

# How Independent the Arbiter? A case study of recent Northern Territory events

Robyn Smith<sup>1</sup>

## *Abstract*

One of Dean Jaensch's much-heralded reforms for Australian parliaments is the election of an Independent Speaker along the lines of the process adopted by the House of Commons. In the contemporary context of the 25-Member Northern Territory Legislative Assembly which is being governed in a minority capacity by the Henderson Labor Government, this paper considers the role of the Speaker and identifies areas of frustration and difficulty for the Opposition and Independents. Also examined are other methods for electing or appointing a Speaker including some that represent a considerable departure from Westminster parliamentary convention.

## *2008 General Election*

Chief Minister Paul Henderson put himself to the people of the Northern Territory in an early general election on 9 August 2008. Few predicted that the result would be a hung parliament — and that outcome was only narrowly averted.

On election night the result was not clear but indicated that the Assembly's sole Independent, Gerry Wood, could hold the balance of power.

When Henderson called the election his government held 19 seats in the 25-member Legislative Assembly. He lost eight of those and emerged with a slender majority of two. The result was 13 seats for the ALP, 11 for the Country Liberal Party (CLP) and one held by an Independent. Three ministers lost their seats in an election that came down to a handful of votes in the Darwin seat of Fannie Bay, which had been comfortably held by retiring member and former Chief Minister Clare Martin. It was several days before the Electoral Commission declared Labor's Michael Gunner the winner by 78 votes.

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<sup>1</sup> Robyn Smith is a Parliamentary Officer with the Northern Territory Legislative Assembly. She is a Bachelor of Arts (Anthropology and Journalism) and a Master of Cultural Heritage. She is presently finalising a PhD thesis on Northern Territory Political History.

When the ALP's marginally victorious position became apparent, there was media speculation about whether Independent Gerry Wood would assume the role of Speaker. His response was that he 'wouldn't consider it'.<sup>2</sup>

As was the case with the ALP's landslide victory in 2005 both parties were shocked by the result. A shattered former Chief Minister Clare Martin sat with the ABC's Kerry O'Brien in the Tally Room as results came in. The CLP made a clean sweep of urban Alice Springs, Katherine, Darwin's satellite city of Palmerston and picked up some Darwin seats. Labor lost one key northern suburbs seat, its two Palmerston seats and an inner city Darwin seat.

Curiously two ALP members held their seats unopposed — a first in the history of self-government in the Northern Territory. They were Malarndirri McCarthy in the Top End bush seat of Arnhem and Alison Anderson in the Central Australian bush seat of MacDonnell. Both were promoted to the ministry, along with Karl Hampton who retained his Central Australian bush seat of Stuart.

### ***Parliamentary Demographics***

Of the ALP's then 13 members six were women and four were Indigenous. Three of the ALP's Indigenous members were women. Paul Henderson's Cabinet was comprised of nine ministers,<sup>3</sup> four of whom were women and four of whom were Indigenous (one male).

The CLP's first Indigenous member of the Legislative Assembly since self-government was elected: Adam Giles<sup>4</sup> successfully contested the urban Alice Springs seat of Braitling which was vacated by retiring Independent (and former CLP Minister and Speaker) Loraine Braham. Of the 11 CLP members, two are women.

The ALP was left with four members who were not in the Ministry. Jane Aagaard, the Member for Nightcliff, retained her position as Speaker of the Legislative Assembly. The three newly elected members became office holders: Michael Gunner (Fannie Bay) was appointed Whip; Lynne Walker (Nhulunbuy) was appointed Deputy Speaker and Chairman of Committees; and Gerry McCarthy (Barkly) was appointed Chairman of the Public Accounts Committee. This arrangement gave rise to the peculiar situation of the government having no backbenchers to serve on Parliamentary Committees, although the three office holders named serve on the majority of Parliamentary Committees.

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<sup>2</sup> *Northern Territory News*, 11 August 2008; 4.

<sup>3</sup> It is now eight Ministers.

<sup>4</sup> Giles contested the House of Representatives seat of Lingiari for the Country Liberal Party in the 2007 Federal Election. Hyacinth Tungatalum was the first Indigenous CLP Member, holding the seat of Tiwi in the First Assembly (prior to self-government) from 1974–1976.

