THE FEDERAL CONSTITUTIONAL RIGHT TO VOTE IN AUSTRALIA

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INTRODUCTION

The franchise is the linchpin of representative democracy. The level of representation is dependent upon the extent of the franchise. This most fundamental of democratic rights, the right to vote for those who govern, is not entrenched in the Commonwealth Constitution. At the time the Constitution was enacted, the franchise was in a period of flux, with property qualifications and plural voting on the demise and the concept of a universal franchise in the ascendant. Proposals to enshrine the franchise in the Constitution met with protests that the smaller colonies, such as South Australia (which allowed women the right to vote) were attempting to impose their will on the larger colonies of New South Wales and Victoria. It is not surprising therefore that such protection as may be found in the Constitution for the right to vote has been described as "obscure".[1]

This protection has been recognised in two forms: express and implied.[2] The express protection is contained in s 41 of the Constitution. It gives a limited form of protection to the franchise by providing that adults who have or acquire the right to vote for the lower house of a State Parliament, cannot be prevented from voting in Commonwealth elections by any law passed by the Commonwealth Parliament. This section has been called upon to protect the rights of Asian and African immigrants, Aborigines, people between the ages of 18 and 21, people who have not been enrolled on the Commonwealth electoral roll before the rolls are closed for an election and prisoners. It has been largely unsuccessful in giving such protection, due to the narrow interpretation of its application by the High Court.

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1 *King v Jones* (1972) 128 CLR 221 at 231 per Barwick CJ.

2 For recent discussions on the right to vote, see A Brooks, "A paragon of democratic virtues? The development of the Commonwealth franchise" (1993) 12 *U Tas LR* 208; G Williams, "Sounding the Core of Representative Democracy: Implied Freedoms and Electoral Reform" (1996) 20 *MULR* 848 at 861-863; J Kirk, "Constitutional Implications from Representative Democracy" (1995) 23 *F L Rev* 63; P Hanks, "Constitutional Guarantees" in H P Lee and G Winterton, *Australian Constitutional Perspectives* (1992) at 95-97; M Coper, *Encounters with the Australian Constitution* (1988) at 309-313; G S Reid and M Forrest, *Australia's Commonwealth Parliament 1901-1988* (1989) at 94-98.

The implied constitutional protection for the right to vote is to be discerned in s 24 of the Constitution. The phrase "directly chosen by the people of the Commonwealth" has been interpreted by a number of Justices of the High Court as implying the application of a universal franchise.

This paper contrasts the two different approaches to the constitutional protection of the right to vote and the difficulties that arise from each. It criticises the narrow interpretation given to s 41, particularly where this is based upon dubious interpretations of constitutional history; and challenges the prevailing view of how s 41 is to be read with the other constitutional provisions relating to elections. The paper also critically considers more recent attempts to find implied constitutional protection of the right to vote, querying both the extent of this implication and its validity, given the constitutional history of the right to vote and the failure at referendum to entrench a right to vote in the Commonwealth Constitution.

THE FRANCHISE AND S 41 OF THE CONSTITUTION

Section 30 of the Constitution provides:

> Until the Parliament otherwise provides, the qualification of electors of members of the House of Representatives shall be in each State that which is prescribed by the law of the State as the qualification of electors of the more numerous House of Parliament of the State; but in the choosing of members each elector shall vote only once.

The franchise for the Senate is, under s 8, the same as that prescribed for the House of Representatives. Section 30, in conjunction with s 51(xxxvi), grants the Commonwealth Parliament power to establish its own franchise. This power, however, is qualified by s 41 which provides:

> No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth.

Section 51(xxxvi), which gives the Commonwealth Parliament power to enact a Commonwealth franchise, is expressly "subject to this Constitution". It is therefore subject to s 41 which expressly prohibits any law of the Commonwealth from preventing an adult, who has or acquires a right to vote at elections for the lower House of a State Parliament, from voting at elections for either House of the Commonwealth Parliament.

The relationship between the franchise and ss 25 and 128 of the Constitution is also important. Section 25 diminishes the representation of a State in the House of Representatives if a law of the State disqualifies persons of any race from voting for the more numerous House of the Parliament of that State. The significance of this section to the interpretation of s 41 is discussed below. For present purposes, however, it should be noted that this section has been pointed to as an indication that exclusion from voting on racial grounds was constitutionally acceptable when the Constitution was enacted.[3]

Section 128, in prescribing the means of amending the Constitution by way of referendum, provides that "until the qualification of electors of members of the House

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3 See, for example, *Attorney-General (Cth); Ex Rel. McKinlay v Commonwealth* (1975) 135 CLR 1 at 44 per Gibbs J.

of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails". The point of this paragraph was to ensure that States with female suffrage did not gain a disproportionate advantage in the assessment of whether a referendum proposal was approved by a majority of electors across the nation. Its importance, though, for the purposes of this article is the suggestion that it was intended that the Commonwealth franchise be "uniform" and the suggestion that it is constitutionally acceptable to exclude women from the right to vote.

The drafting history of s 41

As much of the judicial interpretation of s 41 makes reference to the original intent of the framers of the Constitution, it is necessary to understand the drafting history of s 41 in order to appraise the relevant cases critically.

The 1891 draft of the Constitution provided that the federal franchise was to be the franchise which existed in the relevant States.[4] Thus, the different State franchises would govern Commonwealth elections, and the Commonwealth Parliament would not have the power to legislate upon its own franchise. Edmund Barton moved an amendment which would allow the Commonwealth Parliament to establish its own franchise by way of legislation,[5] but this was defeated on the grounds that it unduly interfered with States' rights.[6]

When the federation process was revived at the 1897 Adelaide Convention, after some years of neglect, a new clause was inserted in the draft submitted to the Convention which provided that the federal franchise "until the Parliament otherwise provides" should be the franchise of the relevant States. Plural voting was also prohibited. While there seemed to be general agreement that there should be a uniform franchise at the Commonwealth level, there was disagreement as to the extent of the franchise, and whether it should be determined in the Constitution or left to the Commonwealth Parliament to determine.

Mr Holder from South Australia proposed an amendment which provided that "every man and woman of the full age of twenty-one years, whose name has been registered as an elector for at least six months, shall be an elector".[7] South Australia had already granted women the right to vote, and the lower houses in a number of the colonies had also passed such a law, meeting resistance only in the upper houses.[8] Holder gave the following example of the worthiness of women to vote:

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4 *Official Report of the National Australasian Convention Debates* (hereafter Convention Debates), Sydney, 1891 (1986) at 948.

5 Convention Debates, Sydney, 2 April 1891 at 628.

6 Ibid at 636.

7 Convention Debates, Adelaide, 15 April 1897 at 715.

8 For a discussion on women and the right to vote see: D Cass and K Rubenstein, "Representation/s of Women in the Australian Constitutional System" (1995) 17 *Adel L R* 3 at 10-12. See also K Lees, *Votes for Women: The Australian Story* (1995) and A Oldfield, *Woman Suffrage in Australia: A Gift or a Struggle* (1992).

> At the present time a woman who may be the support of her family, and whose husband contributes nothing to that support, but is simply a burden and hindrance to the woman, has no vote, while her worthless husband, may be, has one. Such a thing is not right.[9]

He also refuted the argument that the right to vote would destroy the femininity of women, stating:

> I do not believe that giving the vote to a woman makes her less of a woman. If I thought it did I would not give it her. But she can be just as much a woman, and care for what is going on round her, and also give time to exercise her franchise wisely and well.[10]

Some of the reasons advanced against this proposed provision were peculiar. Mr Wise suggested that if women could vote, then a law may be passed by a majority of women and a minority of men, but the women would not have the physical force to enforce compliance with the law.[11] Mr Grant was concerned that women are "subject to emotional or hysterical influences" which would affect the way they vote.[12] The main argument, however, was that South Australia should not force the universal franchise on the other colonies, as this would put at risk any agreement to federate.

Holder's proposed amendment was lost by 12 votes to 23. He then proposed a compromise, which had been suggested by Mr Trenwith, that "no elector now possessing the right to vote shall be deprived of that right".[13] This was intended to be a restriction on the Commonwealth franchise. Trenwith interpreted this proposal as also protecting the right of any class, which currently has the right to vote, to be able to vote in the future.[14] Mr Reid noted that such a proposal would be a breach of the principle of uniformity of suffrage, but said that he was prepared to accept that as it would strengthen the cause of Federation by making it more attractive to the South Australians.[15]

After much debate and confusion about the meaning of the clause, Barton drafted a new clause, intended to express the meaning explained by Holder, which provided:

> And no elector who has at the establishment of the Commonwealth or who afterwards acquires a right to vote at elections for the more numerous House of the Parliament of a State shall be prevented by any law of the Commonwealth from exercising such right at elections for the House of Representatives.[16]

Sir George Turner responded that this was going further than Holder suggested. Barton replied by explaining his understanding of the meaning of the provision, as follows:

> I asked my hon. friend if he intended his amendment to apply only to the rights acquired before the date of the establishment of the Commonwealth, or if it was to apply also to rights to vote acquired after its establishment. The hon. member means that when the

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9 Convention Debates, Adelaide, 15 April 1897 at 715. Note, however, that Mr Howe observed in reply that there are also worthless women in the world and that, by letting women vote, you are only increasing the number of worthless voters. He went on to note, however, at 719, that "the good women who are so numerous will counteract the influence of the bad ones".

