into the mix devalues my vote.’\textsuperscript{519}

A fair map which is unresponsive denies the public interest when it fails to register any change as voters withdraw or change their support. Responsiveness is a complex requirement, influenced by incumbency and campaign effects such as turnout differentials, but at its

\textsuperscript{514} An adjustment for turnout is the distinctive characteristic of the Stokes calculation. Pers. comm. Emeritus Prof. E.C.J. Reock, Center for Government Services, Rutgers University, 5 May 2011.
\textsuperscript{516} Rydon noted that if districts had the same number of voters and the vote expressed in two party terms ‘then the simple (unweighted) average of these for any one party would equal the overall percentage vote polled by that party.’ Rydon 1957, ‘The relation of votes to seats’, p. 57. See more recently R. Johnston, D. Rossiter & C. Pattie 1999, ‘Integrating and decomposing the sources of partisan bias: Brookes’ method and the impact of redistricting in Great Britain’, \textit{Electoral Studies}, vol. 18, no. 3, pp. 367-78.
\textsuperscript{517} Pers. comm. Assemblyman J. Webber, Republican chair of the 2011 NJ Apportionment Commissioners, 17 May 2011.
\textsuperscript{518} M. Caliguire, NJ Apportionment Commission 2011, \textit{Transcript of Public Meetings}, Trenton, 10 March, p. 54.
\textsuperscript{519} K. Bicka, NJ Apportionment Commission 2011, \textit{Transcript of Public Meetings}, Trenton, 10 March, p. 82.
simplest it requires a minimum number of competitive seats. Stokes addressed the need for responsiveness with a second performance criterion:

*Responsiveness to electoral tides.* The second test is that when a tide moves strongly toward one of the parties, this party should fairly quickly win an effective majority of seats. 520

In 1981 Stokes prepared his own map which he judged to be unbiased and responsive, and required the parties to approximate it. Ten years later he assessed how well the final map had performed, and found that the eight Senate and Assembly elections for the decade had been responsive. In particular, over the range he identified as competitive the plan had translated ‘a 1 per cent swing in the division of votes received into a 1.8 per cent swing in the division of seats won.’ 521

Subsequent Eleventh Members have all adopted a responsiveness criterion, although they have operationalised it in several ways and prioritised it differently. In 2001 Bartels required the parties to provide a map with competitive districts for both parties, likely to be won by margins small enough that the seats could change hands with a negative swing. Bartels attested that it had

seemed desirable for the partisan balance of competitive districts to be approximately even, so that electoral shifts in either direction would be likely to produce changes of similar magnitude in the composition of the legislature. 522

The map he agreed to in 2001 was the final Democrat map which he assessed as having ‘an even balance of competitive races’. 523 In particular, when assessed against results from the three most recent elections it had

20 competitive races (with an expected margin of less than 10 percentage points) and a further 24 potentially competitive races (with an expected margin of 10 to 20 percentage points) across the three relevant elections. 524

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521 As above, p. 16. This ratio is known as the swing ratio: see R.G. Niemi & J. Deegan Jr. 1978, ‘A theory of political districting’, *American Political Science Review*, vol. 72, no. 4, pp. 1304-23.
523 As above.
524 Bartels used the 1997 and 1999 Assembly and 1997 Senate election results, and the assessment was made once the results had been adjusted using a uniform swing assumption, to a ‘close statewide race’. 182
Comparing the agreed map to the final Republican map, Bartels also attested that

[a]djustments for incumbency (or for incumbency plus turnout differentials) significantly increased the number of projected competitive races under both plans, but did not clearly favor either plan over the other with respect to competitiveness or responsiveness. 525

Leading into New Jersey’s 2011 process, the 2001 map had few remaining competitive districts and Eleventh Member Rosenthal wanted more:

Competitiveness is another standard that is not constitutionally or legally prescribed, yet there is agreement on the Commission, I believe, that the apportionment should attempt to establish a number of competitive districts, recognizing that most districts, because of where partisans tend to reside, will not be competitive. My own view is that we should absolutely not reduce the number of competitive districts and, perhaps, increase the number a bit. 526

Public meetings held by the Apportionment Commission showed clear public support for a greater number of competitive districts, expressed as a hope that voters would then become more engaged as much as a desire that incumbent members would become more attentive to their electors. The cartoon below was published in the Jersey Journal some time before, but was consistent with public sentiment at the hearings. 527

Page v. Bartels 2001, Certification of Bartels, p. 5. Note that a margin of 10 per cent would imply a seat won with 55 per cent of the two party vote.

525 As above, p. 6.
Incumbent members have an advantage over challengers (due *inter alia* to the ability to be associated with positive change, allowances of office and media coverage) which can reduce responsiveness in the system as they increase their margins or defend their seats against negative swings. There is no rule of thumb for the size of an incumbency advantage but Cain judged that California’s 1981 map, at issue in *Badham v. Eu*, achieved more from the displacement of incumbent congressmen than from changes to the underlying levels of partisan support in each district.528

Therefore, redistricting authorities in 12 states are prohibited from protecting incumbents when district boundaries are drawn. California requires for example that: ‘The place of residence of any incumbent or political candidate shall not be considered in the creation of a map. Districts shall not be drawn for the purpose of favoring or discriminating against an incumbent, political candidate, or political party.’529 But seven of the 12 are silent on the matter for their congressional maps because congressional committee positions provide a channel to advantage a congressman’s state, and those positions are allocated on seniority. New Jersey’s commission is not one of the 12 states which prohibit protecting incumbents because New Jersey requires candidates to live in their districts, and there is therefore an

unstated obligation not to change the district boundaries too often or too much. But as Dixon said of the redistricting process as a whole, drawing districts blind to their partisan values is no way to ensure that they are fair, so drawing them blind to incumbency would be naïve. 530 New Jersey’s 2011 Eleventh Member looked at how many seats included the residences of more than three incumbents whenever a new map was offered. 531 One map which had a district with six incumbents was rejected for that reason.

As noted in Chapter four, some of the traditional criteria tend to protect incumbency, and indeed incumbents can be favoured for many reasons. In 2001 Eleventh Member Bartels’ concern for accountability led him to minimise voter disruption, and in 2011 Eleventh Member Rosenthal favoured ‘continuity of representation’ and tried to preserve at least the cores of individual districts. 532 Republicans blamed Rosenthal’s policy of retaining existing lines where possible when the final map awarded no more seats than they already held, and again when they failed to win extra seats at the 2011 election. 533 But protecting incumbents and the cores of existing districts may be a necessary part of a process where the Eleventh Member must find agreement with the parties wherever possible, in order to insist on change where it is imperative.

There is one important factor which tempers these tendencies to conserve existing boundaries: the Apportionment Commission’s structure. Members are appointed by party chairs to represent their parties’ interests across the state, not simply to conserve the districts of their incumbents. 534 So when the new map was finalised in 2011 a small number of members from both parties were substantially affected: eight (of the 80) Assembly members announced their retirement because their home towns had been moved into different districts, another moved house to contest his changed district, and a Republican state senator ran for the Assembly when the redistricting moved another Republican senator into his district. 535

531 Each district elects one State Senator and two Assemblymen.
535 D. Levinsky 2011, ‘Conners cites redistricting shuffle as reason he’ll retire’, Phillyburbs.com online edition, 5 April; T. Hester Sr. 2011a, ‘N.J. Assemblywoman Joan Quigley announces she won’t seek re-election after redistricting’, NewJerseyNewsroom.com online edition, 6 April; E. Wander 2011, ‘Voss will not run in District 37, likely to enter freeholder race’, Fort Lee Patch, online edition, 6 April; M. Pizarro
New Jersey’s difficulty drawing more competitive districts in 2011 may be similar to Arizona’s: compliance with more highly regarded criteria defeats the attempt. When Eleventh Member Rosenthal specified his requirements soon after his appointment he addressed competitiveness only after communities of interest and continuity of representation. That led several commentators to conclude that the final map would favor the party already in majority, in this case, the Democrats who had a 52 per cent two party vote average over the last four elections of the decade. Murray showed that it would be possible to produce a competitive map if responsiveness was given priority: he offered a map in which 11 of the 40 districts were tightly competitive, with victory margins under 1,000 votes when assessed against an average of 2007 and 2009 legislative election results.

The US has no agreed definition for competitive districts and neither is there agreement on how many districts should be competitive in order that a map will be assessed as responsive. Regularly used definitions include: a district with a two-party vote of 50 to 52 per cent; a district won with a vote between 50 per cent and 55 per cent; a district which might change hands at an average election; and a district which was won by a small margin. For Arizona’s 2011 commission McDonald derived his definition from the software which had a statistical margin of error of 3.5 percentage points.

If the expected Democratic vote as a percentage of the two major political parties falls within the range 46.5 to 53.5 per cent, then I cannot determine with a


537 These were the 2005 Assembly, 2007 Assembly and Senate and 2009 Assembly elections. T. Hurlbut 2011, ‘Apportionment comm. will give map to Dems: prof’, The Examiner online edition, 16 March.

538 ‘Basically, I defined district competitiveness in the following way: solidly safe partisan districts have a two-cycle victory margin of 10,000 votes or more; likely safe partisan districts average 2,500 to 10,000 vote margins; leaning partisan districts average between 1,000 and 2,500 vote victories; and competitive districts have average victory margins under 1,000 votes.’ P. Murray 2011a, ‘A competitive map’, PolitickerNJ online, 9 March.

539 Only Patrick Murray was prepared to put a number to it: he suggested that a responsive map for New Jersey might have 10 competitive districts out of the total 40. Pers. comm. Prof. P. Murray, Monmouth University Polling Institute, 23 May 2011.

540 Murray 2011a, ‘A competitive map’.
reasonable degree of statistical certainty which of the two political parties is expected to win the district, and I therefore label the district competitive.\footnote{M.P. McDonald 2004b, Report to the Arizona Independent Redistricting Commission on Recommended Competitiveness Baseline for State Legislative Districts, p. 1.}

A different definition which simply considers districts to be competitive if they have been won by either party is sometimes used, but assessing these ‘swing districts’ before an election is a matter of judgment. In New Jersey swing districts are recognised where one party holds an Assembly seat and the other holds the district’s other Assembly seat or its Senate seat, and these districts must be for all practical purposes competitive. The lack of clarity in even defining a competitive district is a result of turnout differences which can produce variable results over several elections in one district even when the underlying level of party support has not changed. When the Eleventh Member’s team assessed the parties’ maps in 2011 they considered a district to be competitive if it would be won with a two party vote of under 55 per cent when assessed using the 2007 and 2009 legislative election results separately.\footnote{Pers. comm. Prof. A. Rosenthal, Eagleton Institute of Politics, Rutgers University, 4 May 2011.}

Democrat members of the commission saw as many as seven competitive districts in the map that was finally chosen, while Republicans (and commentators) saw only two.\footnote{Murray 2011b ‘Same old song’, B.C. Harrison 2011a, ‘When incumbency has value’, NorthJersey.com online edition, 21 Aug.} Magyar took into account political factors as well, including the strength of the new districts’ incumbents and the reputed size of campaign war-chests, and decided that none of the districts identified as competitive would actually be likely to change hands.\footnote{M.J. Magyar 2011, ‘Redistricting map preserves the incumbent advantage’, PolitickerNJ online, 4 April.} The author’s assessment of the final map using averaged results from the four elections was that it would increase the number of ‘swing’ districts from four to six, and once the results were adjusted to a hypothetical 50:50 outcome there would be three Democrat districts and two Republican districts won with a two party vote between 50 and 55 per cent, evidence of unbiased responsiveness.\footnote{Election results are available from the NJ Department of State website: \url{http://www.njelections.org/results_archive_doe.html}}

Despite these various interpretations of the same map using largely the same data sets, there was agreement that the final map in 2011 was more responsive than either party’s initial maps.\footnote{See for example, D.R. Isherwood 2011a, ‘Dems to present redistricting strategy’, PolitickerNJ, online edition, 11 Jan.; D.R. Isherwood 2011b, ‘First map surfaces out of redistricting effort’, PolitickerNJ, online edition, 18 Feb.; T.J. Carroll 2011, ‘Fluid map causes palpitations among Dems’, PolitickerNJ, online edition, 30 March.} Democrat commission member Senator Paul Sarlo attributed that outcome to the
Eleventh Member and his team: ‘it was their work – it was their constant recommendations and constant pushing us to come to the middle which makes this a more responsive and fair map.’

In New Jersey the difficulty with drawing competitive districts may also be a function of scale. Its electoral system currently elects one Senator and two Assemblymen from each of 40 districts, and for the 2011 map an average district has 219,800 residents. At that level of abstraction, pockets of population with different characteristics have relatively little effect on the map, whereas using a single member district system and drawing twice as many districts would mean each would have a smaller population, allowing different population groups to influence them to a greater extent.

A legislature drawing its own districts is unlikely to draw a raft of competitive districts, but New Jersey’s experience shows that even an independent redistricting authority will find it difficult. That accords with the observations of Mayhew and others in the 1970s that marginal congressional districts had been in long-term decline, due partly to redistricting and partly to incumbency. Gary Jacobson observed optimistically that new campaign techniques were so effective that districts were changing hands even though they had previously been won by safe margins, so the disappearance of marginals did not mean the disappearance of responsiveness. More recently McDonald showed the effect of redistricting and of incumbency on the decline in competitive congressional districts during the 1990s and 2000s. For very competitive districts, which he defined as those with a margin of 48 to 52 per cent, almost all the decline occurred at the end of the decade when redistricting occurred. But for competitive districts as a whole (defined as having a margin of 45 to 55 per cent) McDonald found that most of the decline occurred during the decades following redistricting, and he attributed that to incumbents using the advantages of office to defend their districts against challengers, gradually strengthening their hold. Bill Bishop and Robert G. Cushing have proposed a different mechanism: people like to live near others with similar lifestyle and

547 P. Sarlo, NJ Apportionment Commission 2011, Transcript of Public Meetings, Trenton, 3 April, p. 18.

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outlook, so a very mobile population will effectively sort itself politically when it sorts itself geographically.\textsuperscript{551} That would have the effect of making districts safer over the life of a map, especially in states with high in-migration and internal migration.

Lack of agreement on how to measure support and then on how to assess changes in support is the reason why responsiveness has no agreed measure and no standard. Persily noted in relation to court-drawn plans that

the key to producing competitive districts, as with gerrymandered districts, is to employ accurate data that can do a good job of predicting electoral outcomes. Courts, like anyone who must make these approximations on the fly, are not very good at this. The most courts can hope for is that their plans do not go out of their way to stifle competition.\textsuperscript{552}

That seems to apply to any redistricting authority. There is no standard for the right number of competitive seats: the risk is that with too few the electoral system will be unresponsive to a change in voter sentiment and will entrench an unpopular administration, and with too many a state with roughly equal party support could ricochet between administrations, purging the ranks of both parties too regularly and preventing them from achieving longer-term policy goals. A map needs some competitive districts on both sides of the aisle. How many is a matter of judgment.

\textbf{A fairness standard}

Applying various sets of election results to a map raises a central question: how close to an ideal does a map need to be, in order to be assessed as fair enough? As shown in Chapter one the US Supreme Court has established standards in relation to malapportionment – strict equality for congressional districts and substantial equality for legislative districts – but standards for racial gerrymanders and partisan gerrymanders have been harder to develop. In the absence of a Supreme Court standard, New Jersey’s Eleventh Members have operationalised standards developed within academia.

Eleventh Members need a standard to decide whether a party’s map is fair enough to be supported. That decision may also be a function of the remaining time available for yet another revision, the parties’ remaining willingness to make yet another concession, and the

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Eleventh Member’s remaining nerve to imply that one more change may secure his vote for the party’s map. But successive Eleventh Members have relied on two statistical assessments of the various maps against objective standards: fairness at a 50:50 election and partisan symmetry. Other standards have been rejected for various reasons.

To voters, the obvious standard for a fair map is that it will avoid wrong winner election outcomes and instead will reliably allocate most seats to the party with most support.

Wrong winner election results can be evidence of bias in a map, if a party’s ability to win seats is curtailed because its support has been either concentrated in excessively safe districts or distributed between districts that it cannot win. On the other hand, a wrong winner election outcome can be evidence of non-uniform swings – a campaign that has been more effective in safer or more marginal districts – for example, where a party increases its vote in districts it already holds. It would be inappropriate for a court to invalidate a map because the parties have run unusually effective or ineffective campaigns. In addition, requiring a wrong winner result as evidence of an unfair map sets the bar too high in a jurisdiction where the two parties do not have equal support – in that case responsiveness is more important, ensuring that the party with less support could win more seats if it won more support. So while a biased map will produce a wrong winner election outcome in a tight competition between two evenly supported parties, an unbiased map might do so too, and a biased map might not produce this kind of outcome when party support levels are less even.

Stokes rejected the idea that an unbiased map would always produce a fair election outcome and specifically stated in his first criterion that in a tight result even with an unbiased map ‘accidental factors will usually keep the actual division from being exactly even’.

The US Supreme Court has also decided that a single wrong winner election outcome is not a useful standard. In Davis v. Bandemer a district court had invalidated an Indiana map after a wrong winner election, and on appeal to the Supreme Court the judgment was reversed. The higher court was ‘not persuaded that there are no judicially discernible and manageable standards by which political gerrymandering cases are to be decided’ and while it failed to establish a standard the court did dismiss wrong winner election outcomes as proof of gerrymandering. The court refused to arbitrate ‘whenever a political party suffers at the

polls.\textsuperscript{555} Only if an electoral system had been ‘arranged in a manner that will consistently degrade a voter’s or a group of voters’ influence on the political process as a whole’ would the court intrude.\textsuperscript{556} So a series of wrong winner elections could be only partial evidence of gerrymandering.

While New Jersey is the only US jurisdiction where electoral district maps are routinely assessed against fairness criteria, various criteria and standards have been developed for the courts by academic \textit{amici curiae}. Proportionality was often proposed in the 1960s and 1970s but has been less promoted since it has become more widely understood that districted electoral systems are inevitably disproportional even when they are unbiased. In 1983 Grofman was one of the first to make that case: ‘[i]n a single-member district system of elections, we would never expect to find complete proportionality between a party’s vote share and its seat share’.\textsuperscript{557} A party’s share of seats becomes steadily less proportional to its vote share as that vote share increases, so even though a set of districts might award 50 per cent of the districts to a party winning 50 per cent of the votes, it is likely to award much more than 60 per cent of the seats to a party winning 60 per cent of the votes. The mechanism for this amplification – sometimes referred to as a ‘winner’s bonus’ – is often attributed to the operation of a plurality count in which minor parties win votes but no seats, thereby enabling larger parties to win more seats than their vote share might (proportionately) entitle them to. In fact, the amplification is a function of the geographic distribution of support, so it applies in all districted systems regardless of the voting system. Parties win a given level of support across the jurisdiction and winning an extra marginal seat may be achieved by a targeted local campaign which will bring in relatively few extra votes. So in a 100 seat house a party will need to win far less than an extra 1 per cent of the statewide vote to win an extra seat.\textsuperscript{558} In a districted system where two major parties dominate the field a proportionate electoral system is now regarded as unattainable.

During the 1980s, the general academic view was that the courts should follow their reasoning in racial gerrymandering cases and require a partisan gerrymandering challenge to show evidence of non-compliance with traditional or legislated criteria as well as evidence of how

\textsuperscript{555} As above, p. 111.
\textsuperscript{556} As above, p. 132.
the map performed at elections.\textsuperscript{559} So as \textit{amicus curiae} at the district court hearings of \textit{Badham v. Eu}, Grofman reported evidence of intentional bias and drew the court’s attention to packing and cracking, strangely shaped districts, incumbents pitted against each other and a lack of competitive seats.\textsuperscript{560}

Richard Niemi argued against a standard with many components because it would involve specifying allowable trade-offs between the various criteria. It would be difficult for the courts to specify the degree to which strict adherence to a community of interest criterion could be a defence against the fact that a plan had too few marginal seats.\textsuperscript{561} So Niemi proposed simply that unresponsive maps should be invalidated.

A partisan symmetry standard requires that a fair map will award parties the same seat share if they win the same vote share. Fairness at 50:50 is a narrow version of this standard, requiring simply that at the point when the parties win equal support they should win equal numbers of seats.