Table 1: Summary of Parliamentary Demographics — August 2008

	<i>ALP</i>	<i>CLP</i>	<i>Ind</i>	<i>Total</i>
Members	13	11	01	25
New Members	03	08*	--	11
Women	06	02	--	08
Men	07	09	01	17
Indigenous	04	01	--	05
Bush seats <sup>+</sup>	07	01 (rural Darwin)	01 (rural Darwin)	09
Urban seats <sup>+</sup>	06	10	--	16

*Notes:* \* the former CLP Member for MacDonnell (1997–2005) in Central Australia was elected to the urban Darwin seat of Port Darwin; the former CLP Member of the House of Representatives seat of Lingiari Dave Tollner (2001–2007) was elected to the new industrial/rural Darwin seat of Fong Lim. Both are treated as 'new' members for the purposes of these statistics.

+ a 'bush' seat is one that is in a remote region and does not include an urban or town area. 'Urban' seats are those within a town boundary and in Darwin's rural area, which is substantially populated.

### ***Electoral Fallout***

Chief Minister Henderson personally accepted responsibility for the ALP's poor performance in the election and immediately moved to redress issues identified as having a negative effect on the government. One criticism throughout the three-week campaign was that he had called the election nine months earlier than was necessary (and did so on the premise of Japanese petroleum company Inpex requiring 'certainty' in government before making a decision to base its LNG operation in the Northern Territory or Western Australia). Following the first Cabinet meeting on 19 August, the Chief Minister announced that his government would amend the *Electoral Act*<sup>5</sup> to incorporate fixed four-year parliamentary terms in the Northern Territory and acknowledged that the 'low voter turnout was due in part to the early election date'.<sup>6</sup>

Henderson claimed his Cabinet would 'reach out to all Territorians, with every corner of the Territory represented', which was a response to the criticism that the ALP's campaign was too presidential, too negative and too Darwin-centric. Further addressing that criticism, Henderson headquartered a government department in Alice Springs and opened offices of the Chief Minister in the regional centres of Katherine and Tennant Creek, claiming that it was 'the most significant devolution of decision making to the regions in 20 years, and presents a unique opportunity to continue to grow the Territory'. In a letter to the Northern Territory Public Sector

<sup>5</sup> The Northern Territory has no Constitution, hence the amendment to the *Electoral Act*.

<sup>6</sup> Media Release, *Fixed Four Year Terms to be Introduced*, Chief Minister Paul Henderson, 19 August 2008

on 18 August 2008, he identified his government's priorities as: making our communities safe; closing the Gap on Indigenous disadvantage; economic development and job creation, particularly in the Regions; supporting business; better health, welfare and child protection outcomes; improving educational outcomes; and supporting our lifestyle, sport, natural assets, culture and heritage

### ***Parliamentary Arrangements***

Given the closeness of numbers in the Assembly the government was forced to consider the mechanics of parliamentary sittings. At the first sitting following the election, Sessional Orders included a 45-minute dinner break. The Government also negotiated with the Opposition for a Pairing arrangement. After some negotiation which resulted in additional staff and facilities, the Opposition agreed.

By the first General Business Day on 29 October it was clear that Opposition business would keep the House sitting until 3 or 4am the following day, a highly ceremonial day on which the Assembly would be addressed by the President of Timor Leste, His Excellency Dr Jose Ramos Horta.

On 28 October, Chief Minister Henderson announced reforms to parliamentary arrangements which included: three extra sitting days per year; starting the parliamentary day at 9am rather than 10am; finishing the parliamentary day no later than 10pm [thus abolishing the Sessionally Ordered dinner break]; and web casting, including video, all parliamentary proceedings.<sup>7</sup>

These reforms were not effective by General Business Day, however the Assembly only sat until 1.30am after the government used its numbers to shut down debate, moved that the Assembly do now adjourn and further moved that the motion be now put, which, inevitably, drew howls of protest from the Opposition, which had been squarely ambushed following a Division.