10 Ibid at 715-716.

11 Ibid at 718.

12 Ibid at 722.

13 Ibid at 725.

14 Ibid at 726.

15 Ibid at 727.

16 Ibid at 731.

> Commonwealth proceeds to legislate it shall not make any law in derogation of the right acquired before it legislates, even though acquired after the Constitution has become law.[17]

Holder accepted the new formulation of his suggestion.[18]

There was further debate and confusion about the meaning of this provision later in the Convention. Some delegates were of the view that the effect of the provision would be to require the Commonwealth Parliament to enact uniform franchise laws on the basis of the most liberal franchise in the States.[19] Thus, if South Australia maintained adult franchise, then this would have to be incorporated in the Commonwealth franchise for it to enact its uniform legislation. Barton observed that the Parliament cannot fix a franchise for the Commonwealth unless it is uniform.[20] Concern was also expressed whether the right be limited to particular individuals or whether it should apply to the class of people who qualify under the State franchise. Barton agreed with Mr Isaacs that it should not be limited to particular individuals, but the amendment he proposed, which would have clarified that it was the qualification which could not be taken away, rather than the rights of particular individuals, was lost. This amendment probably failed on the separate ground that it referred only to qualifications that existed at the time of the establishment of the Commonwealth,[21] rather than qualifications existing up until the time the Commonwealth Parliament enacted a law establishing the uniform franchise.

The issue was revisited at the Melbourne Convention of 1898. Barton once again proposed to limit the provision to rights existing at the time of federation. He noted that the provision currently referred to each elector who "has at the establishment of the Commonwealth, or who afterwards acquires, a right to vote at elections for the numerous House of the Parliament of a state". He concluded that the clause would entitle people to the benefit of every successive alteration of the electoral laws of the States even after a Commonwealth franchise was established and would effectively give the States power to legislate for the purposes of the Commonwealth.[22] He also expressed concern that if the States could enlarge their franchise between the time of federation and the enactment of a Commonwealth franchise, the Commonwealth franchise could not be made uniform without conceding the same form of suffrage as in the most liberal of the States.[23] Barton eventually withdrew his amendment in favour of one that ensured that the right to vote could only be given to "adults".

While Mr Brown agreed with Barton, that the uniform franchise would have to be based on the broadest suffrage existing in any colony,[24] both Mr Higgins and Mr O'Connor disagreed, and argued that s 41 permitted distinctions to be made in the franchise in the different States.[25] Isaacs noted that the word "acquires" should be qualified by the restriction "before the Parliament prescribes the qualification of

17 Ibid.
18 Ibid.
19 Convention Debates, Adelaide, 22 April 1897 at 1196 per Sir John Downer and at 1197 per Mr Higgins.
20 Ibid at 1196.
21 Ibid at 1197.
22 Convention Debates, Melbourne, 3 March 1898 at 1841.
23 Ibid at 1842.
24 Ibid at 1848.
25 Ibid at 1846-7.

electors for the Houses of Parliament", so that there would not be an "indefinite power in the hands of the states to constantly enlarge the franchise".[26] This amendment was not put, and the issue never clarified.

The Convention debates are therefore illuminating only to the extent that they show there was no clear rationale behind s 41. On the one hand, delegates such as Holder only wanted s 41 to apply to rights acquired before the Commonwealth enacted its own franchise. On the other hand, there were delegates, such as Isaacs, who considered that the way in which the clause was drafted meant that rights acquired in the States after this time would also be protected by s 41. Similarly, there were those who considered that the Commonwealth franchise, when enacted, would have to apply as the uniform standard the most liberal or broad franchise that existed in a State at that time, whereas others saw s 41 as an additional protection for certain rights, rather than setting the standard for a uniform franchise. Finally, some saw the rights protected by s 41 as the rights held by individuals who were qualified to vote prior to the enactment of the Commonwealth franchise, while others saw the protection as applying to anyone who in the future holds the qualifications which were enacted by State law prior to the Commonwealth franchise coming into effect.

Perhaps the most interesting point is that while these issues of conflict were raised in the debate, attempts to clarify the meaning of the clause failed. On its face the clause continues to refer to rights acquired in the future, with no temporal restriction confining them to rights acquired before the Constitution came into effect or before the Commonwealth franchise was enacted. If anything is to be obtained from the history of the provision, it must be that there is no single view that can be attributed to the founders, and that the history of the provision should not be used to interpret the provision in a manner contrary to the plain meaning of the words of s 41.

The Commonwealth Franchise Act 1902

The debate upon the Commonwealth Franchise Act 1902 was equally confused. While some interpreted s 41 as having an application limited to those holding a right to vote at the time the Commonwealth franchise came into effect, others saw s 41 as having the ongoing effect of allowing the States to enlarge the Commonwealth franchise. The issue arose particularly in relation to the Commonwealth Parliament's denial of the right to vote to Aboriginal people.[27] Isaacs, now a member of the House of Representatives, noted that if States desired in the future to invest Aboriginals within their territory with the franchise for the more numerous State House, "they will come under s 41 of the Constitution which gives them the right to vote for the Federal Parliament".[28] Senator Sir John Downer stressed that "who has or acquires" involves both present and future. He concluded that Commonwealth law on the franchise would be subject to future expansion of the State franchise.[29]

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26 Ibid at 1851.

27 As originally introduced, the Bill would have permitted all Aboriginal people to vote in Commonwealth elections. It was amended in the House of Representatives to remove this right. See discussion in G S Reid and M Forrest, above n 2 at 97-98.

28 Cth Parl Deb 1902, Vol 9 at 11979. For a comment to the same effect by Senator Major Gould, see Cth Parl Deb 1902, Vol 10 at 13005.

29 Cth Parl Deb 1902, Vol 10 at 13009.

As both Isaacs and Downer were heavily involved in the drafting of the Constitution, their interpretation of s 41 challenges other views that it is inconceivable that the framers of the Constitution could have intended the Commonwealth franchise to be affected by future changes in the State franchise.[30]

The franchise that was enacted was relatively liberal for its day. Both men and women over the age of 21 were entitled to enrol to vote. Exclusions, however, applied to those of unsound mind, persons convicted and under sentence for any offence punishable by imprisonment of one year or longer, and to "aboriginal natives of Australia, Asia, Africa or the Islands of the Pacific (except New Zealand)".

Interpretation of s 41

Various interpretative problems arise from the wording of s 41. First, what is meant by the "right to vote"? Does it mean that a person is qualified to vote in an election, or does it mean that the person has a legally enforceable right because he or she has their name on the electoral roll or has acquired an elector's right? This is important not only to determine whether a person has a "right to vote", but also to determine whether the right continues. Removal from the electoral roll may occur even though a person is still qualified to vote. For example, a person may be removed because he or she has left the residence for which the person was enrolled, and not notified the authorities of the change of address.[31] This was a common problem for Aboriginal people who often found themselves removed from electoral rolls due to movement from their registered address.

The major issue, however, is what is meant by "acquires" a right to vote. Is there any kind of temporal restraint tying this acquisition to the period before the enactment of a Commonwealth franchise? If so, does this temporal restraint apply only to new qualifications enacted by a State after the Commonwealth franchise is enacted, or does it affect those who become qualified after that date, but pursuant to laws that were already in existence in a State prior to the enactment of a Commonwealth franchise? In short, it would appear that s 41 could apply to protect the rights of some or all of the following categories:

1. a person who was qualified and enrolled to vote in a State prior to the enactment of the Commonwealth franchise in 1902;
2. a person who was qualified to vote in a State prior to 1902, but had not enrolled to vote until after 1902;
3. a person who was qualified and enrolled to vote in a State prior to 1902, but who was removed from the roll and later re-enrolled in the State (for example, an Aboriginal person enrolled in a State who was removed from the roll after having moved residence, and who sought to be re-enrolled for both the Commonwealth and the State after 1902);

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30 For a further discussion of the debate on the Commonwealth Franchise Act, see G S Reid and M Forrest, above n 2 at 94-98.

31 See *Lake v Australian Electoral Officer* [1998] AATA 83 where removal from the electoral roll because of a change in address had the consequence that two "British subjects" who had previously been enrolled to vote in Australia were not enrolled at the crucial date of 25 January 1984 and were therefore no longer qualified to enrol to vote unless they became Australian citizens.

4. a person who became qualified and enrolled to vote in a State after 1902, pursuant to a State law in force prior to 1902 (for example, an Aboriginal male in Victoria who turned 21 in 1903); or
5. a person who became qualified to vote and enrolled to vote in a State after 1902 pursuant to a law enacted by the State after 1902 (for example, a South Australian who turned 18 after the enactment of the Age of Majority (Reduction) Act 1970 (SA)).

At various times each of these possibilities has been proposed but no satisfactory analysis has ever been provided by the courts of the manner in which s 41 applies.

Quick and Garran's interpretation of s 41

Quick and Garran discussed several of the potential interpretations of s 41 in their *Annotated Constitution of the Australian Commonwealth.* They noted the argument that the franchise must be uniform, and that s 41 therefore requires it to be based upon the most liberal franchise in the States. They rejected this argument, stating:

> But here a diversity of franchise in the different States is recognized by the Constitution itself, and it may be fairly argued that any federal law of uniform application, purporting to define in part or in whole the federal qualification, would—subject to the rights reserved by this section—be good and valid, notwithstanding that it did not wholly remove this diversity.[32]

They concluded that a federal franchise that was restricted to men only would still be valid, as long as it was made subject to the rights granted in s 41 of the Constitution. The result of such a law would have been that women could have voted in Commonwealth elections if they were enrolled in South Australian and Western Australia, but women from other States would have had no such rights. Quick and Garran argued that it would not be the Commonwealth Parliament which was discriminating against States, but the Constitution itself which gives rise to the discrimination.[33]

Quick and Garran did not address the issue of whether the "right to vote" means qualification to vote or enrolment to vote. However, they did consider in some detail the temporal aspect of s 41. They identified three possible interpretations of s 41:

1. that the right may be acquired at any time, under a State law passed at any time;
2. that the right may be acquired at any time, but only under a State law passed before a federal franchise is fixed; or
3. that the right must be acquired by the "adult person" concerned before the federal franchise is fixed.[34]

Quick and Garran noted that Holder did not appear to intend the first interpretation, but that his statements waver between the second and third interpretations, as he sometimes referred to the protection of the rights of individuals and other times referred to the protection of the franchise. Quick and Garran came to the conclusion that Holder "probably intended that South Australian women should be

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32 J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 485.