Grofman published a paper including these standards in 1983 and offered them at a 1984 UCLA conference, the proceedings of which were reviewed by the US Supreme Court in its deliberations on \textit{Davis v. Bandemer}.\textsuperscript{562} When the court handed down its decision it referred to the conference proposals but did not adopt a standard. The partisan symmetry standard was further developed in 1987 by Gary King and Robert Browning who defined a fair map as an unbiased map which would treat the parties equally:

\begin{quote}
[i]n an election system where \( x\% \) of the Democratic votes produces an allocation of \( y\% \) of the seats to the Democrats, then in another election under the same system \( x\% \) of the Republican votes would yield the same \( y\% \) Republican allocation of seats.\textsuperscript{563}
\end{quote}

\textsuperscript{559} Cain reported that ‘the single piece of wisdom our discipline could agree on was that no one indicator completely and unambiguously captured the meaning of ‘fair representation’.’ B.E. Cain 1990, ‘Perspectives on \textit{Davis v. Bandemer}: views of the practitioner, theorist, and reformer’, in \textit{Political Gerrymandering and the Courts}, ed. B. Grofman, Agathon Press, New York, p. 117.


But King and Browning anticipated that proving any map was biased would require results from ‘numerous elections over at least a decade’ on the new boundaries. Like ‘continued frustration of the will of a majority of the voters’ this test would be so demanding it would be useless. A new map would be produced before any existing map could be invalidated.

Grofman (with Jacobson) offered the Supreme Court the partisan symmetry standard again in an amici brief in relation to Vieth v. Jubelirer. They attempted to shift the court’s focus away from egregious gerrymandering towards bias in a tight contest. They offered a standard along the lines of those used in racial gerrymandering cases: a package of tests including predominant intent to gain partisan advantage, shown by ‘evidence that other neutral and legitimate redistricting criteria were subordinated to the goal of achieving partisan advantage’, and evidence of systematic packing or cracking. But they focused on the performance of the map – it would be a gerrymander if a party would not be able to win a majority of seats even if it had a majority of votes. The court again could not agree on a single standard. Four Justices rejected the idea that party support was measurable or even consistent over time and that judges could ‘make determinations not even election experts can agree upon.’ But Breyer J would have been prepared to consider that entrenchment using a plan which was not only biased but unresponsive would be unconstitutional under the Equal Protection Clause, as indicated perhaps by two successive wrong winner election outcomes or the likelihood of wrong winner elections when the plan was measured against ‘strong, unrefuted statistical evidence’ and also where traditional process criteria – such as respecting existing boundaries and keeping communities intact – had not been observed.

In 2006 King, Grofman, Gelman and Katz offered up the partisan symmetry standard once again, in an amici brief in LULAC v. Perry. The standard had already been accepted in

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564 As above, p. 1267.
569 As above, pp. 366-7.
570 The brief concluded: ‘In deciding this case this Court should take into consideration the symmetry standard, as it measures partisan bias itself and it allows courts to decide in a politically neutral and objective manner whether the State’s plan is fair to all political groups.’ LULAC v. Perry 2006, ‘Brief of amici curiae Professors Gary King, Bernard Grofman, Andrew Gelman and Jonathan N. Katz, in support of neither party’, Eddie Jackson, League of United Latin American Citizens; Travis County; GI Forum of
practice – both the expert for the plaintiffs and the expert for the state had assessed the challenged map against a partisan symmetry standard and this time Stevens J would have accepted the partisan symmetry standard too, calling it ‘widely accepted by scholars as providing a measure of partisan fairness in electoral systems.’\textsuperscript{571} But this court found difficulty with evaluating a map prospectively and then with deciding a tolerance – how much partisan advantage would be too much.\textsuperscript{572} Only Stevens J accepted that as the court’s task.

[I]t is this Court, not proponents of the symmetry standard, that has the judicial obligation to answer the question of how much unfairness is too much. It would, of course, be an eminently manageable standard for the Court to conclude that deviations of over 10 per cent from symmetry create a prima facie case of an unconstitutional gerrymander, just as population deviations among districts of more than 10 per cent create such a prima facie case. Or, the Court could conclude that a significant departure from symmetry is one relevant factor in analyzing whether, under the totality of the circumstances, a districting plan is an unconstitutional partisan gerrymander.\textsuperscript{573}

Grofman and King then offered five options: the court could invalidate plans which would have more than minimal bias, or fail a fairness at 50:50 test, or impose a bigger bias than the plan being replaced, or show bias of one seat or more, or produce egregious amplification.\textsuperscript{574} The Supreme Court has not adopted the partisan symmetry standard though that seems the likely choice. According to Grofman and King it has widespread acceptance in academic work and commentary on redistricting,\textsuperscript{575} and it is used in practice in New Jersey.

Although Stokes originally used the narrower fairness at 50:50 test in 1981 and 1991 and did not specifically require partisan symmetry, in practical terms the map will not perform in an unbiased way when support changes with different levels of turnout, unless it does in fact


\textsuperscript{572} \textit{LULAC v. Perry} 548 U.S. 399, 467 (2006). They proposed that a map could be assessed as fair by adjusting the result in each district by a uniform amount to find the number of seats won by each party at a hypothetical 50:50 election outcome.

\textsuperscript{573} As above, p. 468 fn 9.


\textsuperscript{575} As above, p. 6.
allocate a similar proportion of both parties’ support in safe districts and also in competitive districts. So as New Jersey’s Eleventh Member in 2001, Larry Bartels adopted Stokes’ performance criteria, and followed him in articulating the standard for partisan fairness in terms of fairness at 50:50:

The basic idea underlying my analysis of partisan balance is that, if candidates for the two major parties receive the same number of votes statewide, an unbiased map should produce an even allocation of seats in the State Legislature.576

In New Jersey in 2011 Democrat Apportionment Commissioners and counsel articulated their argument to the Eleventh Member in terms of partisan symmetry in addition to the Stokes criteria (which they understood as fairness at 50:50 with a minimum number of competitive districts).577

At US elections so many variable factors affect the translation of votes into seats that the best any map can provide is an absence of built-in advantages to either party – that is, a level playing field. The Stokes tests recognise this by conceding that ‘accidental factors’ will usually skew the translation of votes into seats.578 US election districts are drawn to equalise population rather than voters; enrolment is voluntary; turnout is voluntary; elections are sometimes held just for one house, sometimes for both and sometimes for the Governor as well; campaigns are localised and highly dependent on funding; and incumbency may matter as much as party. A change in any of these factors can skew a result, and successive Eleventh Members have understood their task as providing a map that will not advantage either party going into the next round of elections, and possibly longer. In addition they have considered the public interest in responsiveness.

The public understanding of New Jersey’s Apportionment Commission process is that it provides a map which is relatively unbiased between the parties, so wrong winner election results are interpreted as evidence of campaign effects, not of an inappropriate map. There

577 The 2011 Democrat team retained Professor Michael P. McDonald and cited the work of Grofman and King. Bonier said the Democrats used a method which is a variation on one used by Charlie Cook who ranks congressional districts according to the variation between the district and the national presidential vote. District results are reported in terms of their vote above or below the presidential vote. New Jersey’s 13 existing congressional districts are listed on the Cook Report as ranging from D+33 in the 10th to R+7 in the 11th. The Democrats did not use the presidential vote, just the methodology. Pers. comm. B. Castner, Democratic Party counsel, 24 May 2011; also pers. comm. T. Bonier, Democratic Party consultant, 27 May 2011.
was little acceptance in 2011 of the Republicans’ argument that the wrong winner election outcomes in 2003 and 2009 meant the previous map had been biased towards the Democratic Party. At the time they occurred those election outcomes did not apparently discredit the redistricting process or the previous map – a search of the New Jersey State Library’s databases produced no articles at all which called these results unfair or wrong winner elections. Media reports in 2003 attributed the outcome to low Democrat turnout for the Assembly election, and in 2009 pointed to the gubernatorial campaign which increased support for Republican candidates in districts the party already held. Neither was there any challenge to the Democratic Party’s legitimacy as the majority party in the House.

Murray’s view is that voters accept an election outcome as legitimate if the parties win according to the rules. That view was shared by Republican co-chair of the 2011 Apportionment Commission, Jay Webber, who argued in its public hearings that the wrong winner elections in 2003 and 2009 indicated that the 2001 map had been biased but nonetheless acknowledged that few New Jersey voters were upset by those results or even by the presidential result of 2000 when Al Gore had a majority of the votes but failed to win the presidency. This acceptance of wrong winner election outcomes may be seen as confirmation that the public does not judge the Apportionment Commission’s map against a fair outcomes standard. The Republican Party exercised restraint, allowed the electoral cycle to continue and participated fully in the 2011 process, giving in Christopher Anderson’s terms ‘loser’s consent’ to the process, anticipating perhaps that they would be the winners next time.

The map drawn by the 2011 Apportionment Commission came into effect in November 2011 for elections to the General Assembly and state Senate. Without a gubernatorial ballot the

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579 ‘Three times in the last decade – three of the eight elections in the decade that just past [sic] – Republicans won more votes than the Democratic Party in State legislative elections. In none of those instances did Republicans get the majority of seats in the Legislature. That needs to change.’ J. Webber 2011, NJ Apportionment Commission 2011, Transcript of Public Meetings, Trenton, 10 March, p. 10. The results were skewed in the 2003 Assembly election and both Houses in 2009. The 2009 result was caused by a campaign that grabbed in districts the Republicans already held, but had little resonance in Democrat districts. It has parallels with the non-uniform swings at the South Australian election of 2010. Pers. comm. Prof. P. Murray, Monmouth University Polling Institute, 23 May 2011.

580 The assistance of Deborah Mercer, State Library, Trenton, NJ, is gratefully acknowledged.

581 Pers. comm. Prof. P. Murray, Monmouth University Polling Institute, 23 May 2011.


campaign was low-key, turnout was expected to be low and analysts considered that the map would entrench incumbents.\textsuperscript{584} A Monmouth Poll forecast little change.\textsuperscript{585} They were right. Turnout was just 26 per cent of enrolled voters, a record low which was interpreted as being due to ‘a shortage of competitive races and a district map favoring incumbents’.\textsuperscript{586} One marginal Republican seat changed hands. The Republican Governor blamed the map, particularly the lack of Democrat competitive districts.\textsuperscript{587} The author’s analysis was that if voter support was roughly 51.6 per cent Democrat (the average two party vote from 2005 to 2007) that party would retain its 24 districts and Republicans 16: on the day the two party vote was slightly higher at 52 per cent Democrat, and one seat changed hands.

Public interest groups in the 38 states where legislatures still draw their own electoral district maps might ask whether performance criteria have enabled New Jersey’s Apportionment Commission to produce maps which encourage fair electoral competition and prevent a majority party from entrenching its position, and other redistricting authorities might ask whether performance criteria have enabled it to produce maps which are more responsive than a bipartisan authority can produce.

They appear to have done so. In 1981, New Jersey’s Apportionment Commission had been given the task of drawing districts for the legislature, and its map was widely regarded as fair. The legislature still held responsibility for drawing the state’s congressional districts, and drew ‘a four star gerrymander [that] twisted crazily through counties and townships all over the state to create a Democratic advantage.’\textsuperscript{589} The difference between the two maps is a clear indication of the way that the two different structures and processes generate agreement for quite different maps. As is often the case, electoral change designed to make the system fairer for both parties occurred when a party in majority was about to lose in a landslide, and in 1991 the legislature delegated its responsibility for congressional maps to a bipartisan

\textsuperscript{585} General Assembly seats won in 2011 were Democrat 47, Republican 33, and in 2009 were 48:32.
\textsuperscript{587} Governor Christie is reported to have said: ‘There were no competitive races last night – none.’ Hester 2011, ‘Christie blames redistricting’.
\textsuperscript{588} Congressional Quarterly quoted in Stokes 1991, Legislative Reapportionment, p. 1. New Jersey’s 1981 experience was repeated in Pennsylvania 20 years later when its commission-drawn legislative plan emerged unscathed but its legislature-drawn congressional plan was challenged as a classic gerrymander in Vieth v. Jubelirer.
commission.\textsuperscript{589} Officially that commission does not use the Stokes criteria, and its independent Thirteenth Member receives little funding for staff, but the 2011 Thirteenth Member had been counsel to the 2011 Eleventh Member and would have understood the legislative process and methodology, and it seems likely that the parties’ various congressional maps would have been assessed at least for partisan advantage, if not (given that the state has only 11 congressional districts) for responsiveness.

More recently, while the map drawn through New Jersey’s process in 2011 was challenged, cleared and came into effect for the state legislature’s elections of November 2011, across the state border in Pennsylvania the legislative districts map drawn by a Republican-controlled commission in 2011 was rejected by the state Supreme Court, and the existing ten-year-old map will apply for 2012 elections. The commission produced a new map to apply from 2014 and thirteen challenges were lodged.\textsuperscript{590}

What the performance criteria give to the New Jersey Apportionment Commission is legitimacy. In the context of a supercharged political contest, the Eleventh Member can give agreement to one of the many maps developed during the process on the grounds that its measured characteristics come closest to a measurable standard. He does not agree to either party’s final proposal on a whim nor on the basis of an eloquent presentation and, granted the same evidence and same methodology, another person acting in that role might make the same decision. In addition, the Apportionment Commission structure and the performance criteria signal to the courts that the process is intended to be fair to both parties, and as a result the courts have accorded a presumption of legitimacy to its maps. Most recently in Gonzalez v. Apportionment Commission, the courts cited Davenport where that court was in turn citing the Gaffney court:

The judicial role in reviewing the validity of such a plan is limited...The plan must be accorded a presumption of legality with judicial intervention warranted only if some positive showing of invidious discrimination or other constitutional

\textsuperscript{589} ‘A lame duck Democratic legislature...rushed to avoid allowing redistricting authority to be exercised by the incoming Republican majority.’ Mann 2005, ‘Redistricting reform’, p. 105.

\textsuperscript{590} All About Redistricting website \url{http://redistricting.lls.edu/states-PA.php}; ‘Pa. redistricting appeals headed to court in Sept.’, New Jersey Herald online edition, 11 July 2012. These appeals were consolidated and the hearings are ongoing at time of writing.
deficiency is made. The judiciary is not justified in striking down a plan, otherwise valid, because a “better” one, in its opinion, could be drawn.591

That gives New Jersey’s maps an unusual status in the United States, analogous to commission-drawn maps in Australia where the relevant constitutional or electoral legislation in most jurisdictions requires the courts to give such maps this presumption of validity. Indeed, on the one occasion where a court’s power to vary an Australian map was judicially considered (Gilbertson), the Privy Council found that the court had no power to ‘substitute its own opinion for that of the commission as to the most appropriate way of drawing the boundaries.’592

Conclusion
Like redistricting everywhere in the US, the New Jersey Apportionment Commission needs to abide by federal and state constitutional requirements and the federal Voting Rights Act 1965, so performance criteria and standards are important but not pre-eminent requirements. In addition Eleventh Members have imposed their own priorities and the participants in the process interpret the map differently. Alan Rosenthal commented in 2011 that ‘No formula, no metric, no set of data can do it all. They are all helpful, maybe very helpful, but not adequate’.593

But the use of performance criteria and standards to assess the parties’ maps is important because it makes possible the other defining characteristic of the New Jersey process – an independent member drawing the parties towards agreement on a map that is fairer than either party would otherwise have agreed to. The process and methodology were accepted by the courts in 1974 as evidence of a rational state policy of redistricting in accordance with a political fairness principle, and again in 2011.594 So although the Stokes tests are not legislated criteria for the commission, they have been useful protection.

New Jersey’s experience shows that operationalising performance criteria is challenging. First, other constitutional, legislative or public interest requirements constrain the design of an unbiased and responsive map, so the priority given to performance criteria will determine how much they can influence the map. Second, the parties’ interests will constrain how much fairness and responsiveness they can agree to. Third, New Jersey’s process places a heavy

592 Gilbertson v. the State of South Australia And Another, Privy Council (1977) 51 ALJR 519, at 524.
593 Pers. comm. Prof. A. Rosenthal, Eagleton Institute of Politics, Rutgers University, 5 May 2011.
responsibility on the Eleventh Member and the extent to which the standard is achieved will always be subject to the negotiating ability of the Eleventh Member and the parties’ teams. Still, the performance criteria have been used four times and none of the four maps has been invalidated by the courts, and none has been regarded as giving either of the parties an advantage. Neither of the parties has attempted to change the process. That is more than most jurisdictions can claim and as much as any can hope for.

If a jurisdiction was to mandate a performance standard, give it high priority and ask an independent redistricting authority to draw the map, the political task might be simpler. And if that jurisdiction also drew its districts on the basis of enrolments rather than population, and had compulsory enrolment and compulsory turnout, the measures could be simpler and party agreement might be more easily gained. South Australia is such a jurisdiction. How South Australia has operationalised its fairness requirement is the subject of the next chapter.
Chapter six: Performance criteria and standards in South Australia

South Australia’s fairness requirement is unique in Australia. Although similar requirements were proposed for the federal parliament by Senator Puplick in 1989, proposed to Queensland’s Electoral and Administrative Review Commission by the National Party in 1990, considered by the WA Commission on Government in 1995 and proposed in NSW in 1997 after the Coalition Opposition won 52 per cent of the statewide two party preferred vote but did not win a majority of seats, only South Australia’s has been introduced. The requirement is unusual even by US standards because it is expressed as a fairness at 50:50 standard. In 1991 the Constitution Act 1934 (SA) was amended to include the following section:

83—Electoral fairness and other criteria

(1) In making an electoral redistribution the Commission must ensure, as far as practicable, that the electoral redistribution is fair to prospective candidates and groups of candidates so that, if candidates of a particular group attract more than 50 per cent of the popular vote (determined by aggregating votes cast throughout the State and allocating preferences to the necessary extent), they will be elected in sufficient numbers to enable a government to be formed.

To comply with this requirement the state’s EDBC has developed a methodology to assess whether a set of districts will be fair. Its consultative process has won substantial agreement from the parties for its methodology and maps, and has survived a wrong winner election outcome in 2012. The history leading up to South Australia’s adoption of this performance criterion has been dealt with at length elsewhere. This chapter provides only a summary,

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596 Constitution Act 1934 (SA) s. 83(1).

and focuses instead on how the commission has operationalised what has become known as the ‘fairness clause’. It covers how the commission has recognised and measured bias, measured partisan support, dealt with districts won by minor party and Independent members and assessed its map prospectively.

South Australia’s experience leads to an inescapable conclusion: in any districted electoral system, it may be within the power of a redistribution authority to provide fair competition, but it is not within its power to guarantee that the most favoured party wins the most seats. A fair outcome in those terms cannot be provided by a single-member district system alone.

**Adopting a performance requirement**

South Australia has compulsory enrolment for citizens aged 18+ and compulsory attendance to vote. Elections for the lower house of the state parliament (the House of Assembly) are held every four years, when 47 members are elected to the 47 Assembly districts. There are separate ballot papers for each contest and voters are required to rank each candidate contesting the district, from most preferred to least. Electoral districts are drawn to equalise electors rather than population, and district boundaries are adjusted by the EDBC after each election; the commission must consider subordinate criteria including communities of interest and geography.\(^{598}\) The EDBC is a semi-judicial redistribution authority, with a senior Supreme Court judge as chair, and the state’s Electoral Commissioner and Surveyor General as commissioners. None of its maps has been appealed.\(^{599}\) A final characteristic is similar only to New Jersey’s process: potential maps are assessed in terms of their fairness and responsiveness.

South Australia adopted its fairness criterion in 1990 because Liberal Party support was over-concentrated in rural districts and the single member district system understated that party’s support when it was translated into seats. In debate on the bill which made this change, and in a select committee on the bill, alternative remedies were considered: multi-member districts with proportional representation; a single member district system with additional ‘top-up’ districts which would come into effect only in the event of a wrong winner election result; or a second ballot paper on which electors would indicate which party they wanted to form government. The fairness requirement was favoured because it was a minimally disruptive solution to the problem of under-representation, providing a way to redress the over-

\(^{598}\) *Constitution Act 1934* (SA) ss. 77, 83.

\(^{599}\) In Gilbertson it was not a map which was appealed but the wording of the Act (*Gilbertson v. South Australia* 51 ALJR. 519 (1977)).
concentration of partisan support while still allowing single member districts to be retained. With an assumption that the major parties’ election campaigns would have roughly equal effect, the requirement seemed likely to prevent wrong winner election outcomes. The select committee recommended adoption of a fairness requirement and a review after the first election to reconsider the top-up option, but that review was never held.\(^{600}\) The legislation which introduced the fairness requirement also changed the frequency of redistributions – they now occur every four years, after each election.

