A Paragon of Democratic Virtues? The Development of the Commonwealth Franchise

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All nations have their cherished myths and Australia is no different in this. One such myth is that of the Australian as a sun-bronzed sportsperson. Another is of Australia as a paragon of democratic virtues - a society where everyone gets a "fair go", irrespective of gender, class, colour or creed. Amongst the matters relied on in support of this myth are facts relating to the electoral process. Schoolchildren learn that Australia led the world in terms of female suffrage, and that the secret ballot was so much our invention as to have once been known as the "Australian ballot". However, to extrapolate from these facts to a picture of Australia as unblemished in its record in relation to issues of franchise is misleading, as the history of the development of the Commonwealth franchise shows.

Despite that history, the myth has continued throughout the ten decades of the Commonwealth's existence. The Joint Select Committee on Electoral Reform, set up by the Commonwealth Parliament in May 1983, stated in its First Report:[1]

> A central consideration in any participative government system is the question of the franchise, the determination of those who are permitted to be involved in the selection of the government. Australia's commitment to extending the vote universally has been apparent from the commencement of the Federation ...

Certainly in the ninety-three years since Federation, the Commonwealth franchise has been progressively widened to the extent that there is now complete enfranchisement of all adult citizens (accepting "adults" as being people over 18). However, that development does not necessarily constitute a record of "commitment" to democratic principles. The extensions made over the years were strongly opposed by many when they were introduced, and there is plenty of evidence that the beliefs underlying that opposition are still widely held.[2] As the pages below

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1 Parliament of Australia, Joint Select Committee on Electoral Reform, First Report, Canberra, AGPS, September, 1983, at 7.

2 Support for this can be found constantly in the daily newspapers - almost any reported comment of Professor Geoffrey Blainey is relevant as regards the attitudes expressed in past opposition to the

demonstrate, the historical record belies the claim that "Australia's commitment to extending the vote universally has been apparent from the commencement of Federation ...". This divergence between myth and reality would be of less importance if there were constitutional protections of the broad franchise presently in force. However, analysis of the Constitution shows little such protection. The one protection initially in operation has been judicially eviscerated by what some commentators believe to be erroneous interpretation by the High Court.[3] Since that Court can reverse its decisions, it becomes necessary to examine that course of interpretation to see whether, if the need should arise, constitutional protection of the franchise can be revivified in any way.

The Constitution and the Franchise

Despite the suggestion by the Joint Select Committee on Electoral Reform that commitment to universal suffrage has been apparent since Federation, the Constitution which established that Federation did not prescribe the franchise for federal elections. As with other matters of electoral process, the Constitution directed that, unless and "until the Parliament otherwise provide[d]", State laws would apply to the enfranchisement of voters within each State in federal elections. By s 30 of the Constitution, the qualifications of electors for the House of Representatives were to be those prescribed in each State for electors of members of the more numerous House of Parliament of the State (until the Parliament should otherwise provide). In addition, by s 8 the qualifications of electors of Senators were to be those of electors of members of the House of Representatives. Since, for the Parliament to provide a franchise, other than that laid down in State laws, a Parliament had first to exist, the elections for the first federal Parliament would inevitably have to be conducted on the existing State franchises. Not only does the Constitution give no explicit prescription of a federal franchise, it does not contain any explicit commitment to ideological principles relating to suffrage (apart from an opposition to plural voting) although some argue[4] that such principles are implicitly indicated in phrases such as "directly

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enfranchisement of people of Asian birth or descent; much of the current comment occasioned by the "*Mabo* debate" is reminiscent of the blatant racism of the debates on the enfranchisement of Aborigines; and it is not drawing too long a bow to hear in recent comments from the bench regarding what women mean by "No" echoes of the paternalistic allegations of the susceptibility of women to "influence" made in the context of the 1902 debate on female suffrage.

3 See below.

4 For example, Murphy J in *A-G (Aust) (Ex Rel McKinlay) v Commonwealth* (1976) 50 ALJR 279.

chosen by the people".[5] Instead, the Constitution gives to the Commonwealth Parliament the power to legislate to determine the franchise.

That is not to say that the framers of the Constitution had no thoughts on the matter of the franchise. They did - but different colonies, and their representatives at the Constitutional Conventions, had different thoughts on this, as on so many issues. The resulting final draft of the Constitution represents a pragmatic solution, aimed at achieving a federation without alienating any of the colonies, whose adoption of the draft Constitution was part of the federation process.

The Conventions and the Franchise[6]

The matter of the franchise was raised at the first National Australasian Convention in Sydney in 1891. A draft Constitution Bill was brought to the Convention on 31 March, 1891 by the Constitutional Committee. This draft Bill provided that the franchise in federal elections was to be the provincial franchise of the States, in that each State of the Federation was to elect its members on the franchise of that particular State. There was no prohibition on plural voting, and no power was given to the federal Parliament to legislate for a uniform franchise.[7] In the debates of the Convention, sitting as a Committee of the Whole, Dr Cockburn of South Australia proposed an amendment to the draft Bill forbidding property qualifications for electors in House of Representatives elections, and disallowing plural voting by allowing each elector to vote for only one House of Representatives electorate - "in other words, to embody the principles of manhood suffrage and 'one man one vote'".[8]

Edmund Barton proposed a different amendment - to allow the federal Parliament to legislate to prescribe a uniform federal franchise. Both the Cockburn and Barton amendments were resisted as being invasions of State rights. The pragmatic approach to the question of the franchise can be seen in the contribution to the debate on the matter by Duncan Gillies (Vic) who asserted that there was no practical necessity for these "fads" and that they "would throw difficulties in the way of Federation".[9] In the event, both

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5 See case cited at footnote 4, at 305.

6 The material in this section is based on the discussions in Quick, J and Garran, RR, *The Annotated Constitution of the Australian Commonwealth*, Sydney, 1901 (hereafter, "Quick and Garran").

7 Quick and Garran, at 133.

8 Quick and Garran, at 137.

9 See footnote 8.

amendments were lost - Barton's without even a division, and Cockburn's on a vote of 28 to nine.

The 1891 draft Bill was not proceeded with, as we now know, becoming bogged down in dilatory debate in the various colonial Parliaments. A new draft was submitted to the Adelaide session of a new Constitutional Convention on 12 April, 1897. This draft was similar in form to the 1891 draft, but it provided that the federal franchise in each State, "until the Parliament otherwise provides", should be the franchise of the State, and it did not permit plural voting. It thus differed from the 1891 draft in incorporating the substance of the abortive Barton amendment and part of Dr Cockburn's unsuccessful proposal.