33 Ibid.

34 Ibid at 486.

entitled to vote, whether actually qualified before or after the federal law, because the franchise under which they claim was in existence before the federal law".[35]

Having ascertained the apparent intention, Quick and Garran then went on to consider the "real intention as expressed by the section itself". They observed that "it is not to be presumed that it was intended that the State Parliament should be able, after the Federal Parliament had legislated, to confer by fresh legislation any further right of voting at federal elections". On this basis they concluded that the only way to discern this meaning from the provision is to construe "acquires" as meaning "acquires before the framing of the federal franchise" or to construe "prevented" as a deprivation taking effect at the time of the passage of the federal law.[36] Such a construction of "acquires" is clearly unwarranted from the text of the provision, and the construction of "prevented" is even more distorted, as the provision refers to prevention "by any law of the Commonwealth", not just the first law establishing the franchise. The deference to the power of the Commonwealth Parliament to enact a franchise is also uncalled for, as this power under s 51 is made "subject to" the Constitution, including s 41. Section 41 clearly prevails over "any law of the Commonwealth" which establishes the franchise.

Quick and Garran proceeded to contend that their third interpretation of the provision must prevail over the second, because one only "acquires" the right to vote when one is fully qualified, rather than when a law which establishes those qualifications is enacted. However, if the sole reason for construing "acquires" as applying before the enactment of a federal franchise is to avoid the problem of a State subsequently expanding its franchise with the effect that the Commonwealth franchise is also expanded, then there is no reason why the acquisition of the right to vote cannot occur after the Commonwealth franchise is enacted, as long as the State law granting the qualification to that class of people is enacted before the Commonwealth franchise.[37]

Garran pursued his opinion on the interpretation of this provision in his role as Secretary of the Attorney-General's Department, and later as Solicitor-General. He was asked in 1914 to advise on the situation of an Indian man who had become qualified to vote in South Australia by virtue of the Electoral Law Amendment Act 1904 (SA) (that is, after the enactment of the Commonwealth Franchise Act 1902) and who actually enrolled to vote in South Australia in 1911. Now that he had a right to vote in State elections, did s 41 give him a right to vote in Commonwealth elections? Garran responded by giving a very narrow interpretation of s 41. He stated:

> I think that the intention of section 41 is that an elector, who under the provisional franchise established by section 30, has (at the establishment of the Commonwealth) or acquires (before the Parliament passes a Franchise Act) **a right to vote at Commonwealth elections by virtue of his State right,** that right shall not be taken away by any law of the Commonwealth.

35 Ibid at 486-487.

36 Ibid at 487.

37 See W Harrison Moore, *The Constitution of the Commonwealth of Australia* (1902) at 109, where he said of the Quick and Garran approach that "such an operation of the law would be so partial and anomalous as to constitute a strong reason for rejecting altogether the limitation of time". Moore interpreted s 41 as meaning "*has* at the establishment of the federal franchise or *acquires* at any time afterwards under a State law in force at the establishment of the federal franchise".

> That is to say, the right to vote at State elections which is referred to in section 41 means a right to vote at State elections **which is by section 30 made effective for Federal elections;** a man who is a Federal elector by virtue of section 30 cannot, while his State right continues, be disfranchised by Commonwealth law.[38]

Accordingly, Garran concluded that the man had no right to vote in Commonwealth elections.

The interpretation of s 41 in the 1920s

Garran's view was not the only view on the operation of s 41. Others continued to hold a broader view. In *Muramats v Commonwealth Electoral Officer (WA)*[39] Higgins J appeared to have taken the view that s 41 is prospective in nature and remains as a continuing safeguard for voting rights. However, none of the other members of the Court discussed the issue.

Justice Higgins' view influenced the outcome of the first legal challenge to the restrictive application of the Commonwealth Electoral Act 1918. Mr Mitta Bullosh, who was an Indian living in Melbourne, had become enrolled to vote in Victoria. He was denied the right to enrol for Commonwealth elections because his State enrolment had occurred after 1902. Section 39 of the Commonwealth Electoral Act 1918 expressly excluded from the right to vote all "aboriginal natives of Asia". Bullosh took an action in the Magistrate's Court to have his name inserted on the Commonwealth roll, pursuant to his right under s 41 of the Constitution. The Magistrate, after considering the judgment of Higgins J in *Muramats*, adopted the broad interpretation of s 41 and ordered that Bullosh be enrolled to vote in Commonwealth elections.[40]

The consequence of this decision, if left unchallenged, would have been that Aborigines in Victoria, New South Wales, South Australia and Tasmania would have had a continuing right to vote under s 41 of the Constitution. The Commonwealth responded by lodging an appeal in the High Court.[41] The appeal was withdrawn before it was heard, after pressure was applied by both the Indian Government and the British Colonial Office to ensure that Indians had voting rights in Australia. The Commonwealth responded to this pressure by amending the Commonwealth Electoral Act in 1925 to allow Indians the right to vote in Commonwealth elections. No mention was made in the Hansard record of the debate of the *Bullosh* case. The Chief Electoral Officer was instructed by Garran, who was by then Solicitor-General, that he should follow the previous advice from the Attorney-General's Department as to the narrow application of s 41 and not apply the *Bullosh* case to others who had enrolled in a State after 1902.[42] The *Bullosh* case was forgotten, and Aborigines and others from Asian and Pacific countries continued to be denied the right to vote in Commonwealth elections, even when they were enrolled to vote in State elections.

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38 P Brazil (ed), *Opinions of the Attorneys-General* (1981) Vol 1, No 542 at 695 (emphasis in original).

39 (1923) 32 CLR 500. See also H S Nicholas, *The Australian Constitution* (1952) at 75.

40 *Bullosh v Miller*, 3 September 1924, cited in P Stretton and C Finnimore, "Black Fellow Citizens: Aborigines and the Commonwealth Franchise" (1993) 24 *Australian Historical Studies* 521 at 527-528.

41 High Court case no 40, 1924. See P Stretton and C Finnimore, ibid at 528.

42 Ibid at 529, quoting a letter from Garran which is held in the Australian Archives.

Garran later gave evidence on 28 September 1927 before the Royal Commission on the Commonwealth Constitution. He made the following comment on the operation of s 41:

> The meaning of section 41 has been the subject of much debate, and it is a section which is difficult to construe...There is a good deal of doubt whether the phrase "has or has acquired a vote" refers only to the state of affairs existing at the passing of the Constitution 27 years ago, or whether it is a permanent provision, so that any person who now reaches the age of 21, and acquires the right to vote in some State, is by this section enabled to vote at a Federal election...I think this section is of very little practical importance now, and the view I have always taken is that it referred to the state of affairs existing at the commencement of the Commonwealth, and its operation is almost exhausted.[43]

It is interesting to note that Garran did not mention the *Bullosh* case or the potential application of s 41 to Australian Aborigines and immigrants from Asia, Africa and the Pacific. Moreover, he treated s 41 as only applying to those who had acquired the right to vote by the time of the "commencement of the Commonwealth", rather than the date upon which Commonwealth franchise legislation came into effect. These two deficiencies were remedied in the actual report of the Royal Commission, which stated:

> There are no words in the Constitution which expressly provide that the section is to have only a limited duration, *e.g.*, that is to apply only to persons who had a right to vote under a State franchise at the time when the State laws which governed the first elections after Federation were superseded by the enactment of a uniform franchise throughout the Commonwealth (*cf.* s 30, and the fourth paragraph of s 128). In practice the section has been interpreted, by the instructions issued to Electoral Registrars, as meaning that the right to vote under a State franchise "must have been acquired by lawful enrolment as an elector for the more numerous House of the Parliament of the State prior to the passing of the *Commonwealth Franchise Act* 1902, and that in order to be entitled to Commonwealth enrolment the elector concerned must have continuously retained his right to such State enrolment". It may be noted in regard to the franchise under the *Commonwealth Electoral Act* 1918-1928 that the only effect of section 41 of the Constitution is to preserve the right of a person who but for that section would be disqualified as an aboriginal native of Australia, Asia, Africa, or the Islands of the Pacific except New Zealand.[44]

The Royal Commission did not come to any settled view as to the meaning of s 41. However, it is important that it noted the potential impact of s 41; and the absence of any textual basis for limiting its application to those who acquired the right to vote before Commonwealth franchise legislation was enacted.

Changing views on the interpretation of s 41

The controversy as to the interpretation of s 41 continued to be raised from time to time. Professor Elkin, in his pamphlet *Aborigines and the Franchise*, published in 1946, supported the broad view of s 41. He contended that any Aboriginal person who had a right to vote in the States was guaranteed a right to vote in Commonwealth elections under s 41 of the Constitution,[45] and believed this view to be supported by the now

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43 Royal Commission on the Constitution, *Evidence* (1929) para 1066.

44 Royal Commission on the Constitution, *Report of the Royal Commission on the Constitution 1929* (1929) at 27.

45 Professor A P Elkin, *Aborigines and the Franchise—Facts and Suggestions* (1946) at 1-2.

retired Solicitor-General, Sir Robert Garran.[46] It is not clear whether Garran changed his mind on this matter after his retirement or whether Elkin misunderstood him.