**Fair competition or fair outcomes?**

There is some confusion in South Australia about just what the fairness clause requires the EDBC to do. The wording of the Act requires it to ‘ensure, as far as practicable’ that the subsequent election outcome will be fair, and at hearings in 1991 for the first redistribution after the introduction of the clause, initial debate centred around just what might be feasible. Jaensch urged the commission to refuse the task entirely on the grounds that it was not practicable, but the commission found that it had ‘no discretion to shrink from the task on the basis that it is too difficult or not “practicable”’.\(^{601}\) Labor argued that ending malapportionment was all that the commission could realistically do to comply with the new requirement.\(^{602}\) The commission again disagreed, distinguishing between equality (of electors) and fairness (of outcomes), and found that the new legal requirement meant that it must consider the political effects of the lines it draws. The new criterion had ‘effected a substantial change in the law. That change in the law must be complied with as far as practicable’.\(^{603}\)

Some Liberals and many commentators have taken the wording of the fairness requirement literally and expect the commission to produce a map which will guarantee that a subsequent election will award a majority of seats – and government – to the party which wins the support of a majority of voters. They understand the fairness clause as a fairness at 50:50 performance standard. The EDBC understands the requirement differently. It takes into account the history of the requirement and the qualifying phrase ‘as far as practicable’, and interprets the clause as a directive to produce a map which will take account of the geographic distribution of party

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602 ‘The most sensible way to interpret the section is to see it as a desired outcome which is most likely to be achieved if the other criteria in the Act are followed.’ EDBC 1991, Transcript of hearings, vol. 1, p. 63 (J. Hill representing the ALP).
support and which will give neither party an advantage at a subsequent election. That is, the EDBC understands the clause as requiring a level playing field.

It seems clear that the parties originally considered that their campaigns would not be so differently effective that they would skew the way votes translated into seats. On that basis they assumed that if the commission minimised geographically embedded bias then fair election outcomes would occur. So the fairness requirement was generally understood by the parties and academic analysts as a fairness at 50:50 requirement, imposing an obligation on the commission to draw a set of districts which would prevent wrong winner elections and give both parties a chance to win 24 of the 47 House of Assembly seats if they won the support of just over 50 per cent of the voters across the state. Given that internationally ‘[t]he most common measure of bias used by political scientists is the share of seats a party would receive if it were to get 50 per cent of the vote’ this was not an unreasonable understanding of the task.604

However, the commission understood the task differently. The 1991 commissioners considered that even with a set of districts which provided neither of the parties with an advantage, there would always be a possibility that an election campaign could skew a result, so they could not guarantee to draw a set of districts which would generate a fair outcome at a subsequent election. Given that the clause requires the commission to ‘ensure, as far as practicable, that the electoral redistribution is fair’, commissioners judged that their task was to provide a set of districts which were not biased towards either party and which would be likely to generate a fair electoral outcome. Having drawn a new map on this basis for the first time in 1991, the EDBC reported that

[t]he “playing field” has now been made even. It is for the Parties to present their policies, candidates and campaigns to the electors at the next election. The Commission has no control over, and can accept no responsibility for, the quality of their candidates, policies and campaigns. Nor can the Commission accept responsibility for the issues arising at the next election and elector response thereto.605

In 1991 it was widely assumed that the electoral system was robust enough, and parties’ campaign abilities were similar enough, that the level playing field would produce fair election

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605 EDBC 1991, Report, p. 73.
outcomes. On that basis the parties interpreted the commission’s differentiation between the two tasks as an expression of a prudent approach, and its reservations passed largely unnoticed.

The subsequent election in 1993 was a Liberal landslide in which there was no question of a wrong winner election outcome. The first test of the fairness requirement came with the tight election of 1997 when the Liberal Party won a majority of seats with a statewide two party preferred vote of 51.5 per cent. That set of districts did translate votes into seats in a way which resulted in a fair election outcome and seemed to confirm the viability of the process. The result at the next state election in 2002 challenged the commission. The Labor Party won 23 seats, the Liberal Party won 20 seats, and four Independent or minor party candidates won seats which the two party preferred recount showed would have been won by Liberal candidates if those candidates had not contested the seats. So there were 24 Liberal or notionally Liberal districts (a majority) and the statewide two party preferred vote was 50.9 per cent Liberal, indicating that the majority of voters across the state supported a Liberal rather than a Labor candidate in their electorates. On this basis the outcome of the election was fair in terms of the Act. But one of the minor party Members representing a district which would otherwise have elected a Liberal candidate gave his support to the Labor Party. With that agreement, Labor had a majority of votes on the floor of the House and formed government.

While some within the Liberal Party considered that this outcome constituted a failure of the fairness requirement, the commission assessed the boundaries it had drawn for this 2002 election, and concluded that the districts had produced an election result which had been fair. It was the post-election deals, not the election, that had produced a Labor government even though the Liberals had a majority of support, and that could hardly mean the commission had failed. The commission considered that

> [e]vents subsequent to the last general election cannot be used to properly qualify the use of those results when meeting the fairness demand of s 83(1).  

At the next election in 2006 Labor won a strong majority of votes and also of seats. Assuming that the 2002 result was accepted, four Redistributions with four fair outcomes at subsequent elections seemed ample evidence that a level playing field would produce a fair result, and the commission’s emphasis on fair competition rather than a fair outcome seemed unnecessarily

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prudent. But the result at the election of 2010 caused some reassessment of that conclusion when a series of non-uniform swings allowed Labor to retain a majority of seats even though it won the support of only a minority of voters across the state. With just 48.4 per cent of the statewide two party preferred vote, the Labor Party retained 26 of the 47 House of Assembly seats and an Independent candidate, not nominated by any party, won one more district which was notionally Labor on a two party preferred recount. Those who saw the commission’s task as preventing wrong winner elections judged that it had failed. That group included most of the Liberal members who expected that the commission would redress the imbalance at the subsequent redistribution and would adjust at least four, and probably six, ALP districts to make them notionally Liberal. More Labor districts would then need to be adjusted to bring them down the Labor side of the pendulum to fill the gap, so a large-scale remapping of Labor districts was expected. Others who saw the commission’s task as preventing disadvantage due to the over-concentration of a party’s votes looked at the post-2010 pendulum and saw ten safe Labor seats and 15 safe Liberal seats, indicating an over-concentration of Liberal support in safe districts, and these people expected the commission to redraw the safe Liberal districts. The pendulum below shows these results.

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607 Because each ballot paper shows a preference for every candidate contesting the district, it is possible to re-examine them after the election in those districts which are not won by the two major parties. They are recounted to find a notional Labor and Liberal two party preferred result as if the Independent or minor party candidate had not contested the ballot.
### RESULTS OF THE SOUTH AUSTRALIAN STATE ELECTION OF 20 MARCH 2010

(using boundaries ordered by the EDBC in 2007)

<table>
<thead>
<tr>
<th>ALP SEATS</th>
<th>SWING TO LOSE</th>
<th>LIB SEATS</th>
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<tbody>
<tr>
<td>Torrens 58.6</td>
<td>28</td>
<td>77.8 Chaffey [CLP:LIB rethrow] (Whitstone)</td>
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<tr>
<td>50.1</td>
<td>27</td>
<td>76.2 Flinders [Teloar]</td>
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<tr>
<td>West Torrens 56.9</td>
<td>26</td>
<td>75.3 Mackillop [CLP:LIB rethrow] (Williams)</td>
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<tr>
<td>Little Para 56.6</td>
<td>25</td>
<td>71.3 Bragg [Chapman]</td>
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<tr>
<td>Light 55.9</td>
<td>24</td>
<td>69.2 Hammond (Pederick)</td>
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<tr>
<td>Ashford 54.8</td>
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<td>68.0 Ramsay (Rann)</td>
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<tr>
<td>Mawson 54.4</td>
<td>22</td>
<td>67.8 Schubert [Venning]</td>
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<tr>
<td>Bar (Londonderry) 53.6</td>
<td>21</td>
<td>65.8 Mt Gambier [CLP:LIB rethrow] (Pegler)</td>
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<td>Hartley 52.2</td>
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<td>65.4 Heysen (Redmond)</td>
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<tr>
<td>Newland 52.2</td>
<td>19</td>
<td>64.3 Ramsay (Rann)</td>
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<td>Mitchell (Sibbons) 52.1</td>
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<td>Bright (Fox) 50.4</td>
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<td>62.2 Unley (Pisano)</td>
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<td>15</td>
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<td>3</td>
<td>7</td>
<td>59.3 Playford (Snelling)</td>
</tr>
<tr>
<td>2</td>
<td>6</td>
<td>59.3 Croydon (Atkinson)</td>
</tr>
<tr>
<td>1</td>
<td>5</td>
<td>58.8 Kavel (Goldsworthy)</td>
</tr>
<tr>
<td>0</td>
<td>4</td>
<td>58.7 Fairbairn (Pegg)</td>
</tr>
<tr>
<td>0</td>
<td>3</td>
<td>58.6 Fairbairn (Pegg)</td>
</tr>
<tr>
<td>0</td>
<td>2</td>
<td>58.6 Fairbairn (Pegg)</td>
</tr>
<tr>
<td>0</td>
<td>1</td>
<td>58.6 Fairbairn (Pegg)</td>
</tr>
<tr>
<td>0</td>
<td>0</td>
<td>58.6 Fairbairn (Pegg)</td>
</tr>
</tbody>
</table>

**Total of 27 ALP seats**

**Total of 20 Liberal seats**

**50.4% Statewide 2PP**

**51.6%**

**SOURCE:** Official election data from the Electoral Commission for South Australia
Both these views relied on assessing the existing map against one set of election results – which was the EDBC’s existing policy. But the swings at the 2010 election were so unusual that the commission followed neither of the expected paths. It accepted the author’s submission that the wrong winner election outcome had not been generated by the over-concentration of Liberal votes in excessively safe districts, but was due instead to campaign effects which generated non-uniform swings. The EDBC had not sent the parties into the 2010 election contest with a biased set of districts.608 On those grounds the commission decided that it would simply adjust the existing districts to take projected population changes into account.

The EDBC’s position in 2011-12 is consistent with its position in 1991 and also consistent with the Stokes methodology used in New Jersey which aims to provide a set of districts that will not advantage either party leading into an election and which will respond if voters change their support. The EDBC understands that its task is to draw a set of districts that will provide a level playing field on which the parties will compete; the ‘quality of their candidates, policies and campaigns’ are not within the commission’s control so the voters’ response to them cannot be the commission’s responsibility.609 Of course, campaign effects might not skew an election result enough to make the result unfair – a wrong winner outcome did not occur in South Australia in 1997 or in 2002 when the election result was very tight – so under most circumstances the commission’s districts can be expected to generate both a level playing field and a fair outcome.

To draw a set of districts which will provide this level playing field for electoral competition at a subsequent election, the commission must minimise bias due to the differential concentration of party support, ensure that there are enough marginal seats to keep the electoral system responsive to a change in voter preferences and ensure that this responsiveness will operate equally for both parties. The next sections look at the methodology which the commission uses to achieve this aim.

**Measuring bias**

The EDBC initially adopted methodology which the parties and academic advisors had used to assess previous redistributions, and over time it has been refined and revised. The methodology allows the commission to measure party support, bias and responsiveness, to deal with seats won by Independent or minor party candidates and to assess whether a map will be fair.

608 Newton-Farrelly 2011b, Submission to the Redistribution Committee for Victoria.
Until the 2011-12 redistribution, the EDBC measured bias as the difference between the statewide two party preferred vote and the two party preferred vote in the median seat. But the non-uniform swings at the 2010 election made it clear that it would be misleading to understand that calculation as a measure of geographic bias due to the over-concentration of one party’s votes in excessively safe seats. In fact, the calculation is a measure of all distortion in the way that votes translate into seats, and after the 2010 election it seemed obvious that a large part of the distortion was due to differently effective campaigns in marginal seats, not bias.

The measure adopted by the commission for redistributions prior to 2011-12 had impeccable credentials. Butler had observed in postwar Britain that Labour’s support was concentrated in inner metropolitan areas and a small number of regional industrial cities where it ‘squanders many more votes in piling up huge majorities in absolutely safe seats than the Conservatives whose strength happens to be more effectively spread.’

In both 1950 and 1951 the median Conservative vote (that is the Conservative strength in that constituency which ranked midway between its safest and its most hopeless) was above the mean, while with Labour the opposite was the case. In other words, over half the Conservative candidates secured more than the average for their party, while over half the Labour candidates secured less than the average support for their party. Since almost all victorious candidates are among those who secure a vote above the average, it follows that Conservative support was more effectively distributed about the country from the point of view of winning seats.

Assuming that districts would all be affected uniformly and equally by a swing across the jurisdiction, Butler considered that the disadvantage was of the order of 1 to 2 per cent and that to win a given number of seats Labour would have needed 2 per cent more of the vote than the Conservatives in 1950 and 1951 and about 1 per cent more in 1955. While he recognised the existence of local campaign effects, including a small sitting member advantage which operated in 1955, his uniform swing thesis required an assumption that ‘no local issues,

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campaigns and organisations made an overwhelming difference to the outcome in their constituency.’ Nonetheless Butler himself observed that

[There is always the danger of carrying the refutation too far. In this case it must be stressed that, however much one may provide universal explanations to cover variations in election results between individual constituencies, a small margin still remains which can only be accounted for in local terms.613]

And not just local terms. In relation to the 1955 election Butler found that the swing against the Labour Party was ‘smaller where Labour held the seat’.614

Still, Butler’s hypothesis that although swings would not actually be universal and equal, ‘to a very large extent the variations will cancel out’ was useful.615 Rydon applied Butler’s reasoning to Australia and then developed measures for the distortion in the way that votes translated into seats. She measured total bias from all causes by comparing the statewide two party preferred vote and the two party preferred vote in the median seat. Then she differentiated between disadvantage due to malapportionment (measured in terms of the difference between the statewide two party preferred vote and the average of the two party preferred results in each district) and a residual disadvantage due to all other factors (measured in terms of the difference between the average of the two party preferred results in each district and the two party preferred vote in the median district).616 Rydon followed Butler in discounting the idea that campaign effects could have much effect in distorting the translation of votes into seats and interpreted this latter calculation as a measure of bias due to the ‘differential concentration of majorities.’617

Using this measure Rydon demonstrated in 1957 that Labor was disadvantaged by 1 to 3 per cent at Australian federal elections because a higher proportion of its support than of Liberal and Country Party support was tied up in safe seats, and by about 4 per cent at the 1963 state elections in South Australia where Labor was additionally disadvantaged by malapportionment.618 In 1959 Ralph Brookes used similar measures to make similar findings in

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615 As above, pp. 208-9.
616 In the UK the malapportionment measure could also reflect differential turnout, but it is a reasonable measure of malapportionment in Australia. These measures were demonstrated mathematically in Soper & Rydon 1958, ‘Under-representation’.
617 As above, p. 98.
relation to New Zealand. Butler, Rydon and Brookes all considered that once the different number of votes required to win seats was accounted for (whether it was caused by malapportionment, differential turnout rates or the effect of minor parties competing but not winning), the major cause of any remaining distortion in the translation of votes into seats must be the geographic concentration of one party’s votes. More recently Ron Johnston and his colleagues have made the same assumption in the UK. Only Glynn Evans, writing more recently of South Australia, considered that the measure was misleading; he saw no bias at all in the electoral system, only ‘the vagaries of swing in certain key marginal seats’, and considered that non-uniform swings would occasionally produce a wrong winner result in any single member system.

The contribution of campaign effects to total bias was consistently ignored because it was not possible to separately measure the effect of campaigns and the effect of the geographic distribution of a party’s support. Butler’s model relied on a uniform swing hypothesis to theorise and measure disadvantage due to the interaction of geography (the dispersion of party support) and electoral systems (electoral district boundaries) and it seemed impossible to accommodate irregular swings within that model.

Rydon’s methodology was accepted by Australian academic analysts and then by the parties even though her results were based on incomplete data and remained speculative until some years later when both major parties contested every district. Still, it is clear from parliamentary debates that analyses using these measures made both parties aware during the 1960s that Labor’s geographic disadvantage in South Australia was being redressed by an influx of skilled migrants (although malapportionment still had a real effect). At the same time as Labor’s geographic disadvantage was resolving itself, both parties became aware that the Liberals (then the LCL) would be in danger of being similarly caught by an over-

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620 Butler called this under-representation, Rydon called it the ‘differential concentration of majorities’ and Brookes called it the ‘gerrymander effect’.
concentration of their support as soon as malapportionment ended and rural districts were required to take in more electors. Labor support in rural districts was not strong, so the extra electors required to bring LCL districts up to tolerance would also be LCL voters, and the newly enlarged districts could not be drawn in a way that would use LCL support efficiently.

At the SA state elections of 1968 and 1970 both parties contested each district, so Jaensch was able to produce more reliable estimates of the effect of malapportionment and of the ‘differential concentration of majorities’. Using Rydon’s measures he estimated that in 1944 Labor had been under-represented in the state parliament by about 7.5 per cent – roughly half of that being due to malapportionment and half to the geographic concentration of its support. By 1968 the ALP was advantaged and the LCL was disadvantaged by the geographic distribution of their support, and in 1970 the LCL was disadvantaged to the same extent by the over-concentration of its support as the Labor Party was disadvantaged by malapportionment.

Table 9:
Sources of ALP under-representation, SA House of Assembly, 1944 to 1965

<table>
<thead>
<tr>
<th>Election</th>
<th>Malapportionment (%)</th>
<th>Differential concentration of majorities (%)</th>
<th>Total (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1944</td>
<td>3.8</td>
<td>3.7</td>
<td>7.5</td>
</tr>
<tr>
<td>1947</td>
<td>3.3</td>
<td>3.0</td>
<td>6.3</td>
</tr>
<tr>
<td>1950</td>
<td>2.3</td>
<td>7.2</td>
<td>9.5</td>
</tr>
<tr>
<td>1953</td>
<td>4.3</td>
<td>4.7</td>
<td>9.0</td>
</tr>
<tr>
<td>1956</td>
<td>5.0</td>
<td>2.1</td>
<td>7.1</td>
</tr>
<tr>
<td>1959</td>
<td>3.9</td>
<td>4.8</td>
<td>8.7</td>
</tr>
<tr>
<td>1962</td>
<td>3.3</td>
<td>4.7</td>
<td>8.0</td>
</tr>
<tr>
<td>1965</td>
<td>2.5</td>
<td>-0.1</td>
<td>2.4</td>
</tr>
<tr>
<td>1968</td>
<td>5.5</td>
<td>-1.7</td>
<td>3.8</td>
</tr>
<tr>
<td>1970</td>
<td>3.8</td>
<td>-3.8</td>
<td>0.0</td>
</tr>
</tbody>
</table>

Source: Jaensch 1970:100.
Note: Redistributions are indicated with broken lines.

It escaped comment that these estimates for bias due to the geographic over-concentration of Labor’s support were very variable, ranging from 3 per cent in 1947 to 7.2 per cent at the next election, or from 4.7 per cent in 1962 to -0.1 per cent at the next election. The only redistributions during this period were in 1955 and 1969, so all other comparisons were on the same boundaries. Given that a large proportion of voters rarely changed their party support
and the population was not overly mobile, bias due to the over-concentration of a party’s vote in safe seats would have been relatively stable, and localised campaign effects should have been recognised as contributing to the distortion in the votes-seats translation – a prudent option would have been to attribute the distortion to ‘all factors other than malapportionment.’\textsuperscript{625}

In 1975 Labor had enough support in both houses to have its one vote, one value reform agenda passed through South Australia’s parliament. The \textit{Constitution Amendment Bill (Commission) Act 1975} produced most of the elements of the current redistribution system and in particular it ended malapportionment, requiring all districts to be drawn with equal numbers of electors, with a tolerance of 10 per cent.\textsuperscript{626} During debate on the bill, the LCL showed an awareness of the imminent risk of having its own support over-concentrated in safe country districts, and LCL Members proposed a fair outcomes criterion requiring the commission to consider:

\begin{quote}
83 (aa) the extent to which the representation in the House of Assembly reflected the views of the electors as evidenced by a majority of the votes cast and counted towards the election of candidates at the general election or general elections that occurred since the last redistribution.\textsuperscript{627}
\end{quote}

Labor Premier Don Dunstan acknowledged that the differential concentration of majorities could, even with equal elector numbers, mean that a party could win a majority of seats without a majority of votes, but he argued that bias due to the over-concentration of support was unlikely, and the cases in which it will happen will be rare; it is remote, but it could conceivably happen. How precisely do we then draw electoral boundaries to see that under a single-member electorate system it does not happen? This is what the leader has not explained...What the leader is talking about is something that inevitably comes from a single-member electorate system. It is one of the

\textsuperscript{625} About 72 per cent of respondents to the 1967 Australian Election Survey said they had always voted for the same party. The figure in 2010 was about 52 per cent. I. McAllister 2011, \textit{The Australian Voter: 50 Years of Change}, UNSW Press, Sydney, p. 52.