In the debates of the Committee of the Whole, the franchise issue was again discussed and again liberal amendments came from South Australian delegates. Holder proposed full adult suffrage. This proposal was criticised, as with those in 1891, for presenting an obstacle to Federation in that it was "a rash experiment and an attempt at dictation which would probably be resented in some colonies".[10] When put to the vote, Holder's amendment was defeated by 23 votes to 12. Holder continued to press South Australian views with a compromise amendment that "no elector now possessing the right to vote shall be deprived of that right". This amendment was, of course, designed to ensure that any federal legislation for a uniform franchise should protect the voting rights of women in South Australia, that colony having accepted female suffrage since 1894. However, the compromise was also subjected to vigorous criticism, the argument being that it would prevent any uniform federal franchise which did not base itself on the "fad" of full adult suffrage, and Holder's second amendment did not come to a vote.

Instead, it was withdrawn in favour of another amendment, proposed again by Barton, guaranteeing a federal vote to every State elector. That amendment was passed by a division of 18 to 15. Barton then sought to have the clause limited to protect rights to vote existing at the date of Federation only. Holder countered that all rights existing at the time of eventual Commonwealth legislation should be ensured - thus protecting any extension in the franchise achieved between the date of Federation and the date of subsequent federal franchise legislation, but agreed that the clause should not protect qualifications to vote existing before Commonwealth legislation but withdrawn by a State before the federal franchise was passed. The Convention accepted this latter change and rejected the more drastic limitation proposed by Barton.

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10 Quick and Garran, at 173.

However, Barton was still unhappy with the clause, because he feared that between the date of Federation and the date of legislation establishing a federal franchise, a State might grant the right to vote to non-adult people who would then, as the clause stood, have the right to vote in federal elections. At the Melbourne session of the Convention in 1898, he moved another amendment to the clause so that it would protect only rights which an elector "at the establishment of the Commonwealth has under the law in force in any State at the establishment of the Commonwealth", a formulation if anything more stringent than that which he had put forward the previous year. Eventually, given that his concern was with the infant vote rather than with female suffrage, he agreed to withdraw the amendment in consideration for the insertion in the clause of a reference to the protection of the rights of any person "being an adult" (a dangerously imprecise word, as later litigation showed[11]). The clause as so amended became part of the draft eventually passed by the Imperial Parliament, and is represented by s 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.

In the debate on the draft Constitution in the South Australian Parliament, during the statutory adjournment of the Convention required by the various colonial enabling Acts, the Assembly adopted an amendment that federal representatives be elected on the basis of full adult suffrage. However, that amendment was not accepted when the Convention was reassembled.

The First Federal Franchise Act

As the preceding discussion has made clear, the Constitution did not prescribe an ongoing franchise. It prevented disqualification of certain people by s 41. It indicated the franchise for the first federal elections as being the State franchises, by ss 8 and 30, and it entitled the Commonwealth Parliament to legislate for a federal franchise by s 51(xxxvi). The State franchises which applied at those first elections were (in respect of whites) as follows: adult suffrage in South Australia and Western Australia; manhood suffrage in New South Wales, Queensland and Victoria; and manhood suffrage subject to a property qualification in Tasmania. Tasmania, Queensland and Western Australia also allowed plural voting subject to a property qualification, but this part of their franchise was not applicable in the

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11 See *King v Jones* (1972) 128 CLR 121.

1901 federal election, because of the express prohibition in ss 8 and 30 of the Constitution.

The Victorian franchise made no differentiation in respect of Aborigines. Thus all adult male Aborigines were entitled to vote in Victorian elections in 1901, and would therefore have been entitled to vote in the first federal elections. The New South Wales and South Australian franchise laws in 1901 did not discriminate overtly against Aborigines. However, in New South Wales, people in receipt of State aid or aid from a charitable institution were (until 1926) not entitled to enrol,[12] and this barrier was held to disentitle all Aborigines living on reserves or stations.[13] In South Australia, the requirement that an enrolled elector be domiciled in a particular subdivision for at least one month operated in 1901 as an effective block to Aboriginal enrolment. Aborigines in Queensland and Western Australia were excluded from the franchise in those States in 1901, and were therefore not entitled to vote in the first federal elections.[14]

The Constitution empowered the Commonwealth Parliament to legislate for a federal franchise, subject to the protection granted by s 41 and the requirement in s 8 that a federal franchise law should apply uniformly to the election of members of the House of Representatives and to that of Senators. The legislative power of the Commonwealth Parliament in this regard comes from s 51(xxxvi) of the Constitution. As seen, s 30 sets the qualification of electors of members of the House of Representatives *"[u]ntil the Parliament otherwise provides"*. Section 8 makes the qualification of electors of Senators that prescribed by the Constitution *or the Parliament* for electors of members of the House of Representatives. Section 51(xxxvi) empowers the Parliament to make laws with respect to *"matters in respect of which this Constitution makes provision until the Parliament otherwise provides"*. (Emphases added.)

The Parliament exercised that power to legislate on the franchise by the *Commonwealth Franchise Act* No 8 of 1902, entitled "An Act to provide for an Uniform Federal Franchise". By s 3 of that Act, the people entitled to vote at elections for members of the Senate and House of Representatives were, subject to the disqualifications in s 4, all male or female people of 21 years of age or over

(a) Who have lived in Australia for six months continuously, and

(b) Who are natural-born or naturalised subjects of the King, and

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12 *Parliamentary Electorates and Elections Act* 1893 (NSW), ss 23-24.

13 See Parliament of Australia, House of Representatives, Select Committee on Voting Rights of Aborigines, *Report*, AGPS, 1961, at 5.

14 *Elections Acts* 1885 and 1897 (Qld), ss 6-8; *Constitution Acts Amendment Act* 1899 (WA), ss 15-17.

(c) Whose names are on the Electoral Roll for any Electoral Division.