In any case, pressure from those who considered that Aborigines were illegitimately being denied the right to vote that was constitutionally protected by s 41, led to the passage of the Commonwealth Electoral Act 1949, which expressly gave Aboriginal people the right to vote in Commonwealth elections if they had a right to vote for the lower House of a State Parliament. This law is of note because it was not "uniform" in its application to the franchise, and was presumably justified by the application of s 41, although this is not made clear from the Hansard records of the parliamentary debates.

By the time the House of Representatives Select Committee on the Voting Rights of Aborigines reported in 1961, it was the general view that s 41 of the Constitution was a limitation on the Commonwealth franchise, and that it required the Commonwealth franchise to extend to Aborigines who had the right to vote in the States. The Committee made the following comments on this point:

> Any examination your Committee has made of the franchise of any State, has been made necessary by the fact that, pursuant to Section 41 of the Constitution, 'no adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth'. The manner in which a State grants or withholds the franchise of aborigines thus affects the Commonwealth franchise.
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> Section 41, while forbidding the Commonwealth to withdraw electoral rights from persons to whom the States grant them, clearly leaves the Commonwealth free to extend the Commonwealth franchise to people not entitled to the vote under the law of a State.[47]

This view was supported by the Solicitor-General, Sir Kenneth Bailey[48] (although he noted that several views of the meaning of the section are open) and Professor Sawer[49] who considered that "the prospective view is clearly the correct one".

King v Jones

In 1972 the interpretation of s 41 came before the High Court in the case of *King v Jones*.[50] The case concerned the age at which a person is entitled to vote in Commonwealth elections. South Australia had lowered its age of majority to 18 years, and allowed people of or above the age of 18 to vote in State elections. At the time, the

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46 Cth Parl Deb 1946, Vol 187 at 2062 per Mr White, quoting correspondence from Professor Elkin. Mr White also quoted other views supporting the broad interpretation of s 41 and inquired of the Minister of the Interior whether he was aware of instructions to electoral officials to exclude Aboriginal people from the electoral roll even in those States where they had the right to vote. The Minister, Mr Johnson, replied, at 2064, that he was "enthusiastically interested" in extending the franchise to Aborigines with a sufficient level of education and was pursuing the matter with the States.

47 Commonwealth Parliament Select Committee on Voting Rights for Aborigines, *Report of the Select Committee on Voting Rights For Aborigines* (1961) at paras 28-29.

48 Ibid at para 66 and Appendix VI.

49 Ibid at para 67 and Appendix IV. Others who have taken the broader view or been critical of the narrow view of the meaning of s 41 include: M Coper, above n 2 at 312; P H Lane, *The Australian Federal System* (2nd ed 1979) at 41-42; A Brooks, above n 2.

50 (1972) 128 CLR 221.

age for enrolment to vote in Commonwealth elections was 21 years. Three South Australians who were between 18 and 21 years old applied to be enrolled on the Commonwealth electoral roll. When their application was rejected, they applied to the local court and the matter was removed to the High Court. It was argued that, as they had the right to vote for the more numerous House of the State Parliament, s 41 of the Commonwealth Constitution preserved their right to vote in Commonwealth elections.

The Court did not need to decide whether s 41 has a prospective application, because it held that, even if it did apply, the reference to "adult" in s 41, means a person of or above the age of 21. Accordingly, s 41 would not provide a right to vote in Commonwealth elections for people below the age of 21. Much of the argument and judgment was directed at the meaning of "adult". The argument showed how slippery the distinction is between the connotation of a provision, which is to remain the same, and its denotation, which can change over time. While counsel for the applicants argued that the connotation of the term "adult" was "mature person" and its denotation now included those aged 18 and above, the Court held that the connotation was "person who has attained the age of majority of 21", leaving no room for a changing denotation.[51] This narrow reading of a provision of the Constitution has subsequently become seen as an aberration when compared with the way in which the Constitution is normally interpreted.[52]

As for the overall meaning of s 41, Barwick CJ observed that its precise intent "may be thought obscure",[53] but declined to decide upon the point.[54] Nevertheless, he recognised the possibility of s 41 having a prospective application,[55] and some parts of his judgment appear to indicate that he favoured such an interpretation. He noted, for example, that s 41 "is a permanent provision of the Constitution",[56] and further observed that the uniformity of the Commonwealth franchise will be "subject, of course, to the possibility of other divergences in the State Franchises due to legislative changes subsequent to the enactment of the Constitution".[57] He went on to stress that the presence of s 41 makes it apparent that the qualifications for electors of the Commonwealth Parliament "will not necessarily at any time be entirely uniform", and that in his opinion the drafters of the Constitution were in error in assuming in s 128 that the franchise would become uniform upon the enactment of Commonwealth franchise legislation.[58]

McTiernan J did not deal with the question of whether s 41 has a prospective application, except to note that s 41 "is restrictive of federal legislative power",[59] which appears to indicate that it has an ongoing application that has not yet expired.

Menzies J was clearly of the opinion that s 41 has a prospective application. He stated:

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51 Ibid at 239 per Barwick CJ.
52 *Re Wakim; Ex parte McNally* (1999) 163 ALR 270 at 285-286 per McHugh J.
53 (1972) 128 CLR 221 at 231.
54 Ibid at 232.
55 Ibid at 232-233.
56 Ibid at 231.
57 Ibid.
58 Ibid at 232-233.
59 Ibid at 244.

> The character of s 41 is that of a permanent constitutional provision. It is not a provision to make temporary arrangements for the period between the establishment of the Constitution and the making of Commonwealth laws. It applies to a person, who, in 1901, had or who, in the future, acquires particular voting rights by the laws of a State.[60]

Walsh J also recognised the controversy concerning the interpretation of s 41, and stated that for "present purposes" he would assume that the section was

> not limited so as to refer only to a right to vote given by a law of a State already in force when the Constitution became operative or, alternatively, to refer only to a right given by the law of a State which came into force before the Commonwealth Parliament first enacted a law dealing with the qualifications of electors.[61]

Accordingly, he assumed for the purposes of the case that s 41 would apply to changes in State electoral laws, such as the one in issue, except for the restriction in s 41 which confines it to "adults". He made no determination of the issue. Stephen J took the same approach, without deciding the point.[62]

Gibbs J discussed in some detail the different views concerning the interpretation of s 41. He noted that the word "acquires" is not subject to any express qualification as regards time, and that it can only be read as meaning "acquires before the framing of the federal franchise" if the "context indicates that it should be impliedly qualified in that way".[63] While not deciding whether such an implication should be drawn, Gibbs J expressly rejected the Harrison Moore view that s 41 only applies to persons whose right to vote in State elections was acquired under laws passed prior to federation.[64] More importantly, he regarded the Quick and Garran view that s 41 applies to those who had acquired the right to vote in State elections prior to the enactment of the Commonwealth franchise, as "far from clearly correct", although he concluded that it was unnecessary to express a final opinion on this issue.[65]

R v Pearson; Ex parte Sipka

The issue arose again before the High Court in *R v Pearson; Ex parte Sipka*.[66] This time the meaning of "adult" was not relevant so the application of s 41 was directly in issue. On 4 February 1983, writs were issued for a Commonwealth election. The electoral roll was closed on that same day at 6.00pm, because of the short period before polling day on 5 March 1983. Four people who were not enrolled on or by 4 February[67] then sought enrolment on the New South Wales electoral roll, and subsequently claimed that s 41 of the Constitution gave them the right to vote in the forthcoming Commonwealth election, because they were enrolled to vote for State elections.

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60 Ibid at 246.
61 Ibid at 251.
62 Ibid at 267.
63 Ibid at 258.
64 Ibid at 259.
65 Ibid.
66 (1983) 152 CLR 254.
67 Two were qualified to be enrolled before 4 February, but the two others were not so qualified, as one turned 18 on 15 February 1983 and the other was only naturalised on 15 February 1983. This raised the distinction between qualification to vote and actual registration to vote. However, the Court did not need to address it because of the narrow view taken of the meaning of s 41.

A majority of the Court (Murphy J dissenting) held that s 41 only applies to those individuals who had a right to vote in State elections at the time the Commonwealth franchise was enacted in 1902. As all such persons are now dead, it accordingly has no further application.

In their joint judgment, Gibbs CJ, Mason and Wilson JJ focussed on the reference in s 41 to people being "prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth". They drew from the word "prevented" the assumption that the person must otherwise have had this right before the Commonwealth law applied. Their Honours observed:

> The section prevents the Commonwealth Parliament from taking away a right to vote; it does not create an entitlement which does not otherwise exist. Under the Constitution, persons qualified as electors for the more numerous House of the Parliament of a State were qualified to vote for the election of members of the House of Representatives, but only until the Parliament otherwise provided: see s. 30 of the Constitution...Once a law of the Commonwealth has completely provided the qualifications for electors for Commonwealth elections (as in fact Commonwealth laws have done since the *Commonwealth Franchise Act* 1902 was passed) no elector thereafter could acquire a qualification to vote at Commonwealth elections under ss. 30 and 8 of the Constitution.[68]

Their Honours concluded that if an elector had not previously obtained the right to vote in Commonwealth elections through ss 8 and 30, no future law could be said to prevent the elector from voting.

Gibbs CJ, Mason and Wilson JJ supported this interpretation by arguing that policy considerations demand such an outcome as a more liberal construction would threaten a uniform franchise. They considered that it was impossible to consider it intended that a State could unilaterally alter the Commonwealth franchise.[69] However, s 41 was clearly intended to undermine a uniform franchise, and had the effect of so doing. While the Commonwealth franchise excluded Aborigines, four of the six States gave Aborigines the right to vote, meaning that even on the narrow interpretation adopted by the High Court, the Commonwealth franchise was not uniform for at least the next 60 years.[70]

Their Honours also sought to support their interpretation of s 41 with historical arguments. In doing so they relied on the summary provided by Quick and Garran. Their Honours noted that the Constitutional Convention debates reveal that the provision was intended to prevent the women of South Australia being deprived of the federal franchise by the Commonwealth Parliament.[71] No explanation was given as to how the Convention could have intended only to protect the voting rights of women who were qualified to vote as at 1902, and not the rights of their younger sisters or daughters who reached the age of majority in 1903 or 1904.