\textsuperscript{626} The bill also introduced the ongoing EDBC operating independently of the parliament to produce a set of districts that would come into effect without reference to the parliament; criteria and process were designated within the legislation, with the over-riding criterion being that districts should each have the same number of electors. Finally, a redistribution would be triggered after three elections (providing five years had elapsed since a prior redistribution).

criticisms of that system but it is not something that we can overcome by drawing boundaries according to concentrations of particular points of view. In fact, specifically, Electoral Commissioners should not draw boundaries according to the political points of view of the electors. That is just what they ought not to be doing, because, if they do that, they will introduce Party politics into their consideration of electoral boundaries.\textsuperscript{628}

When the bill passed the Assembly without the LCL amendment, a differently worded performance criterion was proposed in the upper house by Renfrey De Garis (LCL):

that the Commission, in drawing up the boundaries, must keep in mind (and it must be the Commission’s opinion when it draws up the boundaries) that the pivotal point for changing the Government will be 50 per cent of all votes cast...It does not say that the commission has to produce this because in single-member district systems it cannot be done.\textsuperscript{629}

The new criterion would have read:

83(g) the desirability of ensuring that so far as is practicable each vote cast at an election shall have an equal political value.\textsuperscript{630}

The LCL’s proposals were unsuccessful, Labor’s one vote, one value reform bill was passed and in 1976 the newly constituted EDBC made its first redistribution according to equal numbers of electors in each district. The commissioners rejected a submission that they should consider the political effect of the new boundaries. Available measures were too imprecise, they decided, and

[p]olitical science in its role of predicting voting patterns in future elections seems to us, with respect, to involve an interpretation of incomplete statistical data, a series of assumptions as to uncounted preference votes, and a measure of oneiromancy.\textsuperscript{631}

When the EDBC next met in 1983, new commissioners considered whether they might recognise voting patterns under the community of interest criterion, but decided against it,

\textsuperscript{630} As above, p. 1340. He later offered to change ‘political’ to ‘have an equal value in determining the Government.’
citing the unpredictability of election results as a practical difficulty. More important than the practical difficulty of finding measures that the parties might agree to, the EDBC would not have had bipartisan support from the parliament to assess its districts against previous voting patterns, under either the community of interest or the ‘any other matters’ criteria, and taking the step with the support of just one of the parties would have been interpreted within the parliament as a partisan act.

In 1985 the House of Assembly term was extended from three years to four, incidentally extending the time between redistributions, and inequality of enrolments soon reached problematic proportions. In early 1989 Shadow Attorney-General Trevor Griffin put forward a Liberal proposal (the LCL had split into the Liberal Party and the Liberal Movement) to require a redistribution after every second election. This failed to receive the Labor government’s support, but provided the opportunity to raise once again the fact that a larger share of Liberal support was locked up in a series of ultra-safe districts, compared to Labor’s position. Leading into the 1989 election, Griffin again argued that the existing districts were biased.

The only way to assess whether or not the result of an election is fair in political terms is to look at the voting results at past elections. In South Australia in 1975 the Liberal Party would have required 55 per cent of the two-Party preferred vote across the State to have had a reasonable prospect of governing. In 1977 it was 55.3 per cent; in 1979, 54.8 per cent; in 1982, 51.9 per cent; in 1985, 51.1 per cent; and in 1989 it is estimated that the Liberal Party requires 52 per cent of the two-Party preferred vote to have a reasonable prospect of forming a government.

Griffin’s argument that the Liberal Party had been consistently disadvantaged over six elections by 2 to 5 per cent was made in new terms. Previously, bias due to the over-concentration of a party’s support had been found by Rydon’s measure – the difference between the average of the two party preferred results in each district and the two party preferred vote in the median district. But once districts had equal numbers of electors the

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632 At the 1989 election Elizabeth and Whyalla were almost 20 per cent under quota, Ramsay was more than 20 per cent over quota and Fisher was 34 per cent over, and growing. All were Labor seats.
633 Constitution Amendment (Electoral Redistribution) Amendment Bill 1989 (SA). The existing legislation would only trigger a redistribution after the election due in 1993; there was no malapportionment trigger.
component for malapportionment dropped out of Rydon’s measure for total disadvantage and all of the disadvantage measured by the difference between the median seat’s two party preferred vote and the statewide two party preferred vote was due to other factors – primarily the over-concentration of a party’s vote, but possibly also campaign factors. So in Australia since the end of malapportionment, the accepted measure for bias due to the geographic concentration of a party’s support has been the simplest one to calculate: the difference between the statewide two party preferred vote and the two party preferred vote in the median seat.

Griffin introduced a bill to amend the Constitution Act’s redistribution process, including a redistribution after each second state election and a new requirement that the EDBC should take into account

the desirability that a political Party or group gaining 50 per cent plus one of the two party preferred vote at a general election of members of the House of Assembly at which the proposed redistribution would apply should have a reasonable prospect of forming a government.\textsuperscript{635}

The bill lapsed when the 1989 election was called. When the results were in, Labor had retained a majority of seats – and government – with only 48 per cent of the two party preferred vote across the state. Given Griffin’s argument prior to the election, it was generally accepted that the cause of the wrong winner result was bias due to over-concentration of Liberal votes in rural districts. At the same time, 12 of the 47 House of Assembly districts were out of tolerance by more than 10 per cent, so the Labor government introduced a bill to change the frequency of redistributions.\textsuperscript{636} That gave Liberals an opportunity to argue again for a new redistribution process; in particular they argued that the ‘existing district boundaries’ criterion perpetuated bias by effectively directing the 1983 commission to

lock up the potential Liberal vote in as few seats as possible and to spread the Labor vote as widely as possible...At the last election, there were 13 non-Labor seats which polled higher than 65 per cent of the two Party preferred vote for the winning candidate...However, only five seats were won by Labor with the successful member getting more than 65 per cent. This is the perfect psephological example of the ‘locked in’ interest...At the last election, the non-

\textsuperscript{635} As above, p. 114.
\textsuperscript{636} Constitution Act (Electoral Redistribution) Amendment Bill 1990.
Labor vote in those seats totalled 146,469. Labor needed about 20,600 fewer votes to win its 13 safest seats than the Liberal Party.\(^{637}\)

This bill was reviewed by a select committee of the House of Assembly which reported recognising three causes of under-representation: malapportionment, ‘the way the boundaries are actually drawn’ and a third factor: ‘the way in which the parties actually campaign’.

Factor (3) relates, for example, to the tactic of ‘targeting the marginals’. In any system, the political parties will seek to gain whatever advantage they can. Subject to the accepted notions of equity and fair play, this is not improper. No-one would want to discourage a lively contest. Notions of equality cannot be pushed so far as to eliminate the concept of winning and losing.\(^{638}\)

While the select committee agreed that ‘there are significant concentrations of party support in the various regions of the state’, it was cautious about attributing the Liberals’ under-representation only to the geographic pattern of support, and referred again to campaigns. But it agreed that ‘a Commission committed to advantaging any political party by the way it drew the boundaries could do so without obvious contrivance.’\(^{639}\) In order to achieve Labor’s objective of more frequent redistributions, the Labor members on the committee conceded the fairness criterion.\(^{640}\) The committee also recommended that the ‘existing boundaries’ criterion be removed, and the community of interest criterion be subordinated to the fairness criterion, both changes being made in response to the argument that the commission’s application of these criteria had perpetuated, if not produced, Liberal disadvantage.

The media had interpreted the 1989 election results as showing that the existing boundaries were biased, and now supported the proposed changes.

The Government, of course, defends the boundaries but any reasonable examination proves they are patently unfair and significantly weighted in favour of the Labor Party...Assuming [the bill] is passed, the Commission must draw

\(^{637}\) D.S. Baker, SAPD, 10 April 1990, p. 1377.
\(^{639}\) As above, p. 6.
\(^{640}\) The parties had to be in agreement because the bill needed to be approved at a referendum and ‘everyone understood that it was unlikely that the referendum, which is one of the inevitable outcomes of this process, would be approved if any significant political force in the community determined to campaign against it.’ D.J. Hopgood, SAPD-HA, 13 Nov. 1990, p. 1761.
boundaries that are fair to the political parties, fair to the existing members and fair to the public.641

The Constitution Act was amended in line with the select committee’s recommendations and the EDBC made its first redistribution on the new basis in 1991. It found that since 1975 ‘the Labor Party has been able to convert its share of the popular vote into more seats than the Liberal Party with a comparable share.’642 The commission understood the Liberal Party’s disadvantage in terms of an over-concentration of its votes in safe rural districts.

This disadvantage arises from a number of factors peculiar to South Australia which combine to isolate large surpluses of conservative rural votes in “enclaves” where the votes cannot be “mixed” effectively with Labor party votes. The adverb “effectively” is used in the sense that the accumulated surplus votes have not been efficient in gaining another seat or seats for the Liberal Party in proportion to its share of the popular vote. The above factors include the shape of the State (mainly the contours of the coast line), the uneven distribution of its rainfall, the consequential uneven distribution of its population and the very strong support for the Liberal Party in rural areas. This strong rural support is naturally more accentuated in fertile rural areas and is clearly established in past voting patterns.

The surplus rural votes, although useful for the purpose of building up the Liberal Party’s majority of the State-wide popular vote and the sympathetic operation of section 83(1), are useless for the purpose of gaining that extra seat which would enable the Liberal Party to form government when its share of the popular vote is only slightly over 50 per cent.643

The commission found that measuring the size of the disadvantage against the Liberal Party was more difficult than identifying its existence. Malcolm Mackerras offered the commissioners Rydon’s measure, but they wanted a measure expressed in terms of the number of seats they should transfer.644 The Liberal Party had won 52.1 per cent of the two party preferred vote at the 1989 election, but only 23 seats, and Liberal counsel argued that the disadvantage was of the order of at least three seats. That case rested on applying a hypothetical uniform swing to Labor of 2 per cent, which would leave the Liberal Party with

643 As above, p. 12.
the support of a bare majority of voters and only 20 seats, when a fair map would have yielded 23 or 24 seats in a 47 seat House. The commissioners considered drawing two Labor seats as notionally Liberal but finally made a political judgment, reasoning that if the Liberal Party had won 24 seats rather than 23 in 1989, it would have won government and the result would have been accepted by everyone, so the imbalance between the two parties could be treated as if it were ‘the equivalent of one seat in the House of Assembly’.645

Since 1991 the parties’ submissions to the commission have measured bias in terms of the difference between the statewide two party preferred vote and the two party preferred vote in the median seat. This assumes the distorting effect of malapportionment is minimal, and Table 10 which uses the Rydon measures confirms that malapportionment can be ignored as a source of distortion in the translation of votes into seats at recent elections in South Australia. But the table indicates that disadvantage from all other causes has been very variable, affecting Labor by almost 2 per cent in 1997 and then affecting the Liberal Party two elections later by 2.4 per cent and by nearly 4 per cent in 2010.

**Table 10:**
Sources of ALP under-representation, SA House of Assembly elections, 1993 to 2010

<table>
<thead>
<tr>
<th>Election</th>
<th>Under-representation due to:</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Malapportionment (%):</td>
<td>All other causes (%)</td>
<td>Total (%)</td>
</tr>
<tr>
<td>1993</td>
<td>-0.2</td>
<td>-0.3</td>
<td>-0.5</td>
</tr>
<tr>
<td>1997</td>
<td>-0.3</td>
<td>1.7</td>
<td>1.4</td>
</tr>
<tr>
<td>2002</td>
<td>-0.1</td>
<td>0.5</td>
<td>0.4</td>
</tr>
<tr>
<td>2006</td>
<td>-0.1</td>
<td>-2.4</td>
<td>-2.5</td>
</tr>
<tr>
<td>2010</td>
<td>0.0</td>
<td>-3.8</td>
<td>-3.7</td>
</tr>
</tbody>
</table>

*Note: A redistribution was conducted after each election.*

Given that the ‘all other causes’ measure is simply the difference between the Liberal two party preferred vote across the state and in the median seat, the table indicates that in 2006 and 2010 Liberal votes did not translate into seats evenly, and that the size of the distortion was equivalent to a uniform swing of 2.4 per cent (in 2006) and 3.8 per cent (in 2010) across the state – a strikingly big disadvantage. Soper and Rydon would have attributed all of this disadvantage to the ‘differential concentration of majorities’.646 But the commission had not,

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646 Soper & Rydon 1958, ‘Under-representation’, p. 100: ‘the measure of differential concentration of majorities together with the measure for the effect of variation in the size of electorates does exhaust the measure of total under-representation.’
on any of these occasions, drawn a map that was obviously biased, and it was generally agreed after the 2010 election that the result was characterised by non-uniform swings.\(^{647}\) Rather than following Butler, Rydon, Brookes and Johnston and ascribing all of this disadvantage to bias from the over-concentration of a party’s support, it seems clear that it should be seen as a measure of distortion from several sources, certainly including bias but also including campaign effects.

In support of this argument, it could be imagined that at the next election every district recorded a two party preferred vote identical to its vote in 2010, except that the median district would record a change. That would change the statewide two party preferred vote by a tiny amount and the two party preferred vote in the median seat by a larger amount, so the Rydon measure of bias due to the ‘differential concentration of majorities’ would change, but there would not have been any change in either party’s support in safe districts. Bias due to the geographic concentration of a party’s support is a function of safe districts, not the marginals, and the established interpretation of this measure is misleading.

Understood in this broader way, the Butler, Rydon and Brookes measure (which is also the Butler, Tufte and Stokes measure) contains bias due to the differential concentration of parties’ support which the EDBC should redress and also a component due to differentially effective campaigns, for which commissions should not adjust. That was a clear message of the House of Assembly select committee of 1990 which recognised campaigns as one source of under-representation but warned that the commission should not ‘discourage a lively contest.’\(^{648}\)

Until its 2011-12 redistribution, the EDBC had used the academically accepted measures but once the commission recognised that campaign effects could constitute a significant component of this measure, it needed a new way to measure bias. The author’s submission for the 2011-12 redistribution offered the commission a measure of geographic bias based on a partisan symmetry standard which requires that parties win the same share of seats for any given share of the vote. The submission argued that bias should be measured using the proportion of a party’s support tied up in safe seats.


Theoretically if both parties’ seats are symmetrical across the pendulum when the results are adjusted to a 50:50 outcome, neither party could be disadvantaged by having a greater share of its support tied up in safe seats. The measure of bias adopted in this submission is the share of each party’s support in safe seats (a two party preferred result of 60 per cent or higher), when the statewide result has been adjusted to a 50:50 outcome.649

As noted earlier, the partisan symmetry standard was proposed in the US by Grofman and developed by King and Browning, and it is consistent with Rydon’s earlier Australian work. She illustrated the extent to which ALP votes were wasted in overly safe districts, by comparing the number of votes polled by the ALP in districts where the Labor vote was over 60 per cent and the number of votes polled by the Liberal and Country Party in districts where the LCP vote was over 60 per cent; the parties won the same number of seats with these margins, yet at the federal election of 1954 Labor had 88,600 more two party preferred votes in these seats than the LCP had.650 At most elections the parties will win different numbers of safe seats, so the degree to which each party’s support is concentrated can best be assessed in terms of the proportion of their support which would be tied up in safe seats if the parties had the same share of support. That calculation requires adjustment of actual results, using a hypothetical uniform swing.

Using a partisan symmetry standard and assessing the map which applied in 2010 against several different sets of election results, the author’s submission demonstrated that the district boundaries which came into effect at the 2010 state election were not biased. Results from several previous elections were re-sorted into the districts which applied in 2010, so that the map could be assessed as if it had applied at several elections.

649 Newton-Farrelly 2011b, Submission to the Redistribution Committee for Victoria, p. 8.
Table 11:
Assessment of the 2010 map for geographic bias and fairness at 50:50, applying state election results from 1993 to 2010 to districts in operation at the 2010 election

<table>
<thead>
<tr>
<th>State election</th>
<th>% of support in safe districts</th>
<th>Seats won</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>ALP (%)</td>
<td>LIB (%)</td>
</tr>
<tr>
<td>1993</td>
<td>31.3</td>
<td>33.6</td>
</tr>
<tr>
<td>1997</td>
<td>31.8</td>
<td>36.0</td>
</tr>
<tr>
<td>2002</td>
<td>28.3</td>
<td>33.4</td>
</tr>
<tr>
<td>2006</td>
<td>39.4</td>
<td>42.7</td>
</tr>
<tr>
<td>2010</td>
<td>30.3</td>
<td>42.1</td>
</tr>
</tbody>
</table>

Notes: Results at each election have been allocated to the boundaries applying in 2010. A redistribution was conducted after each election.

Before the introduction of the fairness criterion, the 1989 state election results (adjusted to a hypothetical 50:50 outcome) showed that 43 per cent of Liberal support and only 32 per cent of Labor support was located in safe districts. That was recognised as indicating that the Liberal Party was disadvantaged because a larger share of its support was tied up in safe seats. Table 11 shows that with the map which was in effect in 2010, at a 50:50 result the major parties would have had roughly equal proportions of their support tied up in safe districts when assessed against any of the election results from 1993 to 2006, but that for the 2010 election the Liberal Party would once again have had a much larger share of its support tied up in safe seats (about 40 per cent of Liberal support compared to 30 per cent for the ALP). If one map would have generated unbiased results at four out of five elections, it is unlikely to have been a biased map. Considering the number of seats won at a hypothetical 50:50 result the map would have produced fair results in 1997 and 2006 but would have advantaged the ALP in 1993 and 2010 and the Liberal Party in 2002.

The EDBC accepted the author’s submission that the districts it drew for the 2010 election were not biased, and that the commission
could differentiate between election outcomes which are skewed by election campaign effects, and election outcomes which are biased when one party’s support is more geographically concentrated.\textsuperscript{651}

The commission agreed that ‘the 2010 election result was not caused by a set of districts that was biased towards the Labor Party’ and found that because ‘many of the seats held by Labor were marginal, little would have been required for an effective campaign to influence the final result.’\textsuperscript{652} It proposed a new map which adjusted the existing districts for population changes but not for geographic bias.\textsuperscript{653} But while the EDBC accepted the author’s analysis based on a partisan symmetry standard, its draft and final reports do not specify whether a partisan symmetry standard will replace the fairness at 50:50 standard for assessing bias, nor how it will measure bias in future.

The commission did consider an alternative model in 1991 when it first needed to assess whether a map would be fair. If assessing a map as fair at 50:50 necessarily required that results in each new district be adjusted by a uniform amount to bring each party’s share of the statewide two party preferred vote to 50 per cent, non-uniform swings could threaten its methodology. Alastair Fischer offered a stochastic model which would allow some districts to swing at different rates, but the commission was concerned that in a jurisdiction with a relatively small number of districts a stochastic model would generate an assessment with too high a degree of uncertainty.\textsuperscript{654} A stochastic model was also considered federally, when the JSCEM reviewed redistribution provisions in 1995. The AEC submission included papers by Gelman and King and also by Simon Jackman, both proposing stochastic models of the seats-votes relationship.\textsuperscript{655} The AEC argued that a fair outcomes requirement would be impossible for a redistribution authority to comply with because swings are not in fact uniform, that the only alternative to a uniform swing assumption would be a probabilistic model, and that this kind of academic research had been largely ignored by the parties in Australia. There was a

\textsuperscript{651} Newton-Farrelly 2011a, Submission to the 2011-12 EDBC, p. 1.
\textsuperscript{653} ‘Ms Newton-Farrelly submitted that the 2010 election result was not caused by a set of districts that was biased towards the Labor Party. She contended that the 2007 redistribution set up a level playing field for the parties leading into the 2010 election, and as such it gave the Liberal Party a fair chance to form government. The Commission agrees with this submission.’ EDBC 2012a, Draft Order, p. 15.
clear implication that an unworkable fair outcomes criterion would jeopardise the parties’ acceptance of maps drawn under the existing process.