Section 4 disqualified people otherwise entitled to vote who were of unsound mind, or who had been attainted of treason, or who had been convicted and were under sentence or subject to be sentenced for any offence punishable under the law of any part of the British Empire by imprisonment for one year or longer. The second paragraph of s 4 provided that no "aboriginal native of Australia, Asia, Africa or the Islands of the Pacific except New Zealand" could be enrolled as an elector, unless that person was a State elector within the protection of s 41 of the Constitution. Since enrolment on a Commonwealth Electoral Roll was, by para (c) of s 3, one of the qualifications of the franchise, any person covered by this prohibition on enrolment was thereby denied the franchise. This provision thus excluded from the Commonwealth franchise all Aborigines in Queensland and Western Australia, nomadic Aborigines in South Australia and Aborigines domiciled on stations or reserves in New South Wales.

Section 5 of the Act provided that: "No person shall be entitled to vote more than once at the same election." The Constitution had prohibited plural voting in elections for the Senate (s 8) and the House of Representatives (s 30) held on State franchises until the Commonwealth Parliament had itself enacted a federal franchise. It was therefore in keeping with the spirit of the Constitution that the Commonwealth Act, by which the "Parliament otherwise provide[d]" for the franchise, should in its turn prohibit plural voting.

The pragmatism which had contained debate on then controversial aspects of the franchise during the Conventions and which had led to the absence of any permanent provision on the matter in the Constitution was less marked when the Commonwealth Franchise Bill was debated in 1902. Two matters in particular were the subject of heated discussion. The first of these was the issue of female suffrage. The Bill submitted to the Parliament provided that "all adult persons", inhabitants of Australia and resident in Australia for six months continuously, natural-born or naturalised British subjects, whose names were on the Electoral Roll, should be entitled to vote. It thus provided for full adult suffrage (for whites, at least) in Commonwealth elections at a time when only South Australia and Western Australia had legislated to give women the vote in State elections (though Bills for female suffrage had been passed by the Legislative Assemblies of New South Wales, Victoria and Tasmania, and had been defeated in the upper houses of those States). The question of female suffrage was thus still a very vexed one, and the debate on the Commonwealth Franchise Bill contains some excellent samples of the arguments of the anti-female suffrage camp.

Senator Pulsford (NSW), for example, was "not prepared to describe women's suffrage as a blessing. I would rather describe it as an attempt to throw a portion of the white man's burden upon the white woman".[15] Several members of both Houses claimed that women would simply vote as their husbands, fathers or brothers voted.[16] Several opposed giving women the vote on the grounds that (allegedly) women did not want it.[17] None of the opponents of female suffrage were prepared openly to justify their opposition on the basis of alleged mental inferiority. All purported to believe that women's intelligence was as great as men's (though several suggested that women were more subject to influence than men).[18] However, it was argued, women's views should be asserted indirectly in the domestic sphere rather than directly at the ballot box. Sir Edward Braddon spoke poetically on this:[19]

> It is not because I think women inferior to men in any respect that I would deny them the franchise. I look upon them as elevated above us in nearly everything that is most valuable and of the best in nature. I cannot but see that they have their special functions - the duties of the mother with the children at her knee, and all of the many duties of a home - which men cannot by any possibility perform for them, and I would not have them coming down into the hurly-burly of the political contest to cast their votes, although they cast them for me.

It was this "hurly-burly of the political contest" for which opponents of female suffrage argued women to be unfitted. The vote would degrade them, and distract them from their true vocation. "I am very much inclined to think", said Sir William McMillan, "that we are going to do away with that refinement which makes all the difference between the sexes."[20] Senator Fraser waxed eloquent in the same vein:[21]

> Woman has very many duties to attend to. She naturally expects to be married, and very properly, because if she did not marry, the race would come to an end. If she is married she has to attend to her household and to her little ones, and if she does her duty as mothers do - as, at any rate, 99 per cent of them do - she has her hands pretty full from morning until night. These are her duties, and they are

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15 Parliament of Australia, Senate, First Parliament, First Session, *Debates*, Vol IX, at 11464 (hereafter, "*Senate Debates*").

16 For example, Senator Sir John Downer, *Senate Debates*, at 11480.

17 For example, Senators Symon, Gould and Harney, *Senate Debates*, at 11453, 11478 and 11488, respectively.

18 For example, Sir Edward Braddon, Parliament of Australia, House of Representatives, First Parliament, First Session, *Debates*, Vol IX, at 11937 (hereafter, "*HRep Debates*").

19 *HRep Debates*, at 11936.

20 *HRep Debates*, at 11948.

21 *Senate Debates*, at 11557 - 8.

> very important duties, and if she performs them as the majority of mothers do, I say she ought not to be dragged unnecessarily into politics ... Woman naturally and properly clings to man. Naturally and properly, by an instinct born in her, she seeks the advice of man, and looks up to him for assistance and guidance. She looks to man with confidence, and man does not, as a rule, disappoint her. If he does, then he is a miscreant. I say that woman should not enter into the arena of politics, the turmoil of it, and the chicanery of it.

It was even suggested that to give the vote to women was contrary to the Divine Plan:[22]

> The question is whether women are physiologically capable of doing all that will be required of them. We are, in my opinion, running counter to the intentions and to the design of the Great Creator, and we are reversing those conditions of life to which woman was ordained. Woman will be giving away the special position which she now occupies in her relations to man. As her dependence on man decreases, so she will have to assume the positions which men have hitherto occupied, and she will deprive men of those opportunities which have heretofore been presented to them of discharging their duties as the protectors and sustainers of the weaker sex.

However, few of those who were against women's suffrage in principle were prepared to vote against its inclusion in the Bill, believing that there should be a uniform franchise which, given female suffrage in South Australia and Western Australia and the effect of s 41 of the Constitution, meant adult suffrage. Senator Harney expressed this view forcefully: "It is more desirable that we should have uniformity than that women should be denied the franchise."[23] An amendment by Senator Pulsford (NSW) that cl 3 should read: "Subject to the disqualifications hereafter set out, all adult male persons ...", was negatived. In the House of Representatives, no such amendment was attempted, but members expressed fears as to possible misinterpretation of the word "adult", and the clause was therefore amended to read "all persons not under 21 years of age whether male or female married or unmarried".

The second matter which occasioned lengthy debate was the question of voting rights for non-whites. Clause 4 originally read:

> No aboriginal native of Asia, Africa, or the Islands of the Pacific, or person of the half blood, shall be entitled to have his name placed on an electoral roll unless so entitled under section forty-one of the Constitution.