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68 (1983) 152 CLR 254 at 260-261.

69 Ibid at 261.

70 Although many of the Aboriginal people who were entitled to vote in Victoria, New South Wales, South Australia and Tasmania in 1902 may have died by 1962, the amendment of the Commonwealth Electoral Act in 1949 (which gave express Commonwealth voting rights to Aborigines who had the right to vote in the States) ensured that there was no uniform Commonwealth franchise until at least 1962 when all Aborigines were given full Commonwealth voting rights.

71 (1983) 152 CLR 254 at 262.

Reference was made by their Honours to the inconsistent views of Harrison Moore and Quick and Garran, with support being given to Quick and Garran's third interpretation of s 41. No reference was made to the fact that Quick and Garran themselves conceded that the historical evidence from the Constitutional Conventions pointed to the validity of their second interpretation. Reference was also made to *Muramats v Commonwealth Electoral Officer (WA)*[72] but Higgins J was merely described as having discussed other aspects of the matter but not the "difficulties and possible meanings of the section".[73] No reference was made to the fact that his judgment was based on the premise that s 41 had a prospective application.[74]

The case of *King v Jones*[75] was equally summarily dismissed by Gibbs CJ, Mason and Wilson JJ. They stated that:

> Only Menzies J expressed a view which provides any support for the argument of the prosecutors; he said that the character of s 41 is "that of a permanent constitutional provision" and that it "applies to a person who, in 1901, had or who, in the future, acquires particular voting rights by the law of a State".

Their Honours failed to mention that Barwick CJ had also asserted that s 41 is a permanent constitutional provision and that a uniform franchise is unlikely due to s 41. Further, no reference was made to the fact that Gibbs CJ was now supporting the Quick and Garran interpretation of s 41 which in *King v Jones* he described as "far from clearly correct".

Brennan, Deane and Dawson JJ, in their joint judgment, did not take an historical approach, but still relied on the same reasoning as the rest of the majority. They considered that the purpose of s 41 was to ensure that those who had acquired the right to vote pursuant to ss 30 and 8 did not lose that right to vote once the Commonwealth franchise was enacted.[76]

Their Honours also expressed concern that, if s 41 were given a prospective interpretation, it would allow the States to undermine the uniform Commonwealth franchise. Their particular concern was that it would allow a State to increase the number of its electors for the purposes of s 128 beyond the number entitled under the uniform franchise. Interestingly, the Commonwealth Electoral Act permitted this very circumstance to occur, at least from 1949 to 1962. The 1949 amendments to the Commonwealth Electoral Act, which permitted Aboriginal people who had the right to vote in a State, to vote in Commonwealth elections, would have allowed those States in which Aboriginal people were denied the vote, to grant them the vote and thus increase the number of electors in the State for the purposes of that national count of votes under s 128 of the Constitution.[77]

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72 (1923) 32 CLR 500.

73 (1983) 152 CLR 254 at 263.

74 Compare the judgment of Brennan, Deane and Dawson JJ where it was recognised that Higgins J "was of the opinion that a right to enrolment on the Commonwealth roll would follow from an entitlement to vote at elections for the State Legislative Assembly": ibid at 277.

75 (1972) 128 CLR 221.

76 (1983) 152 CLR 254 at 279.

77 Query, however, whether there is any real value to a State in increasing its number of electors for this purpose, given the rarity of referenda and the other requirements about a

The High Court's narrow view of s 41 was later reiterated in *Snowdon v Dondas* where the issue concerned a number of provisional votes in the Northern Territory which had been excluded as invalid because the voters were not enrolled in the districts in which they lived. The Court, comprising Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ observed:

> The protection of a right to vote contained in s. 41 of the Constitution does not avail Mr Snowdon. To begin with, it relates only to the right to vote in a State. Furthermore, the provision does not prescribe a qualification to vote. It assumes the existence of a right and ensures the right is not taken away. In any event the practical effect of s. 41 is now spent.[78]

Section 25 of the Constitution and the franchise

While the High Court has interpreted s 41 in the context of s 30 and s 128, and expressed concern that a broad reading of s 41 would allow the States to affect the Commonwealth franchise and manipulate proportionate State electoral figures for the purposes of referenda under s 128, little attention has been paid to the relationship between s 41 and s 25.

Section 24 of the Constitution sets out the means of ascertaining the number of members of the House of Representatives to be elected in a State. The population of the Commonwealth is divided by the total number of members to be elected in order to ascertain a quota. The number of people in a State is then divided by the quota so as to ascertain the number of members to be chosen in the State. If the remainder is greater than one-half the quota, an extra member shall be chosen in the State. This calculation is based on population, rather than the number of electors in the Commonwealth or a State. However, it is qualified by s 25 which provides that, for the purposes of s 24,

> if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

Section 25 is based on the fourteenth amendment to the United States Constitution, which provides that if a State denies the right to vote to any male inhabitants who are citizens and of age, then the basis of representation of that State shall be reduced in proportion to those denied the right to vote. Quick and Garran noted that the 14th amendment was "passed after the Civil War, in order to induce the Governments of the States to confer the franchise on the emancipated Negroes, who were declared citizens

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majority of voters in a majority of States. Realistically, no State would change its franchise solely for this dubious advantage.

78 (1996) 188 CLR 48 at 71-72. See also *Muldowney v Australian Electoral Commission* (1993) 178 CLR 34 at 39 per Brennan ACJ where he appeared to support the view that the practical effect of s 41 is spent, and a comment to similar effect by McHugh J in *McGinty v Western Australia* (1996) 186 CLR 140 at 244, fn 467. In contrast, it is interesting to note that s 41 is used as support for the implication of "representative government" or "representative democracy" arising from the Constitution—see *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 209 per Gaudron J and at 229 per McHugh J; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 189 per Dawson J and at 195-196 per McHugh J; *McGinty v Western Australia* (1996) 186 CLR 140 at 182-183 per Dawson J and 230 per McHugh J.

of the United States. It was designed to penalize, by a reduction of their federal representation, those States which refused to enfranchise the negroes".[79]

The effect of this provision is interesting. Prior to the enactment of the federal franchise, s 30 provided that State electoral qualifications prevailed. Thus, when members of a certain race were excluded from voting in State elections, they were also excluded from voting in Commonwealth elections, and under s 25 they were excluded from being counted for the purposes of ascertaining the number of members of the House of Representatives to be elected in a State. In the United States, of course, the federal franchise is comprised of the different State franchises. Thus there is a direct relationship between exclusion from the State franchise, and the representation of that State at the federal level. When the Commonwealth Constitution was first drafted in 1891, there was to be no separate Commonwealth franchise, but rather the franchises of the States would determine who could vote in each State for the Commonwealth Parliament. At that time, s 25 logically connected the State franchises to Commonwealth elections. However, at the Adelaide Convention of 1897, the draft Constitution was amended to provide that the Commonwealth Parliament could provide for its own franchise. Little consideration was subsequently given to the relevance to s 25 of this change.[80]

In Australia, once the federal franchise was enacted, there was a potential variation between those excluded from voting for Commonwealth elections on the grounds of their race, and those excluded from or permitted to vote in State elections on racial grounds. It is interesting to note that s 25 does not exclude from being counted those who are disqualified from voting in Commonwealth elections on the ground of race.[81] Rather, it is directed solely at exclusion from voting in elections for the more numerous House of the State Parliament. Clearly, the bridge between the State franchise referred to in s 25 and the Commonwealth franchise, is s 41. To give s 41 such a narrow interpretation that it becomes a "spent" provision, is to undermine the basis of s 25. Section 25 becomes distorted in its effect, if s 41 is read down in such a manner as to make it (s 41) ineffective.

Under the broad view of s 41, even if the Commonwealth purported to disqualify people of a certain race from voting in Commonwealth elections, those people would still have the right to vote in Commonwealth elections, as long as they had the right to vote in State elections. Thus it is the exclusion of the right to vote at the State level which is relevant for the purposes of ascertaining numbers for the allocation of Commonwealth seats.

If, however, one were to take a narrow view of s 41, and the Commonwealth could disqualify all people of certain races who did not personally have a right to vote at the time of the enactment of the federal franchise, then a State which allowed people of all

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79 J Quick and R Garran, above n 32 at 456.

80 Further consideration of s 25 was cursory: Convention Debates, Sydney 1897 at 453-454 and Melbourne 1898 at 1827-1828.

81 Note, however, that s 127 of the Constitution excluded Aboriginal natives from being counted. This provision did not exclude them, however, from obtaining or exercising a right to vote in either State or Commonwealth elections. Such exclusions occurred by way of legislation. Section 127 did, however, eliminate the penalisation of a State which excluded Aborigines from exercising the right to vote in State elections. Section 127 was repealed by referendum in 1967.

races to vote in State elections could gain a proportionate representational advantage over a State which prevented persons of certain races from voting, even though these people were not permitted to vote in Commonwealth elections, regardless of the State from which they came. The link between voting qualifications in the States and the Commonwealth franchise, which underpins s 25, would be severed by a narrow reading of s 41.