The mechanisms by which such probabilities could be estimated and maximized are at the forefront of much contemporary academic research....[but] there is no single approach which can be said to be unambiguously correct and appropriate. The situation is rather akin to that applicable to economic forecasting: assumptions have to be carefully chosen, and plausible competing models can be easily produced.656

In South Australia the commission chose the alternative: it adopted the most recent set of election results to indicate the pattern of partisan support, and a uniform swing assumption.

Measuring partisan support
Initially the commission assumed that electors voted at the polling booth closest to their residential address.657 Results from each booth were reallocated to the new districts and then adjusted to a hypothetical 50:50 result: if that gave both major parties a chance of winning the median seat, then the map was considered fair. In 1998 a more sophisticated system was developed: every address on the electoral roll was allocated to a census collection district (about 225 households) and the copies of the roll which were used at each polling booth were scanned to see which location each elector had attended.658 A political value for each census collection district was built up as the weighted value of the two party preferred vote recorded at the various booths attended by the voters who lived in that small area.659 Data sets are now produced for the commission after each election and are made available to the major parties.

Political support in a geographic area could be shown by various data – past voting figures, expected voting figures or an average of previous election results. By-elections are not common in South Australia’s relatively small house, and the commission has rejected the idea of extrapolating by-election results across the whole state. Opinion polling was never seriously considered, because none is conducted on the scale the commission requires. Neither was party registration or membership data considered – in Australia compulsory enrolment and

657 Roughly 800 locations around the state (mostly schools and local halls) are designated as polling booths. Election results are reported at booth level. All Australian state and federal elections are held on Saturdays.
658 When an elector is given a ballot paper his name is crossed off the polling booth’s copy of the electoral roll; after an election the rolls are scanned to detect duplicate voting and non-attendance.
attendance to vote guarantee that voting figures represent the intentions of many more people.

In 1991 the commission considered that the best indicator of ongoing voter support would be the results from the most recent election. This was reconsidered after the record landslide at the 1993 election when the most recent results seemed unlikely ever to be repeated and could not be thought of as showing, in Philip E. Converse’s term, a ‘normal vote’.\footnote{P. Converse 1966, ‘The concept of the “normal vote”’, in 	extit{Elections and the Political Order}, eds A. Campbell, P.E. Converse, W.E. Miller & D.E. Stokes, Wiley, New York.} The commission used the pattern of support shown by the 1993 results but checked its most marginal seats against 1989, and in some cases 1985, results. At the next redistribution it adopted GIS mapping technology and the process changed from a statistical to a mapping process, aggregating census collection districts visually and checking the political effect of each change using reports generated automatically by the mapping package. Voting data from only one election were coded into the system and the matter did appear to be settled – the political character of an area was taken to be represented by the results from the most recent state election.\footnote{EDBC 1991, 	extit{Report}, p. 68.}

The results of the 2010 state election again called into question whether one election’s voting data could be adequate. That election produced a series of non-uniform swings which seemed unlikely to persist. What skewed the translation of votes into seats in 2010 was a number of swings in particular districts that were quite different from the statewide swing: at previous elections, swings have generally been expressed in each sector to roughly the same extent, and this was arguably true even in 2002 when swings moved in different directions but were small. Table \ref{tab:12} shows the swings by sector, comparing 2010 with previous elections, and shows the anomalous pattern in 2010.
Labor’s effective defence of its marginal districts in 2010 meant that the swing against it was quarantined to districts which it could not lose or could not win. This raised the question of whether the 2010 pattern of support was likely to bear any resemblance to that in a future election due in 2014. While it is clear that party campaigns do affect voters’ views, there is no Australian research on how many of those who change their support at one election have been converted (and will retain that new orientation) and how many exercise a protest vote (and will return to their original party). The Australian Election Study has found that, at federal elections, the major parties can expect to lose about 20 per cent of the voters who had supported them at the previous federal election, but the survey does not revisit those voters to ask how many of them moved back to their original party at a subsequent election. US studies are also rare though one modelled campaign effects (‘shocks’) and found that ‘more than one-half the effects of any shock to aggregate partisanship persist for as long as a four-year presidential term. More than one-quarter of the effects remain after eight years’.

While the level of a new member’s support in a seat may soften as campaign effects dissipate over time, incumbency provides the resources and opportunity to consolidate whatever support was gained. The author’s submission suggested that the parties’ polling research was likely to have given them rule-of-thumb estimates for the advantage of incumbency and also

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for the persistence of campaign effects. \(^{664}\) Neither of the major parties addressed that question in their initial submissions but the Liberal Party argued in its objection-stage submission that the commission should assume that the 2010 pattern of partisan support replaced the previous pattern and would now persist.

It is submitted that at the 2010 election voter sentiment changed and that the Act requires the Commission to draw boundaries having regard to these intentions. \(^{665}\)

If the commission agreed with that argument it would have needed to draw several Labor districts as notionally Liberal. While the commission did not concede this point, it did make changes to its draft map in line with the Liberal submission. In its final submission the Liberal Party argued that the existing Labor districts of Bright, Elder and Hartley should be made notionally Liberal, and the commission did change these districts so that Bright became notionally Liberal; it also redrew Elder and Hartley – and also Ashford – so that they became very marginal Labor districts (the final report estimated that, taking into account population changes, a repeat of the 2010 vote within the new districts in 2014 would produce a result of 50.4 per cent ALP in Hartley, 51.4 per cent ALP in Ashford and 51.6 per cent ALP in Elder). \(^{666}\)

In summary, the EDBC accepted the author’s analysis that the existing map had not been biased. That analysis could only be made using several sets of election results, as opposed to the EDBC’s previous practice of measuring partisan support in terms of the voting pattern at the most recent election. While the commission adopted that assessment it nonetheless reported that it had retained its existing methodology and has not specified how it will measure partisan support in future.

**Assessing a map**

The primary reason why it is important for the South Australian commission to establish how support will be measured is that a redistribution is conducted after each election, so the fairness of a proposed map must be assessed before an election is held. There is only one way to assess a map prospectively, and it is necessarily a hypothetical exercise. \(^{667}\) The map can only be assessed against the results that it would produce given a pattern of voting which seems

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\(^{667}\) Parties assess maps in the US against several sets of data including a ‘normalised presidential vote’ but they do still adjust the results to a hypothetical 50:50 outcome. Pers. comm. T. Bonier, Democratic Party consultant, 27 May 2011.
likely to occur. That pattern could be determined using a stochastic model or by reference to results at a past election or elections. The EDBC has, in the past, assumed that the set of results which will be most similar to the results at the next election will be those from the most recent election, but in 2012 it needed to judge whether the distinctive pattern of support at the 2010 state election would persist – in which case the only useful set of data to assess new districts would be the 2010 data – or would revert to something approaching a longer-term average. That decision would have a political effect: if the commission used the 2010 results its new map would need to draw three Labor districts as notionally Liberal and a fourth so marginal that either party could win it with a tiny swing, but if it used any of the previous three elections (or even the Legislative Council results from 2010) adjustments would only be necessary to allow for population changes.

The commission’s established methodology aggregates census collection districts, with their associated two party preferred results, to form the new districts. Expected population growth is incorporated, the totals have been adjusted by a uniform amount to produce a hypothetical 50:50 two party preferred result across the state as a whole, and the map is considered to be fair if, using the most recent results and adjusting them to a 50:50 outcome, each party would have a reasonable chance of winning a majority of the districts.668

This fairness at 50:50 methodology is conceptual, not predictive of the behaviour of the next election outcome. The adjustment by a regular amount assumes that when the level of support changes (for example, from a statewide ALP two party preferred of 50 to 55 per cent) the relationships between the districts – the pattern of support – would stay the same. In this example of a hypothetical statewide swing of 5 per cent to the ALP, its two party preferred vote would simply rise by 5 per cent in each district.

If swings really were uniform (or in Butler’s terms ‘universal and equal’), it would make little difference which year’s election data the commission used to assess a map – results from any House of Assembly election, if applied to a set of proposed districts, would produce the same graph when the level of support was adjusted to a 50:50 outcome. If the results from several

668 Mackerras popularised the uniform swing thesis through his pendulum diagram (Mackerras 1974, ‘Labor would take a caning’). The work of both Mackerras and Stokes (in New Jersey) rested on earlier work by Butler in the United Kingdom (Butler 1947). Rydon’s work in 1957 makes it clear that Butler’s uniform swing assumption was well known here by that time and was ‘similar to that used by newspaper commentators, pollsters, party officials etc, and is probably as accurate as we can expect any such method to be.’ Rydon 1957, ‘The relation of votes to seats’, p. 56. Stokes also assumed a regular adjustment (Stokes 1991, Legislative Reapportionment, pp. 13-14) and Bartels followed his method (Bartels 2001, pp. 4-5).
elections were graphed, the results from each would trace the same line, indicating a stable relationship between districts and a stable pattern of support. In fact, Graph 1 shows that for South Australia at least, the pattern of support at recent elections is not stable in any sector of the graph. Rather than a stable pattern of support from one election to the next, districts swing apparently erratically from one election to the next, by 5 per cent more or less than the statewide swing. More importantly, the 2010 line is uncharacteristic, especially in the marginal seats sector which is represented as the area between the horizontal lines representing 40 and 60 per cent ALP two party preferred. Graph 1 implies that if the commission drew its new districts in 2012 using the voting data from the 2010 state election, it could generate a biased assessment of the proposed districts.
Graph 1: Holding the level of support in 1993, 1997, 2002, 2006 and 2010 constant at a statewide two party preferred vote of 50 per cent

Note: Results at each election have been allocated to the 2010 district boundaries.
While Butler’s model did assume hypothetically that seats in the UK would swing at a uniform and equal rate, Australian analyses have followed Mackerras’ model which assumes that if one district does not respond to a statewide swing, another will compensate, so that in total a set of districts responds as if there was a uniform swing. But swings in marginal districts are more diverse – less predictable – than the statewide swing because they express the effects of tight local campaigns as well as the statewide campaign. And parties target marginal districts because those districts might be won with the most effective use of resources. So although a uniform swing assumption is a helpful tool, in reality at most South Australian elections, fewer districts have changed hands than would have been predicted.

### Table 13:
**Uniformity of statewide swings at SA House of Assembly elections, 1993 to 2010**

<table>
<thead>
<tr>
<th>Swing (adjusted for the Intervening redistribution)</th>
<th>Statewide 2PP swing (%)</th>
<th>Seats expected to change hands with a uniform swing of this size</th>
<th>Seats which did change hands</th>
</tr>
</thead>
<tbody>
<tr>
<td>1989 to 1993</td>
<td>8.8 to Lib</td>
<td>14 seats to Liberal (Unley, Newland, Norwood, Florey, Mawson, Peake, Mitchell, Kaurna, Torrens, Elder, Hanson, Wright, Giles, Lee)</td>
<td>14 seats to Liberal (Unley, Newland, Norwood, Florey, Mawson, Peake, Mitchell, Kaurna, Torrens, Elder, Hanson, Wright, Lee, Reynell)</td>
</tr>
<tr>
<td>1993 to 1997</td>
<td>9.4 to ALP</td>
<td>12 seats to ALP (Lee, Hanson, Kaurna, Reynell, Wright, Elder, Peake, Torrens, Norwood, Frome, Stuart, Mawson)</td>
<td>11 seats to ALP (Lee, Hanson, Kaurna, Reynell, Wright, Elder, Peake, Torrens, Norwood, Mitchell, Florey)</td>
</tr>
<tr>
<td>1997 to 2002</td>
<td>0.6 to ALP</td>
<td>no change</td>
<td>2 seats to ALP (Colton, Adelaide)</td>
</tr>
<tr>
<td>2002 to 2006</td>
<td>7.7 to ALP</td>
<td>9 seats to ALP (Hartley, Mt Gambier, Stuart, Light, Mawson, Morialta, Bright, Newland, Fisher)</td>
<td>6 seats to ALP (Hartley, Light, Mawson, Morialta, Bright, Newland, Fisher)</td>
</tr>
<tr>
<td>2006 to 2010</td>
<td>8.4 to LiB</td>
<td>7 seats to Liberal (Light, Mawson, Norwood, Newland, Hartley, Morialta, Bright)</td>
<td>4 seats to Liberal (Norwood, Morialta, Fisher, Adelaide) and 1 seat to ALP (Frome)</td>
</tr>
</tbody>
</table>

**Note:** A redistribution was conducted after each election.
The reason why fewer seats change hands than might be expected is that parties can usually defend marginal districts they already hold, more effectively than they can win new marginal districts. This means that a statewide swing towards a party is amplified in the marginal seats which that party already holds, and dampened in the opposing party’s marginal seats. Table 14 shows the average swings in seats that were marginal Labor or Liberal seats going into the last five House of Assembly elections.

Table 14:
Swings in marginal districts, SA House of Assembly elections, 1993 to 2010

<table>
<thead>
<tr>
<th>Swing</th>
<th>Statewide swing (2PP %)</th>
<th>Average swing in ALP marginals (2PP %)</th>
<th>Average swing in LIB marginals (2PP %)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1989 to 1993</td>
<td>8.9 to LIB</td>
<td>9.9 to LIB</td>
<td>10.6 to LIB</td>
</tr>
<tr>
<td>1993 to 1997</td>
<td>9.4 to ALP</td>
<td>10.6 to ALP</td>
<td>7.8 to ALP</td>
</tr>
<tr>
<td>1997 to 2002</td>
<td>0.6 to ALP</td>
<td>2.3 to ALP</td>
<td>0.1 to LIB</td>
</tr>
<tr>
<td>2002 to 2006</td>
<td>7.7 to ALP</td>
<td>10.1 to ALP</td>
<td>7.5 to ALP</td>
</tr>
<tr>
<td>2006 to 2010</td>
<td>8.4 to LIB</td>
<td>1.9 to LIB</td>
<td>6.7 to LIB</td>
</tr>
</tbody>
</table>

Table 14 shows that when the statewide swing is towards the Liberal Party, swings in marginal Liberal seats have generally been stronger than the swings in marginal Labor districts, and a similar pattern occurs when the statewide swing has been towards Labor.

The observation that defending seats is usually easier than winning new ones is consistent with sitting members using the advantages of incumbency to strengthen their margins or to defend their seats. In a close election it is likely to be easier for a government – with more sitting members – to defend its majority than for an opposition to win it, and indeed at federal elections in Australia the governing party has won nine out of ten close results.669 Another conclusion is that a performance requirement which asks for a set of districts which will award government to the party winning the support of a majority of voters is likely to fail whenever the result is close – just when it is needed.

The non-uniform swings at South Australia’s 2010 election imply that the New Jersey commission’s approach of assessing maps against several sets of election results is a useful one. So the author’s submission to the EDBC assessed the existing map which was in place for

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the election of 2010 against several sets of results, to gauge whether it had been biased.\textsuperscript{670} Table 15 is taken from that submission.

Table 15:

Bias and fairness at 50:50: alternative assessment options applied to the current districts

<table>
<thead>
<tr>
<th>State election</th>
<th>At a hypothetical 50:50 result</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Support in safe seats</td>
</tr>
<tr>
<td></td>
<td>ALP (%)</td>
</tr>
<tr>
<td></td>
<td>(No.)</td>
</tr>
<tr>
<td>Average of 1993 to 2006</td>
<td>31.1</td>
</tr>
<tr>
<td>Average of 1993 to 2010</td>
<td>33.5</td>
</tr>
<tr>
<td>Average of 2010 and (1993 to 2006)</td>
<td>35.7</td>
</tr>
</tbody>
</table>

Note: Results at each election have been sorted into the boundaries that operated in 2010.

Table 15 shows that using an average of the results from 1993 to 2006, or including the 2010 results in the average as well, or weighting the average so that the 2010 results and the 1993-2006 average results have equal weight, would all have produced an assessment of the existing map as unbiased: the parties would have had roughly the same share of their support tied up in safe districts, when they had equal support. In addition, each of these measures would have assessed the current districts as likely to produce a fair result if both parties had equal voter support.

An alternative would be to assess a set of proposed districts against the Legislative Council results from 2010. That house is elected using proportional representation; a single statewide district and a list single transferrable vote ballot means that the emphasis is on parties rather than individual candidates, and the major parties’ election campaigns focus on House of Assembly districts and almost ignore the Legislative Council ballot. In theory then, the Legislative Council results within the geographic area of each House of Assembly district would be an approximation of the levels of party support across the state in 2010 without the effect of the particular campaigns in each district. The actual ballot for the upper house uses proportional representation to elect 11 members across a single statewide district but it can be

\textsuperscript{670} Newton-Farrelly 2011b, Submission to the Redistribution Committee for Victoria.
converted to a hypothetical two party preferred vote given several assumptions.\textsuperscript{671} Table 16 shows 2010 Legislative Council results within each current House of Assembly district, converted to a two party preferred vote and then adjusted to a hypothetical 50:50 outcome.

**Table 16:**

**Bias and fairness at 50:50: results from the 2010 SA Legislative Council ballot within the House of Assembly districts current in 2010**

<table>
<thead>
<tr>
<th>State election</th>
<th>At a hypothetical 50:50 result</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>support in safe seats</td>
</tr>
<tr>
<td></td>
<td>ALP (%)</td>
</tr>
<tr>
<td>2010 House of Assembly</td>
<td>30.3</td>
</tr>
<tr>
<td>2010 Legislative Council</td>
<td>21.4</td>
</tr>
</tbody>
</table>

*Note: Results from the Legislative Council results have been converted to a two party preferred outcome in each Assembly district.*

The 2010 Legislative Council results would assess the House of Assembly districts as almost unbiased, awarding Labor one more seat in the 47 seat House of Assembly than would be fair at a hypothetical 50:50 result.

The author’s submission to the EDBC included these assessments of the existing map against various sets of previous election results. In initial EDBC hearings in 2012 the Labor Party adopted the author’s submission, and particularly highlighted the material which is presented above as Table 15 (but presented in the submission as Table 4).

[I]f the last election was completely out of the ordinary, to re-distribute based on that result will create a result out of the ordinary next time, so it shouldn’t be done. The question becomes, how do you do it? We would be content for your Honours to look at [the data in] Ms Newton-Farrelly’s table 4...[A]ll they do is they take a basket of election results, the last four or five election results, and apply those results to the current boundaries, and I think in every occasion they show a 23, 24 seat result. You know, spot on. But you can’t get fairer than that because

\textsuperscript{671} The upper house ballot is single transferable vote list PR, with all candidates contesting a statewide district. The count is conducted for the state as a whole, but results are reported within House of Assembly districts as well, and the author has converted these to a two party preferred vote. Voters can make a single choice for a party and the preferences then flow according to its specified order of allocation (ticket). Roughly 95 per cent of voters choose this option, so the data can be treated as if every voter does so, and the votes for each party or Independent candidate can be allocated to Labor or Liberal according to the order specified by that party or candidate.
one party or the other has to get 24 and one has to get 23...We just say the 2010 result was skewed by a protest vote against the government and is not likely to be repeated at the next election.672

In its draft report the commission determined that the 2010 map was unbiased and adjusted it only for expected population changes. The Liberal Party then argued that the 2010 pattern of support would persist. If the commission had agreed, it would have needed to recognise that the Liberal Party had suffered once again from the over-concentration of its vote in safe seats. But the commission stood firm in its judgment that the existing map was not biased and did not adjust safe districts except to bring them within tolerance of the elector equality requirement; but it did adjust several more marginal Labor districts to increase responsiveness.

Ensuring responsiveness
To reduce the risk of a party winning a majority of votes but not enough seats, the EDBC could create an abundance of marginal districts.673 In 1991 there was general agreement with Mackerras’ argument that Australian election swings are roughly uniform, so that if a district was expected to change hands with a given swing but did not in fact move, then a safer one would.674 But for that to happen there must be seats available, so the commission has maintained the system’s responsiveness by ensuring that both parties have a number of marginal districts.