The media interpreted the Chief Minister's announcement as a response to allegations of late night drunkenness by some members, but it was more a matter of practicality for the efficient functioning of the Assembly, although the government was clearly concerned about the tactics of the Opposition. The Chief Minister when announcing the reforms, said:

Territorians will be able to witness what we say, witness how we say it and be able to see it [and] hear it. Any misbehaviour is likely to be captured by the video and audio stream and can be rebroadcast. I really hope that it does improve the standards of behaviour. (*Northern Territory News*, 29 October 2008)

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<sup>7</sup> Prior to this announcement, parliamentary proceedings were available on the Internet by audio feed only and Question Time was broadcast on an FM radio network throughout the Territory. Full web casting commenced in October 2009.

### *Political Dynamics*

On 10 February 2009 the Deputy Chief Minister and Minister for Education Marion Scrymgour, an Indigenous woman, suddenly resigned from Cabinet following a Ministerial re-shuffle in which she lost Education but gained a heavy portfolio load. She cited a medical condition as her reason for going to the back bench.

On Tuesday 2 June she expressed outrage over the government's proposed Indigenous outstation policy, an area over which she presided whilst in Cabinet. Urgent Caucus meetings were convened and the matter apparently resolved. On Friday 5 June, however, she resigned from the ALP and announced that she would sit as an Independent.

The government's already tenuous grip on power was looking shaky, and the composition of the Legislative Assembly was now ALP – 12, CLP – 11, Independent – 2. With a majority now of a single seat it became apparent that the Speaker was key to maintaining government control.

Table 2: Summary of Parliamentary Demographics — June 2009

	<i>ALP</i>	<i>CLP</i>	<i>Ind</i>	<i>Total</i>
Members	12*	11	02	25
Women	05	02	01	08
Men	07	09	01	17
Indigenous	03	01	01	05
Bush seats	06	01	02	09
Urban seats	06	10	--	16

*Note:* \* Speaker has a deliberative and casting vote in the event of a tied vote.

For her part Scrymgour had given the government an undertaking that she would support the Appropriation Bill and would not support a Motion of No Confidence in the government, the two scenarios that could trigger an Extraordinary General Election under the recently amended NT Electoral Act that provided for fixed four-year terms.

With a vocal although not particularly cohesive Opposition and a Presiding Officer who is a Member of the Government and on whom the government relied to exercise her casting vote if required, the Speaker was noticeably 'soft' on Opposition members during Question Time. She was particularly sensitive to accusations of bias coming from the Opposition and, it could be argued, allowed Opposition Members too much latitude. Indeed such was the commotion in the Chamber that journalists reported that they had difficulty securing a television 'grab' of a Minister completing a single sentence during Question Time.

Seizing their newfound potential as an alternative government with the support of the two Independents, on the first sitting day following Scrymgour's move to the cross-bench,<sup>8</sup> the Opposition attempted to censure the Chief Minister for 'lying to Aboriginal people and failing to deliver on a promises to consult them on the government's outstation policy.' Scrymgour was extremely critical of former CLP governments in the matter under debate and informed the Opposition that under no circumstances would they have her support. Having been dealt a full and frank account of the newly Independent Member's mind, when the motion was put, the Opposition did not seek to divide.

On Tuesday 4 August 2009, another Government Minister resigned and went to the cross-bench. This time, Alison Anderson was the Minister concerned and her resignation was in protest to the expense of and lack of progress with the Closing the Gap housing initiative in remote Indigenous communities. The Henderson Labor government was both vulnerable and in crisis, and the Assembly was scheduled to sit the following week.

Table 3: Summary of Parliamentary Demographics — 4 August 2009

	<i>ALP</i>	<i>CLP</i>	<i>Ind</i>	<i>Total</i>
Members	11	11	03	25
Women	04	02	02	08
Men	07	09	01	17
Indigenous	02	01	02	05
Bush seats	05	01	03	09
Urban seats	06	10	--	16

Now the balance of power rested with the three Independents, two of whom were Indigenous former Ministers in the Labor Government.

The Opposition had anticipated this scenario and was well prepared to move a Motion of No Confidence in the Government pursuant to section 24 of the *Electoral Act*, the success of which would result in either a change of Government or an Extraordinary General Election.