The distortion of s 25 is exemplified by the advice given by Solicitor-General Garran to the Chief Electoral Officer in 1921. The Chief Electoral Officer had sought advice "as to the persons other than aboriginal natives of Australia who are to be excluded pursuant to section 25 of the Constitution in reckoning the number of the people of the State and of the Commonwealth for the purposes of section 24 of the Constitution".[82] After surveying the laws of the different States, Garran concluded:

> I am of the opinion that no persons should be omitted from the count in New South Wales, Victoria or South Australia and that in Queensland and Western Australia all persons of any aboriginal native race of Asia, Africa or the Islands of the Pacific should be excluded pursuant to section 25 of the Constitution.[83]

This leads to the absurd result that Queensland and Western Australia are "penalised" under the Commonwealth Constitution for having the same electoral restrictions as the Commonwealth, when in the other States, although native people from Asia, Africa and the Pacific could vote in State elections, many, if not most, were still excluded from voting in Commonwealth elections, by Commonwealth laws.

THE IMPLIED RIGHT TO VOTE—DIRECTLY CHOSEN BY THE PEOPLE

Having severely limited the only existing express right to vote in the Constitution, in a manner that appears contrary to both its express terms and its structural relationship with the Constitution, the High Court has made a curious effort to find in the Constitution an implied right to vote. It has done so by drawing implications from the requirement that members of Parliament be "directly chosen by the people".

The historical basis of the franchise

Much has been made in recent years of the involvement of "the people" in the formation of the Commonwealth Constitution. The approval of the Commonwealth Constitution by "the people" at referendum has given rise to the conclusion that sovereignty rests with the Australian people (rather than the Crown) and that the approval of the Constitution by "the people" by referenda is the legal basis for the Constitution.[84]

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82 P Brazil (ed), *Opinions of the Attorneys-General*, (1981) Vol 2, No 1049 at 637.

83 Ibid at 639.

84 See suggestions to this effect in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 138 per Mason J; *McGinty v Western Australia* (1996) 186 CLR 140 at 230 and 237 per McHugh J. See also discussion in G Winterton, "Popular Sovereignty and Constitutional Continuity" (1998) 26 *F L Rev* 1 and an earlier analysis in G Lindell, "Why is Australia's Constitution Binding? The Reasons in 1900 and Now, and the Effect of Independence" (1986) 16 *F L Rev* 29.

The notion of "the people" in the 1890s was, however, quite different to that of the 1990s.[85] The franchise for the lower Houses of the various colonial Parliaments was used as the franchise for both the referenda which approved the Constitution and for the election of the first Commonwealth Parliament (as specified in s 30 of the Commonwealth Constitution). The common conditions of this franchise were that it was confined to natural-born or naturalised British subjects who were at least 21 years of age and who resided within the relevant colony. While this franchise seems broad enough, so were the categories of disqualification:

- Women were only permitted to vote in South Australia[86] and Western Australia,[87] being excluded from the franchise in the other colonies.
- "Aboriginal natives of Australia, Asia or Africa" were denied the right to vote in Western Australia,[88] as were Aboriginal natives of Australia, India, China or the South Sea Islands in Queensland elections,[89] unless a freehold qualification to vote was held in the relevant colony. In South Australia, a distinction was made with the Northern Territory, where immigrants under the Indian Immigration Act 1882 and all persons, except natural born British subjects, and Europeans or Americans naturalised as British subjects, were disqualified from voting.[90]
- Persons of unsound mind were disqualified from voting generally, either by reason of specific reference in the legislation, or because they suffered from "legal incapacity".[91]
- Persons in receipt of aid from any public or charitable institution were disqualified from voting in New South Wales,[92] Queensland[93] and Western Australia,[94]. In Victoria, any person receiving "relief as an inmate of any eleemosynary or charitable institution" was also disqualified from voting.[95]
- Any person convicted of treason, a felony or an "infamous offence" who had not served his or her sentence or received a free pardon was disqualified from voting in New South Wales,[96] Queensland,[97] South Australia[98] and Western Australia.[99] New South Wales listed a number of other reasons for disqualification, including conviction for being "an habitual drunkard", an "idle and disorderly person", an

85 See further A Twomey, "The Constitution—19th Century Colonial Office Document or a People's Constitution?" in Parliamentary Research Service, *The Constitution Papers* (1996) 1.
86 Electoral Code 1896 (SA), s 15.
87 Constitution Acts Amendment Act 1899 (WA), s 26.
88 Ibid.
89 Elections Act 1885 (Qld), s 6.
90 Electoral Code 1896 (SA), s 16.
91 Parliamentary Electorates and Elections Act 1893 (NSW), s 23; Constitution Acts Amendment Act 1899 (WA), s 28; Elections Act 1885 (Qld), s 8; Constitution Act Amendment Act 1890 (Vic), s 128.
92 Parliamentary Electorate and Elections Act 1893 (NSW), s 23.
93 Elections Act 1885 (Qld), s 8.
94 Constitution Acts Amendment Act 1899 (WA), s 28. In Western Australia a person was also disqualified if he or she was in receipt of relief from the Government.
95 Constitution Act Amendment Act 1890 (Vic), s 142.
96 Parliamentary Electorates and Elections Act 1893 (NSW), s 23.
97 Elections Act 1885 (Qld), s 8.
98 Electoral Code 1896 (SA), s 17.
99 Constitution Acts Amendment Act 1899 (WA), s 28.

"incorrigible rogue" or a "rogue and vagabond".[100] Moreover, men against whom there was an unsatisfied order of a court for the maintenance of their wives and children (legitimate or illegitimate) were also disqualified from voting, as were men convicted within the previous year of an aggravated assault on their wives.[101]

- Members of the navy, army and the police force were disqualified from voting in New South Wales[102] and Queensland.[103]

The only property or income qualification for voting for the lower house of an Australian colonial Parliament at the time of federation was in Tasmania. There a person had to be either included on the Assessment Roll as owner or occupier of any property within the electoral district or in receipt of income, salary or wages at the rate of forty pounds a year. A person who had been previously entitled to vote at an election for the House of Assembly, but had been prevented by sickness or inability to obtain employment from earning such income, salary or wages, was still permitted to vote.[104]

Thus, the ownership of property was not a prerequisite to vote for the lower house of any colony[105] at the time of the referenda or the first Commonwealth election, despite some misleading suggestions to the contrary.[106] A number of the colonies did allow, however, plural voting to give property owners additional representation in the colonial Parliament. Plural voting was permitted for those with freehold or leasehold interests of a specified minimum value, in Western Australia,[107] Queensland[108] and Tasmania.[109] Plural voting in Victoria was abolished in 1899.[110] Plural voting was not permitted in New South Wales or South Australia.

When drawing, from this historical background, a picture of "the people", as referred to by the Commonwealth Constitution, two factors have to be taken into account. The first factor is that s 30, when providing that the State franchise will apply to Commonwealth elections until the Commonwealth Parliament enacts its own franchise, defines the State franchise as that for the "more numerous House of Parliament of the State". Thus the property qualifications and qualifications based on education or profession which applied to the upper (less numerous) houses, would have no impact upon the Commonwealth franchise. The second factor is the rider to s 30 which states that "in the choosing of members each elector shall vote only once". This was intended to eliminate plural voting and the increased representation of those with property.

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100 Such a conviction must have happened within 1 year prior to the sitting of the Revision Court, which revised the electoral rolls.

101 Parliamentary Electorates and Elections Act 1893 (NSW), s 23

102 Ibid.

103 Elections Act 1885 (Qld), s 8.

104 Constitution Amendment Act No 2 1896 (Tas), s 4.

105 Property qualifications were traditionally applied to the franchise for State upper Houses, as the upper House was intended to represent the interests of landed people. Lower Houses, being "popular" or "more numerous" Houses, tended to have a broader franchise.

106 See discussion below.

107 Constitution Acts Amendment Act 1899 (WA), s 26.

108 Elections Act 1885 (Qld), s 6.

109 Constitution Amendment Act No 2 1896 (Tas), s 4.

110 Constitution Act Amendment Act 1899 (Vic), s 4.

Accordingly, to refer to the property qualifications involved in plural voting for the lower House or as qualifications for voting for the upper House of a colony, as a reflection of the type of distinctions permitted by s 30 of the Constitution, is highly misleading. Such misleading statements are made by Barwick CJ in *Attorney-General (Cth); Ex Rel McKinlay v Commonwealth,* where he referred to property qualifications in Queensland and Victoria, as well as plural voting in Tasmania, Western Australia and Queensland, in a passage which he related to the constitutional acceptability under s 30 of existing colonial franchises.[111]

Even more misleading is a passage by McHugh J. in *McGinty v Western Australia,*[112] where he related s 30 to the colonial franchises.

> As I have pointed out, until the federal Parliament legislated, s. 30 made the qualifications of electors in the more numerous Houses of Parliament of a State the qualifications for federal elections for the House of Representatives in that State. There were very large differences in the franchises in each State...In Victoria, only men over the age of 21 who were natural born British subjects or naturalised subjects of three years standing with at least one of those years spent in the State were entitled to vote. It was also a condition of the entitlement to vote in that State that a voter should own land with an annual value of £10 or hold a lease of land that was rated with an annual value of £25. University graduates and members of certain occupations were also given a right to vote.[113]

On the contrary, males were entitled to vote for the Victorian Legislative Assembly without any property qualification, and being a graduate or having a certain occupation made no difference at all to the franchise for the Legislative Assembly.[114] The conditions referred to by McHugh J were only relevant to voting in the Legislative Council,[115] which is, of course, not relevant to the type of State franchise permitted to apply to Commonwealth elections by s 30 of the Constitution.

Despite the care that is taken in the Constitution to exclude the inequities of plural voting, and property and professional qualifications to vote, by setting the franchise as that of the State lower Houses, and prohibiting people from voting more than once, s 30 still contemplates that "the people" who elect the Commonwealth Parliament may exclude women, the young, Aborigines, Asians, Africans and Pacific Islanders, the poor, prisoners and the mentally unsound. Does this acceptance of exclusion in 1901 determine the meaning of "the people" in the Constitution, or can the term be interpreted today in the light of changed attitudes?