Section 83 cannot guarantee that an election result will be fair, but the purpose of the section is most likely to be achieved if there is an evenly graded series of marginal seats on both sides of the pendulum. That has been our object in this redistribution, as it was in 1994.675

However, when marginal districts change hands they increase the winning party’s share of seats more quickly than its share of votes. The danger of a system heavily loaded with marginal districts is that a swing can over-amplify that ‘winners’ bonus’ to the extent that effective opposition is made more difficult. The risk was demonstrated in South Australia in 1993 when

673 In Australia marginal districts are defined as those won with a two party preferred vote between 50 and 56 per cent. In South Australia the average statewide swing to Labor or to the Liberals since 1977 (the first election with equal-sized districts) has been 5.9 per cent, so a marginal district is one which might be at risk at an average election.
674 ‘It doesn’t really matter if there are errors in individual seats because the errors cancel out.’ M. Mackerras 1978, ‘On Elaine Thompson and Tom Wheelwright’, Politics, vol. 13, no. 2, p. 335.
a landslide election left the ALP with only 11 of the 47 seats, and it was argued that the party had too few members to maintain an effective opposition.\textsuperscript{676} The commission has formed the view that, so long as normal levels of party support were roughly equal, ‘the major party not elected to government should hold 12 – 15 seats with a safe margin’.\textsuperscript{677} In a 47 seat house that would mean roughly 30 safe districts and 15 to 20 fairly safe districts (likely to change hands only with a swing that is above average) or marginal districts (vulnerable to a swing of under 6 per cent, likely to be experienced at an average election).\textsuperscript{678}

A different danger would arise if too few districts were marginal or if all marginal districts belonged to one party. Without marginal districts the electoral system’s response to a change in voter support would be lagged, to the extent that a party might need to win much more than 50 per cent of the statewide two party preferred vote to win the median seat, and that would create a bias as effectively as malapportionment or the differential concentration of party support. Whereas lack of responsiveness is a more obvious danger in a system with few districts – South Australia’s 11 federal districts, for example – the state’s 47 seat House of Assembly and the geographic distribution of party support in the metropolitan area provide an assurance of at least some marginal districts.

Unlike New Jersey’s Apportionment Commission, the EDBC does not have great difficulty in drawing marginal districts. New Jersey’s final map is negotiated with the parties whose role is central to the whole process, whereas in South Australia the parties are consulted – and the EDBC does draw a great deal of benefit from their submissions and suggestions – but it is the commission which draws the map and makes the Order which brings it into effect. In addition, ensuring an appropriate number of marginal districts is considered to be necessary for compliance with the fairness clause which is – after equality of electors in each district – the most important of the constitutional requirements of the redistribution process. The commission can over-ride the parties’ reluctance to concede that any of their districts should be made more vulnerable.

\textsuperscript{677} EDBC 2003, Report, The Commission, Adelaide, para. 41.
\textsuperscript{678} The average statewide swing on a two party preferred basis at South Australian state elections since the end of malapportionment has been 5.9 per cent, and the highest has been 9.4 per cent. By chance, these percentages correspond well with the accepted definitions of marginal (50<57 per cent), fairly safe (57<60 per cent) and safe (60 per cent+) districts.
Seats won by Independents and minor party candidates

South Australia’s landslide 1993 election returned only Labor and Liberal members to the parliament, but when the pendulum swung back at the subsequent election in 1997 the House looked quite different. In 11 districts – almost one in four – the final count included an Independent or minor party candidate, and three were elected. The fairness clause does contemplate election of minor party candidates:

>a reference to a group of candidates includes not only candidates endorsed by the same political party but also candidates whose political stance is such that there is reason to believe that they would, if elected in sufficient numbers, be prepared to act in concert to form or support a government.679

As noted earlier, because the major parties contest each district and the preferential count requires that voters rank each candidate in order of preference, it is possible to re-examine ballot papers after an election to find a notional two party preferred result, as if these Independent or minor party candidates had not contested the election. In 1997 ballot papers in each of these 11 districts were re-examined and recounted to a notional two party preferred result, and the recounts showed that all three of the minor party or Independent candidates who did win seats represented districts which would otherwise have voted strongly Liberal rather than Labor. So the commission recognised each of the successful non-Labor candidates as part of a Liberal ‘group’.

Assessing whether a redistribution would be fair on the basis of a two-group vote, rather than a two-party vote, would require a two-group result for the state as a whole, so ballot papers in those three seats were examined once more, counting as if the successful candidate (National, Independent Liberal and Independent respectively) was the primary candidate of the ‘Liberal Party group’.680 In another eight seats, one of the two final candidates in the count was a Democrat, and in a separate exercise ballot papers in those seats were also recounted to find a two party preferred result.681 When the two exercises were compared, the statewide two group preferred result emerged as no different at all from the two party preferred result. In fact, while the results in three of these 11 rethrown seats would have changed marginally if the ballot papers were recounted on a two group preferred basis

679 Constitution Act 1934 (SA), s 83(3).

680 The district of Chaffey was won by a National Party candidate. The original two candidate preferred result, on the basis of which the National candidate won the seat, was a National:Liberal result. The two party preferred recount produced a Labor:Liberal result and the two group result found the National:Labor result.

681 Ballot papers showing a first preference for the Democrat candidate were re-allocated to the next preferred candidate, and the contest was recounted as if the Democrat had not contested the district.
rather than a two party preferred basis, counting in this way would not have made any of them marginal, and the commission decided that it would be difficult to estimate a two group vote for the seats if their boundaries changed to include voters from a neighbouring seat which had not been counted in this way. So in 1998 the one seat where the two measures were appreciably different was moved slightly on the pendulum, and no other changes were made.

What happened after the next state election in 2002 made the concept of belonging to a group seem less straightforward. Neither Labor nor the Liberal Party won a clear majority of seats and the balance of power lay with four Independent or minor party members – a National Party member and three Independents, one of whom had previously been elected as a Liberal. The two party preferred vote in his seat showed that it was clearly a conservative electorate and his own previous party membership implied that he would support a Liberal government, but a few days after the election he gave his support to the Labor Party who were then able to form government. Rethrown ballot papers showed that the two party preferred vote across the state was 50.9 per cent Liberal, and on the two group count the Liberal group – called this time the ‘non-government group’ – had 51.9 per cent of the vote, but regardless of the way the figures were counted, the fact remained that the Liberal Party did not form government.

The commissioners’ problem was to decide whether their previous redistribution had produced a fair result. Had the ‘candidates of a particular group’ who had attracted ‘more than 50 per cent of the popular vote (determined by aggregating votes cast throughout the State and allocating preferences to the necessary extent)’ been ‘elected in sufficient numbers to enable a government to be formed’? The commissioners decided that indeed there had been enough candidates elected in what could be described as conservative electorates for the Liberal Party to have formed government, and that its inability to win the support of the non-aligned members was not a shortcoming of the redistribution. Neither the Labor Party nor the Liberal Party has publicly disputed this conclusion.

The situation after the 2006 state election was even more confusing: this time the commission’s problem was effectively whether to count seats or to count members of the parliament. Labor won a two party preferred vote across the state of 56.8 per cent and a majority of seats, and assumed government in its own right. During the previous term, two

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682 Peter Lewis held a rural district for the Liberal Party for 22 years before forming his own minor party, and was re-elected under that banner. He was defeated at the subsequent election.
683 EDBC 2003, Report, Appendices 8A, 8B.
non-Labor members (the National Party member and one of the Independents) had signed an agreement with the Labor minority government, promising support to pass a Labor budget but reserving the right to vote independently on matters affecting their rural districts. In return they were appointed to the Labor ministry in 2004, and were promised their ministerial appointments again after the 2006 election even if Labor won government in its own right.\(^{684}\) This promise was well publicised in campaign material in their conservative electorates but both ministers also made public statements to the effect that they would prefer to work with a Liberal than a Labor government. Both were re-elected in 2006 and both were duly reappointed to the Labor ministry. The commission’s task was to decide whether these two ministers should be considered as part of the Labor group on the basis of their inclusion in the ministry, or as part of the Liberal group on the basis of their conservative stance and the conservative political orientation of their electorates.

On this question the Liberal Party argued that the commission should consider the reality of these two ministers’ service as part of the Labor government, rather than the conservative orientation of their electorates, and should show their seats on the government side of the pendulum. This would notionally give Labor two extra seats and would change its (Labor:Liberal) two party preferred vote from 56.8 per cent to a (government:non-government) vote of 57.9 per cent. There would be a real effect if the commission made this change: in assessing its proposed districts the commission needed to be sure that the Liberal Party would be likely to win enough seats to form government at the next election if it achieved a two party preferred swing of 6.9 percentage points or, alternatively, a swing against the government group of 8 percentage points. Should the commission look at the political alignment of these seats or at the alignment of their representatives? It decided to look at the seats, and reverted to using straight two party preferred results for all four electorates.

Notwithstanding that the National and Independent ministers had signed official support agreements with Labor, the commission decided not to distinguish them from the other two Independents, adopted the two party preferred recounts (Labor:Liberal) for all four unaligned candidates, and measured the statewide vote in terms of the Labor:Liberal two party preferred vote.\(^{685}\)

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\(^{684}\) C. Bildstein 2006, ‘No promise Speaker will keep his job, says Rann’, The Advertiser (Adelaide), 19 Jan., p. 4.

In 1991 when the fairness clause was debated, it would have been inconceivable that the concept of a party winning majority support would need to be stretched to allow consideration of the political orientation of members who represented conservative seats yet put the Labor Party into government or served in a Labor ministry. The commission’s consideration of a two group vote is not surprising, but in reverting to the two party preferred vote the commission may have returned to safer ground.

The parties assess a map on the basis of previous election data and then interpret it on the basis of political considerations, for example, which individual members will recontest their seats and how well individual candidates will be able to defend or win marginal seats. This level of political judgment is common to all parties and all countries. But while the parties interpret a map, the EDBC (like New Jersey’s Apportionment Commission) does not.

The EDBC has refused to make an allowance for incumbency when assessing its districts, for example. After the 1993 landslide the ALP was left with a much reduced delegation to the House of Assembly and at the subsequent EDBC hearings Labor argued that, as long as the parties held roughly the same number of seats, the commission could ignore the benefits of incumbency, but the post-1993 disparity between Labor’s 11 seats and the Liberals’ 37 meant that Labor would have very limited access to the advantages of incumbency and the EDBC should take that into account. The commission requested an analysis of the results at previous elections and the author concluded that the 1993 election had shown larger swings against ministers – indicating that incumbency had, at least in 1993, a negative value. The commission declined to search further for an average measure of the advantage of incumbency.  

Nonetheless, the commission has taken one factor into account. Rural districts have regularly swung less readily than metropolitan seats, so it has adjusted seats to make sure that ‘the median [seat] for winning or losing government should be a metropolitan seat’. Table 17 shows that country districts still swing less than city districts.

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Actual performance
Using methods which the parties and analysts agreed with – the pendulum, the two party preferred vote and recounts of ballot papers where Independents win seats – and making allowances for city and rural seats, the commission assessed its map in 1991 and decided that it would provide for fair competition. Parties and analysts used the same methods and concluded differently: it seemed likely that at the subsequent election the Liberal Party would only win 23 of the 47 seats, even with 52 per cent of the two party preferred vote.\(^{688}\) The Liberal Party considered an appeal to the Supreme Court, but withdrew when opinion polling predicted that it would win the coming election with a landslide.\(^{689}\)

The 1994 map looked similarly questionable. Again it appeared that the Labor Party could win government with under 50 per cent of the two party preferred vote. The basis for the commission’s confidence that the redistribution would indeed be fair was that Labor would be unlikely to win two of the seats because they were country districts where the swing would be dampened.\(^{690}\) Then in 1998 the pendulum generated by the next redistribution did show quite clearly that, in the event of a uniform swing, the opposition could win the median seat if it won a bare majority of the two party preferred vote. Uncertainty returned with the 2003

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redistribution when the median seat looked unlikely to fall to the Labor opposition with a bare majority of the vote, but the commission used the two group vote rather than the two party preferred vote to assess the pendulum, and on that new basis the distribution of seats did seem to comply with the fairness clause. More recently, the 2007 distribution of seats did seem likely to give the median seat to a party with a majority of the two party preferred vote, but the swings at the subsequent election in 2010 were so diverse that the Liberals (and two Independents in non-Labor districts) won 51.6 per cent of the statewide two party preferred vote but just 20 of the 47 seats.

The 2012 map looks different to Liberals than to Labor. Liberals assess it against the 2010 results and consider that there would be just 19, not 23 or 24, seats on the Liberal side of the pendulum with a 50:50 outcome. Labor assesses the map against several sets of previous election results and is content to have had just one seat made notionally Liberal.

It is now over 20 years since the 1989 state election when a wrong winner election was considered to have been caused by the geographic concentration of Liberal votes in overly safe districts. Five elections have been held on the basis of boundaries which have been drawn with the specific intention of providing a fair outcome for voters and for the parties, and at four elections the group which won the support of the majority of voters across the state was in a position to form government. But the fairness clause has made South Australia’s redistribution process more complex, the exercise must be repeated every four years, and the 2010 election outcome was a wrong winner result, so it would not be surprising if by now the parties or the commission had publicly found major fault with the system. In fact, they have not.

The EDBC has accepted the necessity of the fairness requirement. The parties and most individual members of the parliament have also accepted the new system and there has been no direct attempt to change the fairness provisions. There have been several attempts to reduce the frequency of distributions but none has been successful, perhaps because the parties understand that the commission projects elector numbers to a single future election date, or perhaps because longer-serving members remember the disruption caused when redistributions were conducted less frequently. Some members of the House of Assembly have protested that their seats have been changed too often and too much, devaluing the relationships they have built up with their constituents, but the commission has asserted that its task is to provide a fair result for parties, not for each individual member.
A minor party, the Australian Democrats, has argued that the fairness clause only guarantees a narrow kind of fairness. In 1993 its candidates won just over 9 per cent of first preference votes across the state but won no seats at all, and party counsel argued at the next hearings that this was another case of ‘differential concentration of support’. But the fairness clause does not require the EDBC to make the electoral system fair for every party, just for any group that might win 50 per cent of the vote, and the Democrats could not be considered part of either group because they had refused to align themselves with either of the major parties.691

When the Labor Party retained government in 2010 with the support of only a minority of voters across the state there was unrest amongst Liberal Members, and various proposals for change were considered. There was some intra-party discussion of acceptable alternatives, including the creation of extra seats which would come into effect whenever required to reflect the proportionality of a party’s vote, but in 2010 eight Members would have been required to top up the Liberals’ 20 seats and give them a majority over the 27 Labor seats, and a proposal to increase the size of the House from 47 seats to 55 seemed unrealistic. Any proposal to adopt a full Multi-Member Proportional system designed to allocate seats to the parties proportionally may also be difficult to sustain as it would probably require a larger number of members, and any expansion of the lower house could invite a move to abolish the upper house, a proposal which would probably not be passed by the upper house. Many Liberals expected that the EDBC would redress the wrong winner outcome by drawing four to six Labor districts as notionally Liberal, and unrest resurfaced when the commission refused to do so on the grounds that the existing map was not biased. But the parliament is unlikely to simply discard the fairness requirement without putting into place an alternative which would be likely to do a better job; it would be difficult to convince the general public that enhancing democracy required abandoning something which is so clearly identified with fairness. So while there is a group of members who believe that the aim of an electoral system should be to give government to the party with the support of a majority of voters, most members in both parties still understand the lower house as having a districted electoral system awarding government to the party which wins a majority of seats.

The centrality of the fairness clause does affect how the South Australian electoral system will be able to change in the future. For example, it is unlikely that South Australia could follow New South Wales and Queensland and adopt an optional preferential ballot (effectively a

plurality ballot). The fairness requirement demands a statewide two party preferred result in each district, so the full-preferential ballot must stay.

Conclusion
South Australia’s experience leads to an inescapable conclusion: in any districted electoral system, it may be within the power of a redistribution authority to provide fair competition, but it is not within its power to guarantee that the most favoured party wins the most seats. That guarantee cannot be provided by a single-member district system alone.

There are several messages for other Australian jurisdictions.

A redistribution commission which is able to consider the political effects of the districts it draws can prevent one party’s support being inadvertently rendered less effective than it could be.

Stepping away from an apolitical stance and taking an impartial stance will not imperil the commission’s authority.

It is not a redistribution commission’s role to compensate a party when its campaign has been less successful.

The ability of incumbents to defend marginal seats means that wrong winner outcomes are likely to continue to occur in tight elections.

A single member system – even one where the map is responsive and provides no advantage to either party – demands that the parties compete in a particular way: for seats, not votes.

For US jurisdictions the message seems less encouraging. Even where each district has the same number of voters, all districts are contested, there is almost complete turnout on a regular basis, there is a complete count to the two parties in every district, the legislature has no control over the map or the redistribution commission, and the map is responsive and awards neither party an advantage going into the election, wrong winner elections cannot be prevented. The geographic basis of bias may be addressed, but parties intend to skew the translation of votes into seats with their campaigns. Should they be penalised when they succeed?
Conclusion

This thesis has considered the structures which Australian redistribution authorities were given, and the process and criteria they were required to work with, and has shown that there are now two models for electoral redistributions in Australia: one where all of the requirements are satisfied by fair process, and one where the authority is also required to provide a fair map. Extending South Australia’s criteria to include a performance requirement – that a map should not provide a built-in advantage to a party and should be responsive – has not imperilled the independence or authority of that state’s redistribution authority. Nor has it caused disagreement with the parties which might lead the parliament to change the process.

Other Australian jurisdictions have resisted following the South Australian model because they have interpreted its fairness clause as requiring the EDBC to guarantee fair election outcomes, rather than a level playing field leading into the election. That may now change: in its 2012 redistribution the EDBC made it clear that the wording of the clause cannot be interpreted in this way. The EDBC does not accept the responsibility of preventing wrong winner election outcomes, and this determination should now clear the way for other jurisdictions to follow suit.

If other jurisdictions do adopt performance requirements, most would find that the methodology developed by South Australia’s EDBC would be adequate, although use of an optional preferential count in New South Wales and Queensland means that redistribution authorities would need to find agreement on how party support should be measured. The newly clarified interpretation of what a fairness requirement would require of an authority would also be helpful federally, where a problem of aggregation would otherwise have heaped complexity over the task. The difficulty of aggregation was highlighted in the US by Niemi and Deegan who queried whether, even if congressional maps in all 50 states each produced fair outcomes, they would necessarily produce a fair outcome when the result was aggregated to the federal level. Hughes also considered the task and pointed out the lumpiness of the way that votes translate into seats in the smaller states and territories. But the difficulty dissolves if the standard for a fair map is not that it should always generate fair outcomes but simply that the competition should be fair. Then, aggregating a series of unbiased and responsive federal maps must surely be accepted as providing a level playing field at a federal election. And if,

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after all, campaign effects produce a wrong winner election outcome, that result would not invalidate the maps nor the redistribution authorities’ process.

It might be argued that asking for a level playing field is no improvement on Australia’s current process. If wrong winner election outcomes cannot be prevented, then knowing that a map will create a level playing field might seem hardly worth the effort. Dixon’s refutation of that argument applies equally well in Australia, though he wrote it for the US:

I submit that it should be unthinkable to pick as the final redistricting plan, from among the many “equally equal” plans available in population terms, the plan that predictably favors one party over another at the instant of enactment. Such a result should be equally abhorrent whether the built-in favoritism is purposely planned or the careless result of consciously uninformed decision-making. Such an abhorrent result can be avoided only by considering political data to test the degree of predictable bias in the proffered plans.694

If this thesis offers a path forward for Australian redistributions, what does it provide for a US reader? US reform groups argue for structurally independent redistricting authorities, or at least balanced bipartisan authorities, and it is sometimes argued that these should be prevented from considering the political effect of the lines they draw. Australia’s experience is that drawing maps blindfolded and selectively deaf may have the effect of building bias into a map if the geographic distribution of one party’s support is more concentrated than its opponent’s. And Australia’s redistribution process also shows that responsiveness can suffer when the parties recommend similar changes which have the effect of strengthening marginal seats. Australian authorities took up their blindfolds in an era when they were unsure how well the parties would respect their independence and when the methodology for assessing maps was not well developed, but that stance seems anachronistic now. It would seem absurd for the US, where bipartisan authorities are adopted because there is no strong tradition of independence in public sector management, to then ask those authorities to refrain from considering the partisan effect of their maps. More effective would be a requirement that they balance any partisan advantage so that, given a tight election outcome, victory is not assured to either party. And, as New Jersey and South Australia have shown, a requirement for some responsiveness in the map is vital but needs to be specifically given priority or it will be traded off in order to achieve party agreement on other criteria.

Dominant two-party systems in both Australia and the United States mean that lower house votes elect local representatives and also elect governing parties. So redistribution authorities must be required to recognise the parties, treat them equally and elevate the public interest above party interests. US authorities’ structures prevent them from drawing maps which will be unbiased and responsive, and – by adopting an apolitical stance – Australia’s redistribution authorities have chosen not to, but legislatures in both countries retain the power to ensure that the task will be completed. And this thesis shows that the methodology exists to achieve it.
Appendix: Australian redistribution legislation

The following material relates to the process of drawing districts for the lower houses of the Commonwealth, New South Wales, Victorian, Western Australian and South Australian parliaments as well as for the unicameral parliaments of Queensland, the Australian Capital Territory and the Northern Territory. Tasmania and the ACT use multi-member districts.