On this matter, those opposed to extending the franchise were in a majority. Moreover, in contrast to the debate on female suffrage, no

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22 *HRep Debates*, at 11941.

23 *Senate Debates*, at 11489.

attempt was made to cloak opposition to enfranchisement in pious phrases about higher duties, equal intelligence, etc. The language of the debate was blatantly racist. In relation to Australian Aborigines, an amendment was moved in the Senate and accepted by the House of Representatives so that the clause disqualified any "aboriginal native of Australia, Asia, Africa ...". Speakers on the issue described the Australian Aborigines as degraded and uncivilised; O'Malley remarking that "[t]here is no scientific evidence that the [Australian Aborigine] is a human being at all".[24] Sir Edward Braddon linked his remarks on Aboriginal enfranchisement to the female suffrage issue:[25]

> If anything could tend to make the concession of female suffrage worse than it is in the minds of some people, it would be the giving of it to any of the numerous gins of the blackfellow. It cannot be claimed, I take it, that the aboriginal native is a person of very high intelligence, who would cast his vote with a proper sense of the responsibility that rests upon him. And it can even less be claimed that the gins would give a vote which would be intelligible.

A few members expressed unwillingness to deny the vote to the original "owners" of the country, but they were in a very small minority[26] and, in this truly "uncivilised" climate of debate, the amendment was passed.

In relation to the Chinese in Australia, members were even more virulent in the attack, referring to them as idolators,[27] with no idea of political liberty.[28] Fears were also expressed that the Queensland government might naturalise the Melanesian "kanaka" labourers and thus give them access to the vote.[29] In only two respects was there any real support for enfranchising non-whites. First, a motion by Sir William Lyne to omit the words "or persons of the half-blood" was carried.[30] Secondly, it was believed by many members of both Houses that any Maoris who otherwise qualified should be enfranchised, partly on the grounds that their intelligence was (allegedly) superior to that of other "aboriginal natives"[31] and partly on the grounds that Maoris were already enfranchised in New

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24 *HRep Debates*, at 11930.

25 *HRep Debates*, at 11977.

26 For example, Senator O'Connor, *Senate Debates*, at 11584.

27 For example, Senator Matheson, *Senate Debates*, at 11468.

28 For example, Senator Pearce, *Senate Debates*, at 11496.

29 See footnote 28.

30 *HRep Debates*, at 11975 and 11980.

31 For example, Mr O'Malley, *HRep Debates*, at 11930; Senators Millen, Gould and Staniforth Smith *Senate Debates*, Vol X, at 13007, 13008 and 13009, respectively.

Zealand (that is, in Ao Tearoa), and in fact had been since 1868.[32] The clause was therefore further amended to read:

> No aboriginal native of Australia, Asia, Africa or the islands of the Pacific except New Zealand shall be entitled to have his name placed on an Electoral Roll unless so entitled under section forty-one of the Constitution.

Despite these two amendments, the debate on cl 4 clearly requires some qualification to be made to the claim by the Joint Select Committee on Electoral Reform, quoted earlier,[33] that "Australia's commitment to extending the vote universally has been apparent from the commencement of the federation".

Apart from race, other disqualifications were set out in s 4 of the 1902 Act:

> No person who is of unsound mind and no person attainted of treason, or who has been convicted and is under sentence or subject to be sentenced for any offence punishable under the law of any part of the King's dominions by imprisonment for one year or longer shall be entitled to vote at any election of members of the Senate or the House of Representatives.

There was little debate about this, except to substitute the phrase "punishable under the law of any part of the King's dominions" for the earlier phrase "punishable under the law of the Commonwealth or of a State",[34] and to negative an attempted amendment disqualifying a person "in receipt of charitable relief as an inmate of a public charitable institution".[35]

Post-1902 Extensions to the Franchise

The franchise enacted by the 1902 Act continued until 1961, although the relevant sections themselves were subsumed into the *Commonwealth Electoral Act* 1918 as s 39 (which is - since the renumbering following extensive amendment of that Act in 1983 - s 93). Section 39, as passed in 1918, read:

> (1) Subject to the disqualification set out in this Part, all persons not under twenty-one years of age, whether male or female, married or unmarried -
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> (a) who have lived in Australia for six months continuously, and

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32 For example, Senators Millen and Gould, *Senate Debates*, Vol X, at 13007 and 13008, respectively.

33 See above.

34 *Senate Debates*, 11579 - 80.

35 *Senate Debates*, at 11574 - 6.

(b) who are natural-born or naturalised subjects of the King,

shall be entitled to enrolment subject to the provisions of Part VII of this Act.

(3) All persons whose names are on the roll for any Electoral Division shall, subject to this Act, be entitled to vote at elections of members of the Senate for the State of which the Division forms part and at elections of members of the House of Representatives for the Division, but no person shall be entitled to vote more than once at any Senate election or at any House of Representatives election or at more than one election for the Senate or for the House of Representatives held on the same day.

(4) No person who is of unsound mind and no person attainted of treason, or who has been convicted and is under sentence for any offence punishable under the law of any part of the King's dominions by imprisonment for one year or longer, shall be entitled to have his name placed on or retained on any roll or to vote at any Senate election or House of Representatives election.

(5) No aboriginal native of Australia, Asia, Africa or the Islands of the Pacific (except New Zealand) shall be entitled to have his name placed on or retained on any roll or to vote at any Senate election or House of Representatives election unless so entitled under section forty-one of the Constitution.

The *Commonwealth Electoral Act* No 26 of 1961 extended the franchise by omitting sub-s (5) and substituting therefore two new subsections:

(5) A person who is -

(a) the holder of a temporary entry permit for the purposes of the Migration Act 1958; or

(b) a prohibited immigrant under that Act

is not entitled to enrolment under Part VII.

(6) An aboriginal native of Australia is not entitled to enrolment under Part VII, unless he -

(a) is entitled under the law of the State in which he resides to be enrolled as an elector of that State, and upon enrolment, to vote at elections for the more numerous House of the Parliament of that State, or, if there is only one House of the Parliament of that State, for that House; or

(b) is or has been a member of the Defence Force.