Attorney-General (Cth); Ex Rel McKinlay v Commonwealth

Whether "the people", as referred to by the Commonwealth Constitution, should be interpreted in its modern sense or in the sense that was used at the time the Constitution was enacted, was discussed by the High Court in the case of *Attorney-General (Cth); Ex Rel McKinlay v Commonwealth.*[116] The case concerned whether s 24 of the Constitution also implies the principle of "one vote, one value". In the course of the

111 (1975) 135 CLR 1 at 19.
112 (1996) 186 CLR 140.
113 Ibid at 242.
114 Constitution Act Amendment Act 1890 (Vic), ss 128-135.
115 Constitution Act Amendment Act 1890 (Vic), ss 43-45, 50-51.
116 (1975) 135 CLR 1.

argument, the question arose as to the meaning of "the people" in s 24 and whether it involved equality of voting rights and equality of votes.

Barwick CJ rejected such a suggestion. He stressed that in interpreting the Constitution, Sir Owen Dixon's "strict and complete legalism" should apply, and that in the case of ambiguity or lack of certainty, resort can be had to the history of the colonies.[117] In considering the history of the franchise in the colonies, Barwick CJ noted that the franchise was limited on the grounds of sex, age, property, residence and race. He concluded that, as s 30 set the initial franchise as those of the States until the Parliament otherwise provides, then those existing colonial franchises must have been "constitutionally acceptable".[118] His Honour saw no reason why a limited franchise would not be constitutionally valid today, when it was acceptable in 1901. He considered that "there is no constitutional guarantee of a universal franchise".[119]

Gibbs J took a similar historical approach, noting that it appeared from the provisions of the Constitution "that people might constitutionally be denied the franchise on the ground of race, sex or lack of property".[120] Mason J was also clear that "the Constitution does not guarantee or insist upon universal adult suffrage". He noted that ss 25 and 30 contemplate groups of people being denied the right to vote.[121]

McTiernan and Jacobs JJ took the differing view that the words "chosen by the people" must be applied in the context of the particular facts and circumstances of the time. They observed:

> At some point choice by electors could cease to be able to be described as a choice by the people of the Commonwealth. It is a question of degree. It cannot be determined in the abstract. It depends in part upon the common understanding of the time on those who must be eligible to vote before a member can be described as chosen by the people of the Commonwealth. For instance, the long established universal adult suffrage may now be recognized as a fact and as a result it is doubtful whether, subject to the particular provision in s. 30, anything less than this could now be described as a choice by the people.[122]

Murphy J reached the same conclusion, without revealing how it had been reached. He stated that while it may have been accepted in 1900 that "chosen by the people" could involve the exclusion of women and people without property, a law to this effect in 1975 would be unconstitutional on the grounds that it would be incompatible with the command that the House of Representatives be directly "chosen by the people".[123]

Stephen J took an intermediate view. He noted that "adult suffrage, free of discrimination on the grounds of race, sex, property or educational qualification" will

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117 Ibid at 17.
118 Ibid at 19.
119 Ibid at 25.
120 Ibid at 44. While s 128 implies that voters may be disqualified on the grounds of their sex, and s 25 implies that they may be disqualified on the grounds of race, it is not clear which provision suggests that voters may be disqualified on the basis of lack of property. As noted above, the use of the franchise of the more numerous House of a State, as the basis for the Commonwealth franchise under s 30, does not imply that a person could be denied the right to vote because he or she did not own property. Although in Tasmania property was a qualification for the right to vote, an alternative qualification was income.
121 (1975) 135 CLR 1 at 62.
122 Ibid at 36.
123 Ibid at 69.

aid in the attainment of representative democracy, but he considered that there was no absolute requirement for it in s 24 of the Constitution.[124] The principle of representative democracy, which His Honour discerned in s 24, was regarded as predicating the enfranchisement of electors, but His Honour considered that the extent of that franchise is not determined by the Constitution, except to the extent that it might make democracy no longer representative.[125]

After *McKinlay,* the position was far from clear. Three judges looked to the historical basis of the franchise and the fact that various sections of the Constitution recognise that there may be less than a full adult franchise, while three other judges rejected this approach and considered the current meaning of "the people". The seventh judge took an intermediate position where the franchise must not be so limited as to affect the representative nature of the Australian democracy.

McGinty v Western Australia

The issue was again addressed twenty-one years later in *McGinty v Western Australia.* Once again the case concerned the principle of "one vote, one value" and the meaning of "directly chosen by the people" in s 24 of the Constitution when interpreted in the light of the principle of "representative democracy". It was argued by the plaintiffs that representative democracy requires that "every legally capable adult has the right to vote" and that "each person's vote be equal to the vote of every other person".

Brennan CJ noted the development of the franchise and the restrictions which still apply to it:

> In this century, the age of legal adulthood has been reduced from 21 to 18 and the legal incapacity of women to vote has been removed. Aborigines, who were once constitutionally disqualified from the franchise, are no longer so disqualified. But age, sex and race are not the only qualifications that have governed an adult's right to vote. Other qualifications have related to ownership of property and education or a period of residence within the electoral district. Disqualifications still include the status of convicted criminal and mental infirmity or absence from registered address. In view of the fact that the franchise has historically expanded in scope, it is at least arguable that the qualifications of age, sex, race and property which limited the franchise in earlier times could not now be reimposed so as to deprive a citizen of the right to vote.[126]

Dawson J rejected this approach, noting that ss 8 and 30 allow the Parliament to determine the qualifications of electors, and that this determination "may amount to less than universal suffrage, however politically unacceptable that may be today".[127]

Toohey J referred back to the interpretative distinction between the connotation of words in the Australian Constitution, which remains fixed, and their denotation,

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124 Ibid at 57.

125 Ibid at 56.

126 (1996) 186 CLR 140 at 166. It is unclear what is meant by the suggestion that Aborigines were once constitutionally disqualified from the franchise. While Aborigines were disqualified by legislation, the Constitution itself did not disqualify them from the franchise: B Galligan and J Chesterman, "Aborigines, Citizenship and the Australian Constitution: Did the Constitution Exclude Aboriginal People from Citizenship" (1997) 8 *PLR* 45. Note also that in the earlier case of *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 147, Brennan J stated that "[t]he Constitution permits, though it does not require, that the adult franchise be universal".

127 (1996) 186 CLR 140 at 183.

which may vary over time. He referred to the distinction drawn by the Court in *Cheatle v The Queen*[128] where it was held that the representative character of a jury was part of the connotation of the word "jury", but the exclusion of women and people without property could no longer be said to lead to a "representative" jury. Thus the denotation of a jury has changed with the times. His Honour concluded:

> By parity of reasoning, the essential feature of representative democracy is government by the people through their representatives...In 1900, the popular perception of what this entailed was certainly different to current perceptions. For instance, the franchise did not include all, or even a majority of the population. But according to today's standards, a system which denied universal adult franchise would fall short of a basic requirement of representative democracy. The point is that, while the essence of representative democracy remains unchanged, the method of giving expression to the concept varies over time and according to changes in society.[129]

Gaudron J took a similar approach to Toohey J. She noted that the words "chosen by the people" mandate a "democratic electoral system", and that they should be interpreted "in light of developments in democratic standards and not by reference to circumstances as they existed at federation".[130] Her Honour concluded:

> Notwithstanding the limited nature of the franchise in 1901, present circumstances would not, in my view, permit senators and members of the House of Representatives to be described as "chosen by the people" within the meaning of those words in ss 7 and 24 of the Constitution if the franchise were to be denied to women or to members of a racial minority or to be made subject to a property or educational qualification.[131]

Gummow J agreed that in interpreting the Constitution reference must be made to the particular stage which has been reached in the evolution of representative government. He gave, as an example, the reduction of the voting age to 18 years. His Honour went on to conclude that:

> An even plainer example is the now long-established universal adult suffrage. This has become a characteristic of popular election of senators and members of the House of Representatives which could not be abrogated by reversion to the system which operated in one or more colonies at the time of federation. In my opinion, this is so notwithstanding that ss 8 and 30 of the Constitution, subject to the prevention of plural voting, permitted the qualification of electors to be ascertained in that way, until the federal Parliament otherwise provided.[132]

McHugh J's position is more ambiguous. In *McGinty* he appeared to suggest that universal suffrage is a matter solely for the Parliament to determine, and, to the extent that "representative democracy" may require universal suffrage, such an implication falls outside the Constitution. He stated:

> If representative democracy, as understood outside the context of the Constitution, requires equality of electors in electoral divisions, it does not do so under the Constitution. The Constitution makes the federal Parliament the final arbiter on this

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128 (1993) 177 CLR 541.

129 (1996) 186 CLR 140 at 201. For further judicial discussion of the denotation/connotation distinction see *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 143-144 per Brennan J and at 196-197 per McHugh J. As noted above, contrast the more limited approach taken to the interpretation of "adult" in s 41 in *King v Jones*.

130 (1996) 186 CLR 140 at 221.