The situation changed quickly, with the Government wooing back Marion Scrymgour, the Minister who resigned in June, on the same day that Anderson declared her independence.

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<sup>8</sup> 9 June 2009

Table 4: Summary of Parliamentary Demographics — later, 4 August 2009

	<i>ALP</i>	<i>CLP</i>	<i>Ind</i>	<i>Total</i>
Members	12	11	02	25
Women	05	02	01	08
Men	07	09	01	17
Indigenous	03	01	01	05
Bush seats	06	01	02	09
Urban seats	06	10	--	16

The Opposition, with the support of the [now] two Independents, which represented a majority of Members of the Assembly, wrote to the Speaker seeking to convene the Assembly a day earlier than scheduled, on Monday 10 August, in order to give Notice of a Motion of No Confidence. This was done after which the Assembly was adjourned for the requisite three clear days, to reconvene on Friday 14 August when the Motion was moved, debated and ultimately negated owing to the support of the Independent Member for Nelson, Gerry Wood, who secured a raft of undertakings from the Government in exchange for his support.

As an aside, parliamentary officers spent the intervening days trying to anticipate the range of possible outcomes in respect of the Motion of No Confidence, and working through the procedural mechanics of each of these. The result was a couple of very impressive flow charts.

Chief Minister Paul Henderson found himself a position in which he had to rely on the support of Independent Gerry Wood. The Speaker's position remained integral to the Government, and the Opposition remained in a position to move against the Government subject to the circumstances of the day.

The order of Members speaking in the Motion of No Confidence was: Opposition Leader (who moved and put the case), the Chief Minister (in response) and then the Independent Member for Nelson. By the third speaker in the debate, the outcome was known and the Government had survived. That notwithstanding, the Speaker of the Legislative Assembly decided that she would speak on the motion.

Here it is prudent to consult Erskine-May, who, on the role and demeanour of the Speaker, said:

He [the Speaker] takes no part in debate either in the House or in committee. He votes only when the voices are equal, and then in accordance with rules which preclude an expression of opinion upon the merits of a question.  
(23<sup>rd</sup> edn, 2004; p 220)

Had the Speaker heeded these words she would not have spoken and would only have voted in the [highly likely] event of a tied vote without expressing an opinion on the matter. In this way, she could have ensured Henderson's survival but retained the dignity and apparent independence of the Office of the Speaker.

During debate on the Motion of No Confidence, Speaker Jane Aagaard *inter alia* said: 'I am aware that it is very unusual for the Speaker to take part in debate.' (*Northern Territory Parliamentary Record*, 14 August 2009)

But she did — in the most partisan of debates on which the Government could stand or fall. Her closing sentence was: 'I will not be supporting this motion and indicate my support for both the Chief Minister and the government, and I encourage other members not to support the motion.' (*ibid*)

At any level this cannot be said to have been uttered by a Member who is capable of being an independent and impartial arbiter. By her own words she declared her partisanship and, further, encouraged other Members to follow suit. This is the crux of the question central to this paper: how independent the arbiter?

The situation in the Northern Territory is no different from anywhere else when the numbers are tight and questions, not unreasonably, arise as to the Speaker's ability to be impartial. Is there another way? Should we look to the United Kingdom for guidance?

Sadly, given events in the Commons of earlier this year, the answer is no. Under the UK system, whoever is elected Speaker resigns from the party they represent and proceeds along an 'independent' line. Neither major party fields candidates at subsequent elections at which times the Member merely holds him or herself out as 'the Speaker seeking re-election'. Whilst some minor parties do field candidates, the Speaker is basically assured of a job for life and is inevitably re-elected time and again.

This practice is 'neat' in the sense that the Speaker takes steps to *appear* independent. What remains irrefutable, however, is that the Speaker — unless elected as an Independent as is the case with Speaker Torbay in the NSW Legislative Assembly — comes into parliament under the party system. Whether the person resigns from the party or not it is difficult to imagine that impartiality descends upon the Member by way of slumber time epiphany. It is reasonable to assume that a level of political passion must have existed to motivate the person to seek election to public office in the first place. This cultural and political baggage is not easily removed notwithstanding valiant Mrs Bucket-esque attempts to keep up appearances.