The 1961 Act had originally been introduced into the Parliament in 1960, but had reached only the second reading stage when the Parliament was prorogued. Rather than being restored to the Notice Paper, it was reintroduced as the Commonwealth Electoral

Bill 1961 on 21 March, 1961 because there were some verbal amendments which, however, were minor and did not change the substance of the Bill. In his Second Reading speech on 8 November, 1960, the Minister for the Interior, Mr Freeth, had explained the purpose of this change to the franchise thus:[36]

> It is also proposed in this Bill to widen the provisions of section 39 of the *Commonwealth Electoral Act* to permit British subjects of non-European origin to enrol and to vote, provided they are not subject to any impediment under the *Migration Act* which would prevent them remaining in Australia as permanent citizens. The holders of temporary permits or prohibited immigrants under that Act will not be entitled to enrolment.
>
> The Bill also removes the objectionable and outmoded reference to aboriginal natives of certain other countries.
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> Under the existing law, a British subject, born in say, Hong Kong, Singapore or Fiji, even though he may hold a certificate of registration as an Australian citizen as distinct from a certificate of naturalisation, is not entitled to enrolment. This anomaly is remedied.

This change created another anomaly, however, by entitling people who were "aboriginal natives" (as defined by the High Court in *Muramats v Commonwealth Electoral Officer (WA)*[37]) to be enrolled and to vote while denying the right to the "aboriginal natives" of Australia. This new anomaly was vigorously criticised by members of the Labor Opposition in both Houses. The Deputy-Leader of the Opposition, Mr Whitlam, described this as "the re-enactment of a blot on the Australian statute book"[38] and went on:[39]

> The obnoxious thing about the original enactment and the re-enactment is that the vote is being denied to aborigines because they are aborigines. The vote is not being denied to Australian citizens, as aborigines are, because they are nomadic, illiterate, spendthrift, unhygienic or for any of the reasons which are commonly advanced for depriving aborigines of the vote.

When the House of Representatives went into Committee, Mr Whitlam moved an amendment to delete the proposed sub-s (6), and the same amendment was moved also in the Senate. In both Houses, however, it was defeated.

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36 Parliament of Australia, 23rd Parliament, Second Session, *Debates*, House of Representatives, Vol 29, at 2549.

37 (1923) 32 CLR 500. See discussion below.

38 Parliament of Australia, 23rd Parliament, Third Session, *Debates*, Vol 31, House of Representatives, at 1097.

39 Work cited at footnote 38, at 1098.

In contrast to the debates in 1902, the Government speakers in the debate on the 1961 Bill did not (with one or two exceptions) support the denial of the franchise to Aborigines on overtly racist grounds. The majority of Government speakers professed a desire to see an Aboriginal franchise, but pointed to difficulties which, they argued, needed to be settled before this could be provided in legislation. The Government had announced that there would be a Select Committee of the House of Representatives to inquire into the voting rights of Aborigines, to be composed of four Government and three Opposition members.[40] Government speakers argued that no change should be made until the Committee had made its recommendations for resolution of these "difficulties". The sorts of difficulties referred to included problems of enrolling nomadic people; whether enrolment should be compulsory; the provision of polling places for Aborigines in remote areas, etc. The Opposition response was that "[t]he difficulties in aborigines voting are exactly the same as the difficulties attending all outback voting".[41]

The implicit paternalism in this approach, insisting on the resolution of "difficulties" before extending the franchise, emerged more clearly in the speeches of several Government members who spoke of Aborigines as gentle children, easily swayed[42] (an argument with obvious overtones of the 1902 debate on female suffrage[43]), excellent cricketers and footballers, but with a distressing inherent trait to go "walkabout"![44] Even this patronising belittlement was, of course, more gently presented than the blatant racism of the earlier debate, though the remarks of Mr Killen are reminiscent of that:[45]

> I have been a jackeroo on properties in the far west of Queensland, and I know that some of the aborigines on the mustering camps have seen an aeroplane go over and have referred to it as a high-powered buggy. I put it to the honourable gentleman and to the committee: Do honourable members believe that one could take hold of a mentality of that description and project it into a civilised community and make it embrace all the responsibilities of democracy and understand the obligations and complexities of voting? If so, the honourable gentleman and the committee, indeed, are seriously misunderstanding the intelligence of the aborigines.

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40 The three Opposition members had already been appointed, but it was not until well into the debate on the Bill that the Government members were chosen, a fact of which the Opposition made much.

41 Work cited at footnote 38, at 1406, per Mr Whitlam.

42 Parliament of Australia, 23rd Parliament, Third Session, *Debates*, Vol 19, Senate, at 894 and 897.

43 See above.

44 Work cited at footnote 42, at 962.

45 Work cited at footnote 38, at 1408.

It was not until 4 May, 1961 that the Select Committee on Aboriginal voting rights was fully constituted. Its terms of reference required it to report by 31 October, 1961. In fact, the Committee bettered this deadline, and reported on 19 October. The members of the Committee had, by an amendment to the terms of reference, moved by the Leader of the Opposition, Mr Calwell, been empowered to add a protest or dissent to the Committee's report. However, no member of the Committee chose to exercise that right. Nor did the Committee in its report give much respect to the supposed "difficulties" associated with a nomadic and tribal lifestyle. Indeed, the report suggested that "in the course of a few years, there will be no aborigines living in the completely tribal state".[46]

The report estimated[47] that there were about 30,000 Aborigines in the Commonwealth still without the franchise - that is, 30,000 who did not fall within the protection of s 41 of the Constitution as being entitled to vote for the more numerous House of the Parliament of their States, or who were not service personnel or ex-service personnel. These 30,000 were excluded by virtue of the franchise provisions then current in Queensland, Western Australia and the Northern Territory. The report summarised those provisions briefly.[48]

In Queensland, the *Elections Acts* 1915-59 provided by s 11 that "no aboriginal native of Australia or the Islands of the Pacific" was qualified to be enrolled as an elector, and, by s 11A, that no person who was a Torres Strait Islander or who was a "half-caste" (as defined in the *Aboriginals Protections and Restriction of the Sale of Opium Acts* 1897-1901) and subject to the control and supervision of the Protector of Aboriginals, was qualified to be enrolled as an elector. Under Queensland legislation, "aboriginal" meant a person of more than half Aboriginal descent, and included "half-castes" who associated with people of more than half Aboriginal descent. There was provision for the remaining "half-castes" to gain exemption from the prohibition on voting, but such exemption was not available to Torres Strait Islanders. No particular franchise rights were provided under Queensland law to Aboriginal service or ex-service personnel.