Legislation

Commonwealth: Commonwealth Electoral Act 1918 as amended (CEA)

NSW: Constitution Act 1902 (NSW) as amended (CA(N)); Parliamentary Electorates and Elections Act 1912 (NSW) as amended (PEEA); Royal Commissions Act 1923 (NSW) as amended (RCA(N))

Vic: Constitution Act 1975 (Vic) as amended (CA(V)); Electoral Act 2002 (Vic) as amended (EA(V)); Electoral Boundaries Commission Act 1982 (Vic) as amended (EBCA)

Qld: Constitution Act Amendment Act 1890 as amended (Qld) (CAAA); Electoral Act 1992 (Qld) as amended (EA(Q)).

WA: Constitution Acts Amendment Act 1899 (WA) as amended (CAAA); Electoral Act 1907 (WA) as amended (EA(W)).

SA: Constitution Act 1934 (SA) as amended (CA(S)); Electoral Act 1985 (SA) as amended (EA(S)); Royal Commissions Act 1917 as amended (RCA(S)).

Tas: Constitution Act 1934 (Tas) as amended (CA(T)). This legislation adopts Tasmania’s five federal divisions as the basis for five, five-member state lower house districts.

ACT: Electoral Act 1992 (ACT) as amended (EA(A)).

NT: Northern Territory (Self-Government) Act 1978 (C’wlth) as amended (NTSA); Electoral Act 2004 (NT) as amended (EA(N)).

Electoral authority structures

Commonwealth: a three-member Australian Electoral Commission comprising the chairperson (part-time), Electoral Commissioner, and non-judicial member (part-time) (CEA s. 6).

NSW: NSW Electoral Commission headed by the Electoral Commissioner for NSW (PEEA ss. 21A,AA).

Vic: Victorian Electoral Commission, headed by the Victorian Electoral Commissioner (EA(V) s. 7). The commission is not subject to the Minister’s direction or control (EA(V) s. 10).

Qld: Electoral Commission of Queensland headed by the Electoral Commissioner (EA(Q) s. 6).
WA: Western Australian Electoral Commission headed by the Electoral Commissioner (EA(W) s. 5).

SA: Electoral Commission South Australia headed by the Electoral Commissioner (EA(S) s. 5).

Tas: the Electoral Authority has no involvement in redistributions.

ACT: Australian Capital Territory Electoral Commission comprising the chairperson (part-time); Electoral Commissioner and the non-judicial member (part-time) (currently the Australian Statistician) (EA(A) s. 6).

NT: Northern Territory Electoral Commission headed by the Electoral Commissioner (full-time) (EA(N) ss. 307-8, 314).

Redistribution authority:

Commonwealth: Stage 1: a four-member Redistribution Committee comprising the Electoral Commissioner, the Australian Electoral Officer for the state (or senior Divisional Returning Officer for the ACT), the State Surveyor-General or equivalent, and the State Auditor-General or equivalent (CEA ss. 55A,60). Stage 2: a six member augmented Electoral Commission comprising members of the Redistribution Committee, plus the chairperson of the Electoral Commission and the non-judicial member of the Electoral Commission (CEA ss. 55A,70).

NSW: Electoral Districts Commission comprising a current or former Judge of the NSW Supreme Court, the NSW Electoral Commissioner and the NSW Surveyor-General (PEEA s. 6).

Vic: Electoral Boundaries Commission comprising the Chief Judge of the County Court (chairman), the Victorian Electoral Commissioner and the Victorian Surveyor-General (EBCA s. 3).

Qld: Queensland Redistribution Commission comprising the chairperson (part-time), the Electoral Commissioner, and a non-judicial member (part-time) (EA(Q) ss. 6,8).

WA: Electoral Distribution Commission comprising the chairman, the Electoral Commissioner, and the Government Statistician (EA(W) s. 16B).

SA: Electoral Districts Boundaries Commission comprising a Judge of the state Supreme Court (chairperson), the Electoral Commissioner and the state Surveyor-General (CA(S) s. 78).

Tas: No authority required.

ACT: Stage 1: The Redistribution Committee comprises the ACT Electoral Commissioner (chair), the planning and land authority, the ACT Surveyor-General and a person with qualifications or experience that would be helpful in relation to the criteria (EA(A) s. 39).
Stage 2: The Augmented Redistribution Commission comprises members of the Redistribution Committee and the two remaining members of the Electoral Commission (EA(A) s. 47).

NT: Stage 1: Redistribution Committee comprising the Electoral Commissioner (chair), the Northern Territory Surveyor-General and the Northern Territory Auditor-General (EA(N) s. 331-3). Stage 2: Augmented Redistribution Committee comprising the members of the Redistribution Committee, and an appointed member (EA(N) s. 334-6). The appointed Member is chairperson of the Augmented Redistribution Committee (EA(N) s. 339).

**Insulation from political influence**

Commonwealth: It is an offence to improperly seek to influence a member of a redistribution committee or commission (CEA s. 78).

NSW: Commissioners have the same protection and immunity as a judge of the NSW Supreme Court (PEEA s. 19; RCA(N) s. 6).

Vic: A person must not obstruct or endeavour to influence a member of the commission in the performance of his duties or the exercise of his discretion under the Act otherwise than by way of a submission (ECBA s. 10).

Qld: no legislated protection.

WA: no legislated protection. The Electoral Commissioner cannot be a member or former member of a state or federal parliament (EA(W) s. 5B).

SA: A commissioner has the same protection and immunities as a judge of the Supreme Court (CA(S) s. 17; RCA(S) s. 16B).

Tas: Not applicable.

ACT: No legislated protection

**Qualifications for appointment to the redistribution authority**

Commonwealth: The chairman must be a current or former judge of the federal court with three years’ standing (CEA s. 5); the non-judicial appointee must be head of a Commonwealth government agency or of equivalent status (CEA s. 6).

NSW: The chair must be a current or former judge of the state Supreme Court (PEEA s. 6).

Vic: The Electoral Commissioner cannot have been a member of a political party within the past five years (EA(V) s. 12).
Qld: The Electoral Commissioner cannot be a member of a political party (EA(Q) s. 22). The chairperson must be a judge or former judge of the Commonwealth or a state or territory with three years’ standing, and the non-judicial member must be a departmental chief executive or equivalent (EA(Q) s. 6). Appointments of the Electoral Commissioner, chairperson and non-judicial appointee, and the process of their appointments, are subject to consultation by the Minister with each party leader in the Legislative Assembly and also with the parliamentary committee and are made by the Governor-in-Council (EA(Q) s. 6).

WA: The chairman must be a person with judicial experience. Appointments of the Electoral Commissioner and of the Electoral Distribution Commissioners are made after consultation with the parliamentary leader of each party in the parliament and with independent members (EA(W) ss. 5B,16B).

SA: The Electoral Commissioner is appointed after approval by the (joint parliamentary) Statutory Officers Committee and a resolution of both houses of the parliament (EA(S) s. 5); the chairperson is a senior puisne judge of the state Supreme Court (CA(S) s. 78).

Tas: Not applicable.

ACT: The ACT Electoral Commissioner is appointed after consultation with the leader of each party represented in the Legislative Assembly and independent members (EA s. 22); the appointment is for up to 5 years (EA s. 25). An appointed member cannot have been a member of any Australian federal state or territory parliament within the past ten years, or a member of a political party within the past 5 years (EA(A) s. 12A). An appointment as chairperson can only be made to a judge or former judge or person with knowledge and experience at a senior executive level (EA(A) s. 12B).

NT: The Electoral Commissioner is appointed after consultation with leaders of parties in the Legislative Assembly and independent members (EA(N) s. 314). A member of the Legislative Assembly cannot be appointed as the Electoral Commissioner (EA(N) s. 327). The appointed member must be a current judge of the Supreme Court or a magistrate or eligible to be appointed to either position, or if not then a person with appropriate qualifications or experience who cannot be a member of a political party (EA(N) s. 336). (The appointed member for the past three redistributions has been head of the planning and infrastructure department.)
Reaching agreement

Commonwealth: At meetings of the Redistribution Committee the Electoral Commissioner presides, or in his absence the Australian Electoral Officer or senior Divisional Officer, and the chair has a deliberative and also casting vote (CEA s. 62). Questions can be resolved by a majority vote (CEA s. 62). A minority report is possible (CEA s. 67). At meetings of the augmented Electoral Commission the chairperson of AEC presides or in his absence the Australian Electoral Commissioner, and a determination requires agreement of at least four members including at least two members of the AEC(CEA s. 71).

NSW: chairperson presides, or in his absence the Electoral Commissioner, and has a deliberative as well as a casting vote (PEEA ss. 8, 10).

Vic: chairman presides (EBCA s. 7).

Qld: The chairperson presides if present; the presiding person has a deliberative vote and casting vote if numbers are equal but if only two commissioners are present and cannot agree then the matter must be postponed until a meeting where all three are present (EA(Q) s. 15).

WA: No legislated provision.

SA: The chairman presides; a decision requires concurrence by the chairman and at least one other member (CA(S) s. 80).

Tas: Not applicable.

ACT: At a meeting of the Redistribution Committee the Electoral Commissioner presides and questions are resolved by a majority vote; the chair has a casting vote as well as a deliberative vote in the event of an equality of votes (EA s. 40). A minority report may be lodged (EA s. 43). At a meeting of the augmented commission, the chairperson of the Electoral Commission presides and questions are resolved by a majority vote. The chair has a deliberative vote and, in the event of an equality of votes, also has a casting vote but a casting vote cannot be used to decide a determination (EA ss. 47, 48). A determination must be agreed by at least four members of the augmented commission, including at least 2 members of the Electoral Commission (EA(A) s. 48). There is provision for a statement of disagreement by a member of the augmented commission (EA(A) s. 53).
NT: At a meeting of the Augmented Redistribution Committee, the chairperson has a casting vote as well as a deliberative vote (EA(N) s. 343).

Redistribution triggers

Commonwealth: Change in the size of the House (CEA s. 59); reapportionment (CEA s. 48); malapportionment (CEA s. 59); seven years after the last determination (CEA s. 59).

NSW: Change in the size of the House (CA(N) s. 27); malapportionment (CA(N) s. 28A); after two elections on the same district boundaries (CA(N) s. 27). The Legislative Assembly has a four year term (CA(N) s. 24).

Vic: Change in the size of either house; malapportionment; or after two elections on the same district boundaries (all in EBCA s. 5). The Legislative Assembly has a four year term (CA(V) s. 38).

Qld: Change in the number of districts of the Legislative Assembly (EA(Q) s. 37); malapportionment (EA(Q) s. 39); one year after the third general election on a set of district boundaries, or 7.5 years after a redistribution becomes final, whichever is later (EA(Q) s. 38). No trigger is effective if it occurs more than 16 months after an election (i.e. within 20 months of the expiry of the life of the parliament) (EA(Q) s. 35). The Legislative Assembly has a three year term (CAAA s. 2).

WA: Two years after each general election (EA(W) s. 16E). Note that the Legislative Assembly term is four years (CAAA s. 21).

SA: A redistribution must commence within 24 months of any change in the number of districts of the House of Assembly or a general election of the House of Assembly (CA(S) s. 82). The House of Assembly has a four year term (CA s. 28).

Tas: A federal redistribution.

ACT: A redistribution must commence two years prior to the next scheduled election (EA(A) s. 37). The Legislative Assembly has a four year term (EA(A) s. 100).

NT: Two and a half years after each general election (EA(A) s. 138) or malapportionment (EA(A) s. 138, NTSGA s. 32). The Legislative Assembly has four year terms (EA(A) s. 23).

A redistribution is effected when

Commonwealth: The Augmented Electoral Commission publishes a determination in the Government Gazette (CEA s. 73).

NSW: The Governor publishes a proclamation in the NSW Government Gazette (PEEA s. 15).
Vic: The Electoral Boundaries Commission publishes in the Gazette a notice that a statement of division of electors (with particulars and maps) has been lodged with the Department of Sustainability and Environment, and the Victorian Electoral Commission Gazettes a notice of the names and boundaries of the new districts and regions (EBCA ss. 12-15).

Qld: The commissioners publish in the Gazette a notice (with names and boundaries) (EA(Q) s. 51); the redistribution takes effect 21 days later, or on resolution of an appeal (EA(Q) s. 52).

WA: The commissioners publish in the Gazette a notice dividing the state (EA(W) s. 16F, 16K).

SA: The commission publishes an order in the Gazette, provided that an appeal may be made within one month of the gazetted and the order does not become final until the appeal is disposed of (CA(S) ss. 82, 86).

Tas: Schedule 4 to the Constitution Act 1934 (Tas) is amended to incorporate a federal redistribution made under the Commonwealth Electoral Act.

ACT: The Augmented Electoral Commission makes a public announcement, provides a copy of its report to the Minister and publicly releases it; the Minister must table the report (EA(A) ss. 53-4).

NT: The Augmented Redistributed Committee publishes a redistribution declaration notice in the Gazette (EA(N) s. 147).

**Court review**

Commonwealth: Subject to the Constitution and the Judiciary Act 1903 a decision is ‘final and conclusive; shall not be challenged, appealed against, reviewed, quashed, set aside or called in question in any court or tribunal on any ground; and is not subject to mandamus, prohibition, certiorari or injunction, or the making of a declaratory or other order in any court on any ground’ (CEA s. 77).

NSW: No legislated protection from court review.

Vic: No legislated protection from court review.

Qld: Appeals may not be made on the commission’s application of the criteria (EA(Q) s. 46). An appeal may be made within 21 days on the ground that the commission has not complied with the Act (EA(Q) s. 57). If the court is satisfied that the commission has not complied with Part 3 of the Act (which covers all of the redistribution process), and the effect is significant and the interests of justice require an order, the court may quash the notice and order the commission to make a fresh or amended notice (EA(Q) s. 57).
Otherwise, the commissioners’ decision is final and conclusive and cannot be challenged, appealed against, reviewed, quashed, set aside or otherwise called in question in any court or tribunal on any ground (EA(Q) s. 57).

WA: No legislated protection from court review.

SA: An appeal may be made within 30 days to the Full Court of the state Supreme Court on the ground that order has not been duly made in accordance with the Act. The court may quash the order and direct the commission to make a fresh redistribution, vary the order or dismiss the appeal (CA(S) s. 86). These appeal rights have been read narrowly in Gilbertson v. the State of S.A. and the Attorney-General for the State of South Australia (1976) 15 SASR 66.

Tas: Not applicable.

ACT: A determination by a Redistribution Committee or Augmented Redistribution Committee is final and conclusive, cannot be challenged, appealed against, reviewed, quashed, set aside or called in question in any court or tribunal on any ground and is not subject to any proceeding for an injunction, declaration or order for prohibition or mandamus (EA(A) s. 55).

NT: A determination by a Redistribution Committee or Augmented Redistribution Committee is final and conclusive; cannot be challenged, appealed against, reviewed, quashed, set aside or called in question in any court or tribunal on any ground and is not subject to any proceeding for an injunction, declaration or order for prohibition or mandamus (EA(A) s. 151).

Expected duration of a regular redistribution

Commonwealth: Seven years (CEA s. 59).

NSW: Two elections (CA(N) s. 27).

Vic: Two elections (EBCA s. 5).

Qld: Three elections or 7.5 years (whichever is later) (EA(Q) s. 38).

WA: Until the next general election (four years) (EA(W) s. 16E).

SA: Until the next general election (four years) (CA(S) ss. 28,82).

Tas: Seven years (CEA s. 59).

ACT: Until the next general election (four years) (EA(A) s. 100).

NT: Until the next general election (four years)(EA(N) s. 138).
**Tolerance at the time of redistribution**

Commonwealth: +/- 10 per cent from the average number of electors (*CEA* s. 73).

NSW: +/- 10 per cent from the average number of electors (*CA(N)* s. 28).

Vic: +/- 10 per cent from the average number of electors (*EBCA* s. 9).

Qld: +/- 10 per cent from the average number of electors. Applies also to districts of 100,000 km² or more where elector numbers include notional electors equivalent to 2 per cent of the number of square kilometres in the district (*EA(Q)* s. 45).

WA: For all districts with area less than 100,000 km²: +/- 10 per cent from the average number of electors. For all districts with area of 100,000 km² or more: +10 per cent and -20 per cent from the average number of electors, where elector numbers include notional electors equivalent to 1.5 per cent of the number of square kilometres in the district (*EA(W)* s. 16G).

SA: +/- 10 per cent from the average number of electors (*CA(S)* s. 77).

Tas: Not applicable.

ACT: +/- 10 per cent from the quota of electors (*ACTSGA* s. 67D).

NT: +/- 20 per cent from the average number of electors (*NTSA* s. 13).

**Equality at a future time**

Commonwealth: Aim is for equality three years and six months from the time of the redistribution unless the Electoral Commission projects that population change will change the jurisdiction’s entitlement to divisions, and require an earlier redistribution (*CEA* s. 63A). In that case, the aim is for equality half-way through the period from the time of the redistribution until the apportionment trigger is expected to operate (*CEA* s. 63A).

NSW: Aim is for equality four years from finalisation of the previous general election (*PEEA* s. 17A). This implies equality at the first of the two elections for which the map will operate.

Vic: No provision.

Qld: No provision.

WA: No provision.

SA: The commission interprets a demographic change criterion (see below) to imply a requirement for equality at the time of the general election (*CA(S)* s. 83).

Tas: Not applicable.
ACT: The aim is for equality at the time of the next general election (EA(A) s. 36).
NT: The next general election (EA(A) s. 139).

**Tolerance at the future time**
Commonwealth: As far as practicable, +/- 3.5 per cent from the average number of electors (CEA ss. 63A, 66, 73).
NSW: As far as practicable, +/- 3 per cent from the average number of electors (PEEA s. 17A).
Vic: An object of the Electoral Boundaries Commission is ‘establishing and maintaining...electoral districts of approximately equal enrolment’ (EBCA s. 5) and the commission ‘shall give due consideration to...the likelihood of changes in the number of electors in the various localities’ (EBCA s. 9).
Qld: The Queensland Redistribution Commission must consider demographic trends to ensure as far as practicable that the malapportionment trigger is not activated (EA(Q) s. 46).
WA: No legislated provision.
SA: No legislated provision but the commission aims for elector numbers within 3.5 per cent of the state average, at the time of the next election.
Tas: Not applicable.
ACT: As far as practicable, +/- 5 per cent of the expected quota (EA(A) s. 36).
NT: As near to equal as practicable (EA(N) s. 139).

**Malapportionment trigger operates**
Commonwealth: When more than one-third of divisions in a state or territory have a number of enrolled elector numbers that is more than 10 per cent higher or lower than the jurisdiction average, for three months in a row (CEA s. 59).
NSW: When more than a quarter of districts have elector numbers that are more than 5 per cent higher or lower than the state average, for more than two months in a row (CA(N) s. 28A).
Vic: When either: 3 Legislative Council regions and 27 or more of the 88 Legislative Assembly districts have elector numbers that are 10 per cent higher or lower than the state average for two months, or: 3 Legislative Council regions or 23 Legislative Assembly districts have elector numbers that are 10 per cent higher or lower than the state average and 1 region or 5 districts have elector numbers that are 20 per cent higher or lower than the state average for two months (EBCA s. 5).
Qld: When one-third or more of the districts have elector numbers more than 10 per cent higher or lower than the state average for two or more consecutive months (EA s. 39).

WA: No legislative provision.

SA: No legislative provision.

Tas: No legislative provision.

ACT: No legislative provision.

NT: Although redistributions occur after each election there is also a malapportionment trigger which operates if one or more divisions have elector numbers that are more than 20 per cent higher or lower than the Territory average (EA s. 138).

**Sequence of the redistribution process**

Commonwealth: Public suggestions, comments on the suggestions, proposal by the Redistribution Committee, public objections, comments on the objections, proposal by the Augmented Electoral Commission, further public objections, determination by the Augmented Electoral Commission. *If the augmented Electoral Commission’s proposal is not significantly different from the original proposal then the Commission need not call for further public objections and may simply issue the determination (CEA s. 72).*

NSW: Public suggestions, comments on the suggestions, proposed alteration of districts by the Electoral Districts Commission, public suggestions or objections, draft determination by the Electoral Districts Commission, public objections, public inquiry, determination by the Electoral Districts Commission. *The draft determination stage (and receipt of objections, and inquiry) may be omitted if the draft determination is not significantly different from the original proposed alteration of districts (PEEA s. 14).*

Vic: Proposal by the Electoral Boundaries Commission, public suggestions or objections, statement of the division of electors by the Electoral Boundaries Commission.