The former Speaker of the House of Commons, Michael Martin, is a topical case in point. Speaker Martin's independence was highly questionable — in some quarters



at least. For example, the day Speaker Martin announced his resignation amid the MPs expenses scandal, Simon Heffer in *The Telegraph*, wrote:

At a time when most senior politicians were seeking to engage in damage limitation, the incarnation of the authority of the Commons sent out a signal to the nation that it should be business as usual as far as he was concerned, and that critics of the system should just shut up. That has nothing to do with his class, or with his politics, but a great deal to do with his being an arrogant, insensitive idiot.<sup>9</sup>

Mr Heffer did not stop there. In fact, he launched quite an attack on the Member for Glasgow North-East:

Let us not forget, though, that Mr Martin had a great deal of form when it came to being a bad Speaker. He routinely lapsed into partiality. Controversy about his and his wife's extravagances with public money compromised the dignity of his office. We have just exposed the fact that he used £1,400 of our money to hire a man in a peaked cap to drive him to and from various constituency functions...but then, as we know, nothing's too good for the workers.

Then Mr Heffer directed his attention to the office of the Speaker and Mr Martin's performance in it:

He never seemed to understand what his job entailed, nor the need to cultivate distance from some of those over whom he presided. He fundamentally lacked the basic scruples of leadership. He quarrelled with staff whom he seemed to think from the wrong class...and blamed Jill Pay, the Serjeant-at-Arms, for the appalling decision to allow police to raid the private office in the Commons of Damian Green last autumn, when the buck in fact stopped with him. He simply never knew how to behave; and he simply never understood how well others recognised his faults. His imperviousness to reason and reality came to its climax on Monday when, in the face of unprecedented calls for him to step down, he made a statement that blithely ignored them, and proposed to carry on. He just didn't get it; and his departure in what can most charitably be described as abject humiliation is his just, and necessary, reward.

Erskine-May's view on the role and demeanour of the Speaker cannot be said to be the case in the Northern Territory Legislative Assembly under the present circumstances. As I have noted, during the Motion of No Confidence in the Government, the Speaker took her seat as the Member for Nightcliff, spoke in support of the Government and urged all Members to do likewise. Whilst her vote was critical to the survival of the Government, her comments were not.

In the Commons, however, there was disquiet about the newly elected Speaker, John Bercow, the Tory Member for Buckingham, whom Peter Osborne of *The Spectator* described thus:

Parliament has signalled open defiance of ordinary decency by electing John Bercow, one of the more appalling expenses cheats, to the formerly magnificent post of Speaker. Under Bercow's squalid leadership, the House of Commons

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<sup>9</sup> 20 May 2009

(with the secret support of government whips as well as the Tory opposition) has sabotaged the Parliamentary Standards Bill. Every single one of the key measures designed to impose honour, integrity and honesty on our scurrilous legislators was voted down last week in the Commons. (11 July 2009, p 8)

What might be the options for a truly independent Speaker? I have devised a list which is not necessarily exhaustive but considers some possibilities: direct election of Speaker by the electorate; election of an Independent Member as Speaker by the parliament; adoption of the UK Commons system; appointment of a non-Member as Speaker by the Government; appointment of a non-Member as Speaker by the Administrator/Governor on advice from the Chief Minister/Premier and Leader of the Opposition; and rotation of role of Speaker between all Members of the Assembly (or a panel of Members representing all parties) over the life of the Assembly.

Method	Merit	Pros	Cons
Direct election		Fair Decisive Will of electorate	Mechanical nightmare Abolition of a seat? Impractical
Elect Independent		Highly desirable	What if no Independents are elected or of those elected, none want the job? Narrows the field in small jurisdictions
Commons system		Theoretically 'independent'	Person is bound to a party Apprehension of bias Tenure far too long
Appointment by Government		No pros	Nepotism Bias Questions of privilege Person is not elected and therefore not entitled to sit in parliament
Appointment by Vice- Regal		Similar to appointment of Clerk – both major parties must agree	Questions of privilege Method of removal under given circumstances? Person is not elected and therefore not entitled to sit in parliament
Rotation		Fair system Impartiality would even out eventually	Open to fits of bias Nightmare for parliamentary staff Lack of certainty

Prior to debate of the Motion of No Confidence in the Legislative Assembly, the Opposition released a list of parliamentary reforms which included appointment of the Speaker in similar terms to appointment of the Clerk. This, of course, would require amendment of the Commonwealth's *Northern Territory (Self-Government) Act*, not to mention a sophisticated marketing campaign to the electorate, but it is indicative that the Opposition had concerns about the ability of Speaker to exercise impartiality.