Section 18 of the Western Australian *Electoral Act* 1907-59 disqualified from voting every "native", as defined in the *Native Welfare Act*, who was not the holder of a Certificate of Citizenship

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46 Parliament of Australia, House of Representatives, Select Committee on the Voting Rights of Aborigines, *Report*, AGPS, 1961, at 11 (hereafter, "*Report*").

47 And it could only be an estimate, given the absence of systematic census records - see *Report*, at 2, para 17.

48 *Report*, at 5 - 7, paras 42 - 60.

under the *Natives (Citizenship Rights) Act* 1944-58. The definition of native referred to appears in s 2 of the *Native Welfare Act*:

> "Native" means -
>
> (a) any person of the full blood descended from the original inhabitants of Australia; and
>
> (b) any person of less than full blood who is descended from the original inhabitants of Australia or from their full blood descendants, except a quadroon or person of less than quadroon blood.

A proviso to the definition exempted service and ex-service personnel from the definition of "native". Section 4 of the *Natives (Citizenship Rights) Act* entitled adult "natives", as defined, to apply for a "Certificate of Citizenship" which, if granted, would give the holder the right to enrol and vote.

The Northern Territory franchise was, by s 22 of the *Electoral Regulations*, denied to all Aboriginal natives of Australia who were "wards" under the *Welfare Ordinance* 1953-60, unless they were or had been members of the Defence Forces. All but 89 of the approximately 17,000 Aborigines in the Northern Territory at the time were "wards" ("aboriginal" in the Northern Territory being in practice taken to include only people of full Aboriginal descent).

In addressing itself to the situation of the estimated 30,000 people disenfranchised under these provisions, the report claimed that:[49]

> [t]he Commonwealth exclusion of some aborigines up to the present has not been based upon race but upon the non-incorporation of tribal and nomadic aborigines within the general community and the irrelevance of the general Australian society to their way of life. But more and more they are being integrated into the Australian community and there are no longer any great number of nomads.

The above discussion of the debate on the 1961 Bill suggests that this analysis too generously exempted the legislature and the legislation from any allegation of racism. However, despite its sometimes questionable phrasing,[50] the report professed itself as eschewing such

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49 *Report*, at 2, para 21. This phraseology, referring to Aborigines as being "more and more ... integrated into the Australian community" reproduces the revealing habit, common in public and private discourse by white Australians, of differentiating Aborigines from whites by reference to "Aboriginals" and "Australians". One can also discern an underlying racism in the Committee's frequent references (see the subsequent quotations) to integration in terms suggestive of progress to a "higher" state.

50 See footnote 49.

racism (in terms which perhaps give the lie to the exemption). The Committee recommended:[51]

> that the right to vote at Commonwealth elections be accorded to all aboriginal and Torres Strait Islander subjects of the Queen of voting age, permanently residing within the limits of the Commonwealth.

and stated that:[52]

> [Y]our Committee ... recommends as it does because any other basis of the franchise would either discriminate on the grounds of race, or penalise for lack of opportunity ... It is considered better that a right be granted before there is a full capacity to exercise it on the part of some individuals, than that others should suffer the frustration of being denied a right that they can clearly exercise ... Your Committee has dismissed proposed tests of literacy, housing standards, permanency of employment or the possession of a bank balance, on the ground that they are not applicable to the electorate at large ... Your Committee dismissed the suggestion that a ward of the Commonwealth in the Northern Territory, or a "protected native" in a State, should not vote, because Australians of European origin are not usually disqualified from the franchise by their need for special public assistance.

But, while the Committee was not prepared to allow that the "difficulties" referred to earlier justified any delay in enfranchising Aborigines, it did believe that steps should be taken to deal with those matters. For a start, it recommended that, as a temporary measure, "the enrolment of aborigines and Torres Strait Islanders be voluntary, but when enrolled, compulsory voting be enforced".[53] The Committee expressed itself as[54]

> concerned that the extension of the compulsory provisions of the *Commonwealth Electoral Act* to many aborigines still in the tribal state or recently emerged from the tribal state, or not completely integrated into the Australian community could result in grave injustice. These people have not perceived the relevance of parliamentary elections to their lives, so to compel enrolment would be harsh ... Your Committee is also concerned at the danger of electoral malpractice and the possible use of undue influence by those having contact with aborigines ... Your Committee considers voluntary enrolment a temporary provision in respect of the aboriginal people, and one which creates immediately an entitlement to the franchise for those who desire the franchise, without injustice to those who do not desire it or simply have no use for it in a tribal or nomadic life.

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51 *Report*, at 8, para 77.

52 *Report*, at 9, paras 88 - 92.

53 *Report*, at 8, para 77.

54 *Report*, at 8 - 9, paras 78 - 80.

There is, in the reference to undue influence, a paternalism reminiscent of that exhibited in the 1902 debate on the inclusion of women in the franchise, with its suggestions that women were more subject to influence than men (see above).

Secondly, the report stressed that:[55]

> the extension of the franchise recommended by your Committee is to people who have no history of exercising a franchise and who have no knowledge of electoral and political rights, and, therefore, every help must be given in their enrolment and political education.

and recommended:[56]

> that the matter of enrolment should not be left to welfare officers, private persons, organisations, or political parties and recommends that the administrative procedures of the Commonwealth Electoral Office be altered to provide for specially qualified electoral officers to receive personal applications for enrolment at places accessible to aborigines ... It is recommended that the voluntary expression of a wish to enrol by an aboriginal to such officers, would be sufficient for them to help in the completion of an enrolment card ... It is recommended by your Committee that a penal provision be inserted in the amending Act in respect of the use of duress or undue influence on aborigines in the exercise of their franchise ... It is recommended that the procedures of voting and the structure of the Parliament be explained to aborigines on government settlements and on missions and other convenient locations. In this connexion, well prepared visual aids and publications would be helpful.

Finally, the Committee suggested the need for more polling places in the Northern Territory.[57]

The report also pointed out that many Aborigines who were in fact entitled to vote were unaware of that fact and that, in some cases, State authorities had actively hindered the Commonwealth Electoral Office in informing these people of their rights. It referred to the definition of "aboriginal native" provided by the Attorney-General's Department to the Chief Electoral Officer in 1929 as "a person in whom aboriginal descent preponderates",[58] and stated that it had thereby established:[59]

> that thousands of such people in Queensland and Western Australia, who are already integrated into the community and are not living in the tribal state, have the right to be enrolled and to vote at Commonwealth elections but are unaware of the fact

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55 *Report*, at 9, para 81.