131 Ibid at 221-222.

132 Ibid at 287.

> matter just as it makes the federal Parliament the final arbiter on whether there should be universal suffrage, secret ballot, preferential or proportional voting or first past the post voting.[133]

His Honour made a similar comment in footnote 467 where he observed that at federation women had the right to vote in only two States, and that this discrimination was resolved at the Commonwealth level by the enactment by the Commonwealth Parliament of the Franchise Act 1902 (Cth). He then observed that this "is further evidence that it was the federal Parliament and not the Constitution that concerned itself with the equality of individual voters".[134]

In contrast, in the case of *Langer v Commonwealth*[135] McHugh J discussed the "higher purpose of s 24" noting:

> That purpose is to ensure representative government by insisting that the Parliament be truly chosen in a democratic election by that vague but emotionally powerful abstraction known as "the people", a term whose content will change from time to time. In the light of the extension of the franchise during this century, for example, it would not now be possible to find that the members of the House of Representatives were "chosen by the people" if women were excluded from voting or if electors had to have property qualifications before they could vote.[136]

It is also worth noting that in the earlier case of *Nationwide News Pty Ltd v Wills* Deane and Toohey JJ implied that there is now constitutional protection for the franchise, observing:

> While one can point to qualifications and exceptions, such as those concerned with the protection of the position of the less populous States, the general effect of the Constitution is, at least since the adoption of full adult suffrage by all the States, that all citizens of the Commonwealth who are not under some special disability are entitled to share equally in the exercise of those ultimate powers of governmental control.[137]

It is not clear how far implications from "the people" will be identified by the High Court. To what extent does it cover people convicted of an offence?[138] Could the disenfranchisement of certain prisoners[139] be extended to those convicted of an offence who have served their sentence, or to those convicted of a summary offence who were never imprisoned? How far can the constitutionally valid disenfranchisement of those of "unsound mind" extend? Could it extend to those with an IQ below a certain level? Must the basis for this disenfranchisement be an inability to understand the meaning

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133 Ibid at 244. See also His Honour's comments in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 201, where he noted the absence of any guarantee of universal suffrage in the Constitution.

134 (1996) 186 CLR 140 at 244.

135 (1996) 186 CLR 302.

136 Ibid at 342.

137 (1992) 177 CLR 1 at 72. Quoted and distinguished in *McGinty v Western Australia* (1996) 186 CLR 140 at 174-5 per Brennan CJ.

138 For a discussion of the franchise and prisoners see G Orr, "Ballotless and Behind Bars: The Denial of the Franchise to Prisoners" (1998) 26 *F L Rev* 55.

139 Commonwealth Electoral Act 1918, s 93(8)(b) suspends the right to vote in Commonwealth elections from persons serving a sentence of 5 years or longer for an offence against the law of the Commonwealth or of a State or Territory. Technically, this does not mean the person remains in prison. The sentence could be being served by way of periodic detention or parole or possibly as a suspended sentence.

of the act of voting, or could it be the inability to make a rational and competent decision (in which case many more electors could presumably be excluded).

As for the implied constitutional prohibition on excluding from the franchise people of a particular race, how would this apply to the exclusion from the franchise of dual citizens who are also citizens of a nation with which Australia is at war? During World War I, the Commonwealth Electoral (War-time) Act 1917 excluded from voting naturalized British subjects born in enemy countries (subject to certain restrictions, for example, if the person was serving in the British armed forces or was a Member of Parliament).[140] How would the High Court deal with such legislation in a future war? What if citizenship were denied to persons of certain races, thus denying them a right to vote? Would this be in breach of the Constitution?

What if, as was the case in the early 1900s, the right to vote were removed from those who perpetrate domestic violence or who breach requirements to pay maintenance to a former spouse or children? Does "the people" include those who bash their spouse or children, or refuse to support them financially? Can the removal of the right to vote be legitimately used as a form of punishment and an indication of society's disapproval of an action? How is the Court to decide such matters?[141]

CONSTITUTIONAL REFERENDA ON THE RIGHT TO VOTE

Given this uncertainty as to the constitutional protection of the franchise, it is not surprising that attempts have been made for the position to be clarified and the franchise to be protected. In all cases, those attempts have failed. Ultimately, it was the enfranchised voters themselves who rejected the constitutional protection of the franchise.

In 1974 the Constitution Alteration (Democratic Elections) Bill was passed by the Commonwealth House of Representatives and put to a referendum. It contained amendments which would have entrenched the right to vote in both State and Federal elections and the principle of one vote one value. It proposed placing a limit on s 30 of the Constitution by requiring the Commonwealth Parliament's laws to be consistent with an entitlement to vote for every Australian citizen who has attained the age of 18, subject to compliance with reasonable conditions concerning residence and enrolment, and subject to any disqualification with respect to persons of unsound mind or undergoing imprisonment for an offence. It was proposed that a similar provision to s 106A be inserted to provide an entitlement to vote in State elections. In addition, the High Court was to be given jurisdiction to deal with matters arising from these sections, and electors were to be given standing to invoke that jurisdiction. Accordingly, the constitutional provisions could be enforced by ordinary electors.

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140 This law was enacted even though those who were disenfranchised retained their right to vote in the States. Many would presumably have been protected by s 41, even under its narrowest reading.

141 In considering these matters today, the High Court may also have regard to international standards, and Australia's obligations under art 25 of the International Covenant on Civil and Political Rights which requires that every citizen shall have the right to vote "without unreasonable restrictions" and without any distinctions based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The campaign against the referendum was largely based on the other provisions it included concerning "one vote one value". The referendum was defeated in all States except New South Wales, and achieved 47.23 per cent of the vote across Australia.

Subsequent to this referendum, the issue was again raised and constitutional amendment proposed in the Adelaide session of the Australian Constitutional Convention in 1983. The proposal, which did not allow the disqualification of prisoners, was defeated at the Convention by 47 votes to 35.

Senator Macklin of the Australian Democrats also introduced a Constitution Alteration (Democratic Elections) Bill into the Senate in 1985 and 1987. It did not proceed through the Parliament, although it was the subject of consideration by the Joint Select Committee on Electoral Reform.[142] Once again, attention was directed to the principle of "one vote one value" rather than the entrenchment of the franchise.

The Advisory Committee on Individual and Democratic Rights to the Constitutional Commission made a recommendation that s 30 be repealed and the following section substituted for it:

> All citizens who are of or over the age of 18 years are qualified to be electors of members of the House of Representatives.

The Committee rejected the view that prisoners or people of unsound mind should be excluded from voting.[143] The Committee also rejected the power of the Commonwealth Parliament to use residence as a qualification for voting, although the Committee did seem to envision that a person would have to be resident in the electorate for which he or she is enrolled.

The Constitutional Commission did not accept all the recommendations of its Advisory Committee. It recommended that the Constitution be altered to provide that Federal, State and Territory laws which prescribe qualifications of electors "shall provide for enfranchisement of every Australian citizen who has attained the age of eighteen years". However, it recommended that the Parliaments should still be able to make the entitlement to vote dependent on compliance with "reasonable conditions" as to residence and enrolment, and that the Parliament should have the power to disqualify from voting people undergoing imprisonment for an offence and people incapable of understanding the nature and significance of enrolment and voting by reason of unsoundness of mind.[144]

In 1988 four referenda were put to the people. The second of them was the Constitution Alteration (Fair Elections) 1988 referendum. Once again, the proposed amendment concentrated on the "one vote one value" principle. However, the referendum also involved the repeal of ss 25 and 41 of the Constitution, and a minimum guarantee of a right to vote. The proposed right to vote was as follows:

> Laws prescribing the qualifications of electors for elections shall be such that each Australian citizen who:
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> (a) complies with reasonable conditions prescribed by those laws as to residence and enrolment; and

142 Commonwealth Joint Standing Committee on Electoral Matters, *One Vote, One Value*, (1988).

143 Constitutional Commission, *Report of the Advisory Committee on Individual and Democratic Rights under the Constitution* (1987) at 84-88.

144 Constitutional Commission, *Report of the Constitutional Commission 1988* (1988) at para 4.16.

(b) has reached the age of eighteen years;

is entitled to vote, subject to any disqualification prescribed by those laws as to persons who:

(c) because of unsoundness of mind, are incapable of understanding the nature and significance of enrolment and voting; or

(d) are undergoing imprisonment for an offence.

This amendment would have applied to Commonwealth, State and Territory elections.

The referendum failed in all States and across Australia. The official "No" case, which argued against this referendum, did not refer to the right to vote or the removal of ss 25 and 41. It concentrated on the "one vote one value" proposals, and argued that they removed the rights of the States to order their own elections and would result in costly litigation. Accordingly, it is unlikely that those who voted against this referendum proposal disapproved of a constitutional right to vote, although the minds of the voters can never be known on such matters.

CONCLUSION

The High Court's approach to the constitutional protection of the franchise has been inconsistent. On the one hand it has emasculated the only express protection in s 41, by giving it a narrower reading than the plain words of the provision would seem to require, when the usual interpretative approach has been to give the terms of the Constitution their broader meaning.[145] The Court has also used the history of the provision to narrow its scope, despite the conflicting historical views of its meaning.

In contrast, a number of judges of the Court have drawn broad implications from the meaning of "the people" in s 24 of the Constitution, seemingly unfettered by the history of the provision and the prior constitutional acceptance of exclusion from the franchise on the grounds of race or sex.

Into this controversy have stepped the people, rejecting twice at referenda the constitutional entrenchment of the franchise, although perhaps for other reasons.

While the wind blows fair, the franchise is not a pressing issue, because the Commonwealth Parliament is likely to maintain a relatively liberal franchise.[146] However, when the wind changes and there are strong public pressures to exclude from the franchise an unpopular group in society, the inadequacies of the Constitution, and the High Court's interpretation of it in relation to the franchise, will become manifest.

145 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367-368 per O'Connor J. This approach has been frequently approved. See for example *McGinty v Western Australia* (1996) 186 CLR 140 at 231 per McHugh J.

146 See however, the recent attempt by the Federal Government to further limit the franchise in relation to prisoners. Under the existing law, persons serving a sentence of 5 years or longer have their right to vote suspended. The Electoral and Referendum Amendment Bill (No 2) 1998 sought to suspend the right to vote of all prisoners, regardless of the term of imprisonment. These provisions were defeated in the Senate: Sen Deb, 17 February 1999 at 2047-2060.