Indeed, such allegations have been levelled at the Speaker in the past. On 7 May 2009, there was a Motion of Dissent from the Speaker's Ruling, which was supported by the Independent Gerry Wood in the following terms:

Madam Speaker, this certainly is not against you personally. I think, in this case, there are some inconsistencies in the way I felt that points of order have been raised. The member for Johnston has been raising totally irrelevant matters in regard to the archives, and then the member for Fong Lim gets hit on the head for talking about crime in relation to the Criminal Code Amendment Bill. They are the reasons I am supporting this motion.

As I said, nothing against you personally. I think you are a great Speaker, but I do think that this issue lies firmly with the government. (*Northern Territory Parliamentary Record*, 7 May 2009)

A week earlier, there had been a similar incident whereby an Opposition Member was most discourteous to the Speaker, and used phrases such as 'You have no courage' 'you are a disgrace' and accused her of 'cowardice in the lowest and most vile terms.'

### ***Singing MLA says Sorry for Outburst***

A leading CLP politician was forced to apologise after an extraordinary outburst in Parliament. Opposition Finance spokesman John Elferink shouted 'Come the revolution' as he accused Speaker Jane Aagaard of allowing the Legislative Assembly to 'fall apart'. Earlier this week, he was criticised for singing to himself to disrupt Labor MLAs speaking in Parliament. Mr Elferink launched a furious attack on the government for reducing the time for adjournment debates from 15 to five minutes on Wednesday night. 'The fact that you even sit in here with a straight face and encourage this sort of thing shows what a cur you are — you are a disgrace,' he said. 'And you all, you voted for this, are a disgrace. I have no compassion or compunction in criticising you in the most complete terms. You have no courage. 'Cowardice in the lowest and most vile terms'.

Mr Elferink accidentally forfeited 10 minutes worth of debating time when he called for a vote on whether adjournment speeches should be extended. He then attacked the Speaker when he realised his mistake. 'This is crazy. This is falling apart under your leave,' he said.

When Ms Aagaard demanded Mr Elferink repeat his attack, he said: 'You heard me.

'This House is falling apart and you're allowing it to occur'. Mr Elferink later returned to Parliament to apologise to the Speaker for his behaviour. 'I seek to withdraw those words,' he said. 'I acknowledge that, from time to time, in my passion to defend this House, my passions can get the better of me', Mr Elferink said. 'I offer an apology to Madam Speaker, which I do fulsomely and without reservation' (*Northern Territory News*, Friday 1 May 2009).

The Member for Port Darwin must have momentarily lapsed from Erskine-May's pearls of wisdom for Members: 'Good temper and moderation are the characteristics of parliamentary language.' (23<sup>rd</sup> edn, 2004; 440)

Returning to the current circumstances in the Northern Territory, under the Opposition's proposed regime for appointment of the Speaker by mutual agreement between the Chief Minister and Leader of the Opposition, the following would apply: there would remain 25 seats in the Assembly, so no seat would be lost; the Speaker would be the Presiding Officer and would not have a vote; and a tied vote, as in the Jaensch model, would be a lost vote.

Would this work? It could. Would it be any more effective than the present system? It may be. Whether it would work or not, the most prudent conclusion to this paper is to note that the next Northern Territory General Election is not due until August 2012. The Henderson Government's existence depends entirely upon an agreement reached with an Independent. There is potentially capacity for the Opposition to successfully move a Motion of No Confidence and thus trigger either a change of government or an Extraordinary General Election. Given those circumstances, the only safe and sensible thing to say is: watch this space. ▲