56 *Report*, at 9, paras 82 - 85.

57 *Report*, at 9, para 86.

58 *Report*, at 4, para 33.

59 *Report*, at 4, para 34.

and noted that, in 1945, the Queensland Government had blocked the Commonwealth Electoral Office in its attempts to inform Aborigines at the Cherbourg Aboriginal Settlement of their rights.[60]

> Your Committee found in other parts of Queensland and in Western Australia that persons who have not a preponderance of aboriginal descent have not been informed of their rights ... A similar lack of knowledge was encountered throughout Australia in respect of an aboriginal ex-serviceman's entitlement to enrol.[61]

In New South Wales, where Aborigines were enfranchised, many had not enrolled.[62] In Victoria, on the other hand, the percentage of Aboriginal enrolment was high.[63] In South Australia, the compulsory enrolment provisions were not enforced by the Commonwealth Electoral Officer for that State in the case of[64]

> aboriginal people who are known to be primitive, illiterate, nomadic, periodically nomadic, or associated only loosely or periodically with missions, or with government agencies for native welfare. The compulsory provisions apply only to persons whose names appear on the electoral roll and who fail to vote.

The Committee therefore recommended:[65]

(1) That, because the aboriginal people in New South Wales and Victoria have long been integrated into the Australian community, early administrative action be taken so that the compulsory provisions of the Commonwealth Electoral Act relating to enrolment and voting be applied to them.

(2) That wherever it is relevant for the Commonwealth Electoral Office to act upon the definition of an Australian aboriginal, that definition should be that which is the practice in the Northern Territory, namely, a person entirely of aboriginal descent.

(3) That early action be taken by the Commonwealth Electoral Office to inform aboriginal and Torres Strait Islander servicemen and ex-servicemen, and people entitled to the franchise under the terms of the Attorney-General's memorandum to the Commonwealth Electoral Officer of 25th January, 1929, of their entitlement to be enrolled and to vote.

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60 *Report*, at 4, para 35.

61 *Report*, at 4, paras 36 - 37.

62 *Report*, at 4, para 38.

63 *Report*, at 4, para 39.

64 *Report*, at 4, para 40.

65 *Report*, at 4, para 41. The definition in (2) is much narrower than that used in relation to affirmative action, job creation and special welfare schemes. Here, however, the narrower definition is desirable as it limits the restriction on the Aboriginal franchise which would flow from a broader definition.

The *Commonwealth Electoral Act* No 31 of 1962 followed the Select Committee's recommendations, extending the franchise to all Aborigines by omitting s 39(6) of the 1918 Act (inserted by amendment in 1961).[66] This amendment had the effect of allowing full adult suffrage in Australia regardless of race. The position of tribal Aborigines was recognised by the insertion of s 42(5) into the *Commonwealth Electoral Act* 1918, exempting Aboriginal natives of Australia from the requirement of compulsory enrolment. However, Aborigines who chose to enrol thereby became subject, along with all other enrolled voters, to the obligation in s 42(3) to notify change of residence from one address to another within the subdivision for which they were enrolled, and to vote.

The 1962 Act also made a number of amendments to the sections on electoral offences to deal with people endeavouring, by the offer of reward or benefit, to induce Aborigines to enrol as voters, or people endeavouring by threats to dissuade Aborigines from enrolling.

In debate, Mr Beazley (Labor) stated that:[67]

> we are enacting for the first time a logical and just basis of entitlement to the franchise, which elects the Parliament of the Commonwealth and forms the Executive Government of the Commonwealth.

Only one of the Select Committee's recommendations was not given effect. The Committee had recommended that enrolment be compulsory for Aborigines in New South Wales and Victoria as not being tribalised. Instead, s 3 of the 1962 Act made enrolment voluntary for all Aborigines. The Opposition moved an amendment in both Houses[68] restoring the Committee's recommendation. In arguing for the amendment in the House of Representatives, Mr Beazley commented:[69]

> The first reason for the amendment is that the electoral law should not have any provision which appears to make a differentiation between electors solely on the ground of race in the law governing enrolment. It is true that in Australia, only aborigines are nomadic and tribal. That is the reason why the Committee recommended that there should not be compulsory enrolment in certain States. But they are not nomadic and tribal in New South Wales and Victoria. A provision for voluntary enrolment of aborigines was recommended by the Committee as a device to cope with two situations - that some aborigines wanted the vote, and that to the nomadic and tribal

66 See above.

67 Parliament of Australia, 24th Parliament, First Session, *Debates*, Vol 35, House of Representatives, at 1703.

68 Work cited at footnote 67, at 1786; and Vol 21, Senate, at 1305.

69 Work cited at footnote 67, at 1786 - 7.

> aborigines compulsory enrolment would be an unjust burden. The Committee felt that this provision should not apply in New South Wales and Victoria.

The amendment was, however, negatived in both the House of Representatives and the Senate.[70]

The only other major extension made to the franchise established in 1902 was by the *Commonwealth Electoral Act* 1973, which amended s 39 by substituting the words "eighteen years" for the words "twenty-one years". The measure was supported unanimously and the Opposition Liberal-Country Party coalition made no substantive criticism of the Bill in the debate, though, as might have been expected, given that the Bill was the first legislative proposal of the new Labor government, elected after 23 years in opposition, there was much political point-scoring. Despite this, the Bill was not debated in Committee in either House, but proceeded directly from the second to the third reading.

There were two minor extensions to the 1902 franchise in the 1983 amendments - the *Commonwealth Electoral Legislation Amendment Act* No 144 of 1983. These were achieved by an alteration of the disqualification provision. Section 93(8) (formerly s 39(4)) disqualifies people convicted and under sentence for an offence punishable under the law of the Commonwealth or of a State or Territory by imprisonment for five years or longer. Thus, people under sentence for offences punishable by between one and five years imprisonment are no longer disqualified, nor are people under sentence for an offence under the law of "any part of the King's dominions" outside Australia. The disqualification in relation to treason was given a less archaic phrasing - "convicted of treason or treachery and ... not ... pardoned". Finally, the disqualification on the ground of unsound mind was made clearer - a person who "by reason of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting" is disqualified. People whose mental infirmity does not interfere with their understanding of the exercise of the franchise are therefore not disqualified.