Qld: Public suggestions, comments on the suggestions, proposed redistribution by the Queensland Redistribution Commission, public objections, comments on the objections, determination by the Queensland Redistribution Commission.

WA: Public suggestions, comments on the suggestions, proposal by the Electoral Distribution Commission, public objections, determination by the Electoral Distribution Commission.

SA: Public suggestions, draft order by the Electoral Districts Boundaries Commission, public objections, determination by the Electoral Districts Boundaries Commission.

Tas: Not relevant.
ACT: Public suggestions, comments on the suggestions, proposal by the Redistribution Committee, public objections, proposal by the Augmented Electoral Commission, further public objections, determination by the augmented commission. (The proposal by the augmented commission and further objections may be omitted if the proposal is not significantly different from the original proposed alteration of districts (EA s. 51).

NT: Public suggestions, comments on the suggestions, proposal by the Redistribution Committee, public objections, redistribution declaration by the Augmented Redistribution Committee.

**Deferral of a redistribution**

Commonwealth: A redistribution which is triggered by malapportionment or the 7 years rule may be deferred if the House of Representatives is within one year of expiring. The trigger then operates within 30 days of the new House of Representatives first meeting (CEA s. 59).

NSW: A redistribution due to malapportionment must not be made if it is triggered during the last 12 months of a parliament’s life. Not more than one redistribution can take place between two elections (CA(N) s. 28A).

Vic: No legislated provision.

Qld: A redistribution which is triggered more than 16 months after the last election must be deferred until after the next election, and if an early election is called while a redistribution is underway the process must be suspended until the election has been finalised (EA(Q) s. 35).

WA: No legislated provision.

SA: No legislated provision.

Tas: Not relevant.

ACT: An extraordinary election which is called during a redistribution suspends the redistribution (EA(A) s. 38).

NT: No legislated provision.

**Mini-redistribution**

Commonwealth: Where a state’s entitlement has changed due to an apportionment determination and an election is called before a redistribution has been completed, the Australian Electoral Commissioner and the Australian Electoral Officer for the state must
combine the two contiguous divisions which jointly have the fewest enrolments or split
the pair of contiguous divisions which jointly have the greatest enrolments into three
divisions (CEA s. 76). A full redistribution would then take place after the election.
All states and territories: Not relevant.

**Time limits on the redistribution process**

Commonwealth: As soon as practicable after the redistribution commences, public suggestions
must be invited by public notification in the Gazette (and also in newspapers), to be
received for 30 days after the Gazettal, and also inviting public comments on those
submissions to be received for 14 days after that (CEA s. 64). Objections to a
redistribution proposed by a Redistribution Committee will be received for 23 days after
public notification in the Gazette (and newspapers) of the proposed redistribution, and
public comments on those objections will be received for 14 days after that (CEA s. 68).
The augmented Electoral Commission has 60 days from the close of comments on the
Redistribution Committee’s proposal to complete its process (CEA s. 72). If an
Augmented Electoral Commission determines that its redistribution proposal is
significantly different from the Redistribution Committee’s proposal, further objections
will be received and an inquiry may be held, but the process must be complete by the
end of 60 days after the closing date for comments on public submissions (CEA s. 72).

NSW: Initial public suggestions will be received for 30 days after public notification in the
Gazette that a redistribution has commenced, and public comments on those
submissions will be received for 14 days after that (PEEA s. 13). Suggestions or
objections to a draft determination proposed by the Electoral Districts Commission will
be received for 30 days after public notification in the Gazette (and newspapers) of the
proposed redistribution (PEEA s. 14). The final determination must be made within 60
days of the end of receipt of comments on the draft proposal, but a 10 day extension can
be made (PEEA s. 14).

Vic: Suggestions or objections will be received for 30 days after public notification in the
Gazette of a proposed map being available for comment (EBCA s. 10B).

Qld: Initial public suggestions will be received for 30 days after public notification in the
Gazette (and also in newspapers) that a redistribution has commenced, and public
comments on those submissions will be received for 21 days after that (EA(Q) ss. 42-3).
Objections to a proposed redistribution by the Queensland Redistribution Commission
will be received for 30 days after public notification in the Gazette (and newspapers) of the proposed redistribution, and public comments on those objections will be received for 10 days after that (EA(Q) ss. 48-9). The Queensland Redistribution Commission must make a final determination within 60 days of close of objections to the proposed redistribution (EA(Q) s. 51).

WA: Initial public suggestions will be received for 30 days after public notification in the Gazette (and also in newspapers) that a redistribution has commenced, and public comments on those submissions will be received for 14 days after that. The commissioners’ proposal, with maps and reasons, must be produced within 42 days of the close of comments. Objections to the proposed redistribution proposed by the Electoral Distribution Commissioners will be received for 30 days after public notification in the Gazette of the proposed redistribution. Within 90 days after the close of objections, the Electoral Distribution Commissioners must make a determination (all under EA(W) s. 16F).

SA: Redistribution must commence within 24 months of an election (CA(S) s. 82). Public representations will be received for a specified period after public notification in a newspaper that a redistribution will commence (CA(S) s. 85). Objections to a draft redistribution proposed by the Electoral Districts Boundaries Committee will be received for a specified period after public notification in newspapers (CA(S) s. 85).

Tas: Not relevant.

ACT: Initial public suggestions will be received for 28 days after public notification that a redistribution has commenced (in the Gazette, newspapers and websites), and public comments on those submissions will be received for 14 days after that (EA(A) s. 41). Objections to a redistribution proposed by a Redistribution Committee will be received for 28 days after public notification of the proposed redistribution (EA(A) s. 46). If an Augmented Electoral Commission determines that its redistribution proposal is significantly different from the Redistribution Committee’s proposal, further objections will be received for 28 days after notification of the proposed redistribution (EA(A) s. 51).

NT: Initial public suggestions will be received for 30 days after public notification in the Gazette (and also in newspapers) that a redistribution has commenced, and public comments on those submissions will be received for 14 days after that (EA(N) ss. 137, 141-2). Objections to a redistribution proposed by the Redistribution Committee will be
received for 30 days after public notification in the Gazette (and newspapers) of the proposed redistribution (EA(N) s. 145).

Requirements to consult and consider

Commonwealth: The Redistribution Committee must consider all initial suggestions and comments (CEA s. 64). The Augmented Electoral Commission must consider all initial objections and comments and must hold a public inquiry into the objections unless they repeat suggestions or comments, or are frivolous or vexatious (CEA s. 72). The Augmented Electoral Commission must consider all further objections and must hold a public inquiry into the objections unless they repeat suggestions or are frivolous or vexatious (CEA s. 72).

NSW: The Electoral Districts Commission must consider all initial suggestions and comments (PEEA s. 13). The Electoral Districts Commission must consider all suggestions and objections to the proposed alteration of districts, and must hold a public inquiry into them unless they repeat earlier suggestions or objections or are frivolous or vexatious (PEEA s. 14).

Vic: In the course of its deliberations the Electoral Boundaries Commission shall invite submissions (EBCA s. 10). The commission must consider all submissions and objections and may conduct hearings in public (ECBA s. 10B).

Qld: The Queensland Redistribution Commission must consider all initial suggestions and comments (EA s. 44). The commission must consider all objections and comments (EA(Q) s. 50).

WA: The Electoral Distribution Commissioners must call for initial suggestions and comments, and then for objections to their proposed redistribution, through notices in the Gazette and also in newspapers (EA(W) s. 16F).

SA: The Electoral Districts Boundaries Committee must call for representations, consider all representations and all objections to a draft order, and may hear evidence in public (CA(S) s. 85).

Tas: Not relevant.

ACT: The Redistribution Committee must call for suggestions, to be lodged within 30 days, and comments on them within 14 days after that (EA(A) s. 41). The Redistribution Committee must consider all initial suggestions and comments (EA(A) s. 43). The Augmented
Electoral Commission must consider all objections and must hold a public inquiry into the objections unless they repeat suggestions or are frivolous or vexatious (EA(A) s. 49).

NT: the Augmented Redistribution Committee must consider all objections (EA(A) s. 146).

Requirements to report

Commonwealth: Initial suggestions and also comments on them, must be made available to the public at AEC offices (CEA s. 64) and in practice are also published on the AEC website. A Redistribution Committee must give reasons for the proposed redistribution; and a minority report can be lodged (CEA s. 67). The proposed redistribution must be publicly notified and the report, including maps and reasons, must be made available publicly at AEC offices (and in practice is published on the AEC website) (CEA s. 68). Objections to the proposed redistribution, and comments on the objections, must be made available to the public at AEC offices (CEA s. 69) and in practice are published on the AEC website. An augmented Electoral Commission’s announcement of a proposed redistribution must refer to the Redistribution Committee’s initial proposal and the objections received, its own proposal and a statement of whether its proposal is significantly different from the Redistribution Committee’s proposal (and if so must call for further objections) (CEA s. 72). An Augmented Electoral Commission’s determination must be published in the Gazette, with reasons, and there is scope for a minority report (CEA ss. 73-4). Submissions, transcripts of hearings and reports, including maps and reasons, are available online at the AEC website.

NSW: The Electoral Districts Commission must make initial suggestions available to the public at the commission’s office (PEEA s. 13). The commission must notify a proposed alternation in the Gazette and in newspapers, and make a report with maps reasons available to the public on the commission’s website, and must call for suggestions or objections (PEEA s. 14). Its announcement of a draft determination must call for public suggestions or objections (PEEA s. 14). The determination must be published in the Gazette (PEEA s. 14).

Vic: the Electoral Boundaries Commission must make a public notification in the Gazette of the date on which a redistribution will commence and the reason for the redistribution (EBCA s. 5). Suggestions must be made available to the public for three months at Commission offices (EBCA s. 10). If public hearings are held a transcript must be made publicly available (EBCA s. 10B). The commission must send copies of the determination
and maps to the department of Sustainability and Development, the Victorian Electoral Commission, each House of Parliament, and each Member of Parliament, and must make a public notification in the Gazette (EBCA ss. 12-3). Reports are available online at the VEC website.

Qld: When a redistribution is triggered, the Queensland Redistribution Commission must put a public notice in the Gazette, identifying the commissioners (EA s. 35). Initial suggestions and comments on them must be made available to the public at ECQ offices (EA s. 43) and in practice are published on the ECQ website. The commission must report with maps and reasons for the proposed redistribution (EA s. 47). The proposed redistribution must be publicly notified and the report must be made available publicly at ECQ offices (and in practice is published on the ECQ website) (EA ss. 47,49). Objections to the proposed redistribution must be made available to the public at ECQ offices (EA s. 49) and in practice are published on the ECQ website. The commission must gazette its determination with maps, and must report publicly with reasons, and publicly notify in newspapers the existence of the report (EA s. 53). Reports which include submissions, are available online at the ECQ website.

WA: Initial suggestions and comments on them, must be made available to the public at WAEC offices (EA s. 16F). The Electoral Distribution Commissioners must publish their proposal with maps and reasons, in the Gazette and in newspapers (EA s. 16F). The commissioners must publish their determination with maps and reasons, in the Gazette (EA s. 16F). Reports are available online at the dedicated website of the Electoral Distribution Commissioners.

SA: There is no requirement to make representations or objections public, but in practice they are made available on the EDBC webpage at the Electoral commission SA website. The EDBC must publish a notification in newspapers that a redistribution will commence and representations can be made (CA(S) s. 85). It must publish a notification in newspapers that a draft order for a redistribution has been made (CA(S) s. 85) and must publish an order in the Gazette (CA s. 86). Representations, transcripts of hearings and objections, and the draft order and final order (with reasons) are available online at the ECSA website.

Tas: Not relevant.

ACT: Initial suggestions and comments must be made available to the public and in practice are available from the ACT Electoral Commission website (EA(A) s. 41). A Redistribution Committee must give reasons for the proposed redistribution; and a minority report can
be lodged (EA(A) s. 43). The proposed redistribution must be publicly notified and the report must be made available publicly and in practice is published on the ACTEC website (EA(A) s. 44). Objections to the proposed redistribution must be made available to the public (EA(A) s. 46) and in practice are published on the ACTEC website. An Augmented Electoral Commission’s announcement of a proposed redistribution must refer to the Redistribution Committee’s initial proposal and the objections received, its own proposal and a statement of whether its proposal is significantly different from the Redistribution Committee’s proposal (and if so must call for further objections) (EA(A) s. 51). An Augmented Electoral Commission must report its determination to the minister, with reasons, and there is scope for a minority report. The report must also be publicly available (EA(A) s. 53). Submissions, transcripts of hearings and reports are available online at the ACTEC website.

NT: Initial suggestions must be made available to the public (EA(N) s. 142). The Redistribution Committee must publicly notify its proposed redistribution including maps and call for objections (EA(N) ss. 144-5). The Augmented Redistribution Committee must make a redistribution declaration notice in the Gazette and then report to the Minister with maps and also with details of all suggestions, comments and objections, and the Minister must table the report within 5 sitting days (EA ss. 147-8). Reports are available online at the NTEC website.

**Subordinate criteria**

Commonwealth: Community of interests within the proposed divisions including economic, social and regional interests; means of communication and travel within the proposed division; physical features and area of the proposed division; and subsidiary to the previous matters, boundaries of the existing divisions (CEA ss. 66, 73). For mini-redistributions: census collection districts must not be split; the boundaries of each division shall form an unbroken line, except to include an island (CEA s. 76).

NSW: Community of interests within the electoral district including economic, social and regional interests; means of communication and travel within the district; physical features and area of the district; mountain and other natural boundaries; boundaries of the existing districts (PEEA s. 17A).

Vic: Area and physical features of terrain; means of travel, traffic arteries, and communications and any special difficulties in connection therewith; community or diversity of interests;
and the likelihood of changes in the number of electors in the various localities (ECBA s. 9).

Qld: The extent to which there is a community of economic, social, regional or other interests within each district; communication and travel within each district; physical features of each proposed electoral district; boundaries of existing districts; demographic trends in the State, to prevent malapportionment. The commission may also consider the boundaries of local government areas to the extent that it is satisfied that there is a community of economic, social, regional or other interests within each local government area (EA(Q) s. 46).

WA: Community of interest; land use patterns; means of communication and distance from the capital; physical features; existing boundaries of districts; existing local government boundaries; and the trend of demographic changes (EA(W) s. 16I).

SA: Contiguous boundaries unless islands are involved (CA(S) s. 82); fairness (the electoral redistribution must be fair to prospective candidates and groups of candidates so that, if candidates of a particular group attract more than 50 per cent of the popular vote (determined by aggregating votes cast throughout the State and allocating preferences to the necessary extent), they will be elected in sufficient numbers to enable a government to be formed); the desirability of making the electoral redistribution so as to reflect communities of interest of an economic, social, regional or other kind; population of each proposed electoral district; topography of areas within which new electoral boundaries will be drawn; feasibility of communication between electors affected by the redistribution and their parliamentary representative in the House of Assembly; substantial demographic changes that the commission considers likely to take place in proposed electoral districts between the conclusion of its present proceedings and the date of the expiry of the present term of the House of Assembly; any other matters (all except contiguity are in (CA(S) s. 83).

Tas: Not relevant.

ACT: Community of interests within each proposed electorate, including economic, social and regional interests; means of communication and travel within each proposed electorate; physical features and area of each proposed electorate; boundaries of existing electorates; boundaries of local districts (EA(A) s. 36).

NT: Community of interests including economic, social and regional interests (EA(N) s. 140) and the density of population in each proposed division (EA (N) s. 140); so that the demographic and geographic nature of each proposed division should be as uniform as
practicable (EA(N) s. 139); respect for local government boundaries, Commonwealth electoral divisions, Aboriginal Land Councils and, where possible, existing electoral districts (EA(N) s. 140), so that identifiable communities should be included in only one proposed division if practicable (EA(N) s. 139); the area and types of communication and travel in each proposed division, with special reference to disabilities arising out of remoteness or distance (EA(N) s. 140) so that the physical area of each proposed division containing rural and remote areas should be kept as small as practicable (EA(N) s. 139); physical features (EA(N) s. 140); subject to all others, proposed changes to existing divisions should, as far as practicable, minimise the number of electors being transferred from one division to another (EA(N) s. 139).

Order of priority for applying the criteria
Commonwealth: The over-riding criterion is equal elector population (CEA s. 66).
NSW: The over-riding criterion is equal elector population (CA(N) s. 28) and the requirement to consider demographic trends follows (PEEA s. 17A).
Vic: The over-riding criterion is equal elector population (ECBA s. 9).
Qld: The over-riding criterion is equal elector population (EA(Q) s. 45). Then the commission ‘may give such weight to each of the matters as it considers appropriate’ (EA(Q) s. 46).
WA: The over-riding criterion is equal elector population (the commissioners must make districts with enrolments within tolerance) but that includes making allowances for districts covering large geographic areas (EA(W) s. 16G).
SA: The over-riding criterion is equal elector population, then fairness, then other criteria (CA (S) ss. 77, 83).
Tas: Not relevant.
ACT: The over-riding criterion is equal elector population (ACTSGA s. 67D; EA s. 36); then other criteria (EA s. 36).
NT: The over-riding criterion is equal elector population (NTSGA s. 13); then other criteria but retention of existing electoral district boundaries is subordinate to all other criteria (EA(N) s. 139).

Degree of compliance required
Commonwealth: The committee (CEA s. 66) or augmented commission (CEA s. 73) shall give due consideration to these criteria in relation to each division.
NSW: The committee *shall* determine boundaries to within elector tolerances and *shall have regard* to the demographic change criterion, and then *shall give due consideration* to compliance with the remaining criteria (*PEEA* s. 17A).

Vic: The commissioners *shall give due consideration* to other criteria (*ECBA* s. 9).

Qld: The commission *must ensure* compliance with the population tolerances, and *must consider* the criteria (*EA(Q)* ss. 44-6).

WA: The commissioners *shall give due consideration* to the criteria (*EA(W)* s. 161).

SA: The number of electors in each district *must not* vary more than the tolerance; boundaries *must be* unbroken lines unless islands are involved; the commission *must ensure, as far as practicable*, a fair outcome and the commission *must have regard as far as practicable* to the other criteria, and may have regard to other matters (*CA(S)* s. 77,82-83).

Tas: Not relevant.

ACT: The commission and augmented commission *shall ensure* that districts are within quota at the time of the redistribution and *duly consider* the criteria (*EA(A)* s. 36)

NT: The commission *must ensure* that district population is within tolerance of the quota; and *must give proper consideration* to the criteria so that districts will be as near as *practicable* (*EA(N)* s. 140).
References


Legal authorities: Australia
Attorney-General (Cth); Ex rel McKinlay v. Commonwealth (1975) 135 CLR 1.
Attorney-General (NSW); Ex rel McKellar v. The Commonwealth (1977) 139 CLR 527.
Gilbertson v. the State of South Australia And Another, Privy Council (1977) 51 ALJR 519.
McGinty v. Western Australia (1996) 186 CLR 140.

Legal authorities and court documents: United States
Colegrove v. Green, 328 U.S. 549 (1946).


Major legislation: Australia
(all Acts are ‘as amended’, and all are available at www.austlii.edu.au)

Australian Capital Territory (Self-Government) Act 1988 (Cwlth)
Census and Statistics Act 1905-1973 (Cwlth)
Commonwealth Electoral Act 1918 (Cwlth)
Commonwealth of Australia Constitution Act (Cwlth)
Constitution Act 1902 (NSW)
Constitution Act 1934 (SA)
Constitution Act 1934 (Tas)
Constitution Act 1975 (Vic)
Constitution Act Amendment Act 1890 (Qld)
Electoral Act 1907 (WA)
Electoral Act 1985 (SA)
Electoral Act 1992 (ACT)
Electoral Act 1992 (Qld)
Electoral Act 2002 (Vic)
Electoral Act 2004 (Tas)
Electoral Act 2004 (NT)
Electoral Boundaries Commission Act 1982 (Vic)
Electoral Districts (Redivision) Act 1929 (SA)
Legislative Council Electoral Boundaries Act 1995 (Tas)
Northern Territory (Self-Government) Act 1978 (Cwlth)
Parliamentary Committees Act 2003 (Vic)
Parliamentary Electorates and Elections Act 1912 (NSW)
Representation Act 1905 (Cwlth)
Royal Commissions Act 1917 (SA)

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