Section 93(7), formerly s 39(5), also disqualifies a person who is:

> (a) the holder of a temporary permit for the purposes of the Migration Act 1958; or
>
> (b) a prohibited non-citizen under that Act

from enrolment and therefore from voting. The reference to "prohibited non-citizen" was substituted for "prohibited immigrant"

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70 See footnote 67; and Vol 21, Senate, at 1308.

by the *Migration (Miscellaneous Amendments) Act* No 84 of 1983 to accord with changes to the *Australian Citizenship Act* 1948. The alteration is terminological rather than substantive.

In one respect the franchise first established in 1902 has been limited rather than extended. This occurred in 1981 by the *Statute Law (Miscellaneous Amendments) Act* No 176 of that year. Section 32 of that Act amended s 39(1)(b) of the *Commonwealth Electoral Act* (which became s 93(1)(b) following the renumbering occasioned by the 1983 amendments) by substituting for "[all people who are] British subjects" the following paragraph:

> (i) Australian citizens; or
>
> (ii) British subjects (other than Australian citizens) who were electors on the date immediately before the date fixed under subsection 2(5) of the Statute Law (Miscellaneous Amendments) Act 1981.

The date referred to was "a date to be fixed by proclamation", and s 39(1)(b)(ii) was proclaimed to come into operation on 26 January, 1984. The effect of this amendment was that British subjects not Australian citizens but resident in Australia, even if resident in the country for years, were no longer entitled to vote in Australia unless they had been enrolled as voters before 26 January, 1984. The proclamation of 26 January, 1984 as the date on which this limitation on the franchise would take effect was gazetted on 17 October, 1983, thus giving British subjects not yet enrolled a three-months grace period in which to enrol. However, as from Australia Day 1984, non-citizens resident in Australia could gain the right to enrol and to vote only if they became naturalised Australian citizens. As a corollary to this limitation, the requirement in the then s 39(1)(a) that people, to be entitled to enrol and to vote, should be people "who have lived in Australia for six months continuously" was omitted.[71]

Thus, the Commonwealth franchise has become one based solely on citizenship and on adulthood.[72] All Australian citizens of 18 years or more (unless disqualified by mental incapacity, imprisonment, etc) are entitled to vote. In addition, British subjects

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71 Section 23 of the amending Act also amended the opening words of s 39(1), changing them from "Subject to the disqualifications set out in this Part, all persons not under 18 years of age, whether male or female, married or unmarried ..." to "Subject to subsections (5) and (6) and Part VII [the registration provisions] all persons ...". The limitation in relation to age was replaced as para (a) - "who have attained 18 years of age" - in the place vacated by the repealed residency requirement.

72 As commonly understood, rather than in the sense which the High Court, in *King v Jones* (1972) 128 CLR 221, gave to the word "adult" as used in the Constitution. See below.

not Australian citizens, enrolled before 26 January, 1984, retain the franchise.

There remains, however, the problem that this franchise is not guaranteed. It could be guaranteed *de facto* by a communal dedication to democratic principles - but the history of the development of the present franchise suggests that such commitment is a less inherent characteristic of the country than our mythology would allow. It could be entrenched by constitutional protection[73] whereby all citizens would be assured of life, liberty, the pursuit of happiness and the vote. But we have seen that the Constitution gives no such assurances. The franchise as it exists today is the gift of Parliament and what Parliament gives, Parliament may take away. It is completely within the power of the Parliament to legislate for a more restricted franchise.

Admittedly, the prospect may be remote. But it is not impossible to imagine changes of circumstances which could conceivably lead to such restrictions. For example, an extension of immigration from South-East Asia, as a result perhaps of the return of Hong Kong to the People's Republic of China, is quite likely to intensify and spread the hostility which is, unfortunately, already being expressed by some sections of the Australian community.[74] If such developments were coupled with intensified economic downturn and even higher levels of unemployment, it is not utterly fanciful to hypothesise the passage of legislation restricting the franchise on racial or national grounds. We can be thankful if such scenarios for restriction are imaginative, but we must acknowledge that an attitude of "it couldn't happen here", when there are no constitutional barriers to "it" happening, is somewhat foolhardy.

It is in this context that a discussion of the interpretation of s 41 of the Constitution becomes significant. While the present Commonwealth franchise continues, there is no call for the protection of that section, for the Commonwealth franchise is currently complete.[75] Were that franchise to be restricted, then the question of the true meaning of s 41 would arise, because the Constitution contains no other protection of voting rights.

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73 Which would amount to a guarantee, given the present difficulties of constitutional amendment.

74 See, eg, footnote 2.

75 Unless educational changes, etc, make a further lowering of the age of majority feasible.

Section 41 and the Franchise

The intention of s 41 as finally passed by the Constitutional Convention[76] was that a federal franchise should not deprive of a vote in federal elections any adult entitled to vote for the more numerous House of that adult's State Parliament. The *effect* of the section may, however, be open to doubt. Quick and Garran[77] suggested two possible interpretations. The first is that s 41 preserves to people qualified to vote in State elections a right to vote in federal elections even if they do not fall within the qualifications set by Commonwealth legislation establishing a federal franchise. The second is that s 41 prevents the Commonwealth Parliament from establishing a franchise "which does not extend throughout the Commonwealth every franchise existing, with respect to adult persons in any State".[78] It would be surprising if the latter interpretation could be upheld, since this was the very possibility which was given as the reason for rejecting Holder's compromise amendment in 1897.[79] Whether or not a federal franchise must be expressed by a law of the federal Parliament as uniform in its application throughout the States, the wording of s 41 does not seem to require that every State elector shall be enfranchised by such a uniform law. It states, rather, that whether or not a State elector is enfranchised by the federal Act, that person is enfranchised by the Constitution itself. Section 41 says: "No adult person ... shall be prevented by any law of the Commonwealth from voting" at federal elections. It does not say: "No adult person ... shall be denied a vote by any law of the Commonwealth." Thus, in the case of female suffrage, where this existed in a particular State at the time of introduction of a federal franchise Act, it would be possible for that federal Act to prescribe manhood suffrage as a federal franchise. All adult males would then be federally enfranchised by the federal Act. All adult females in the particular State would be federally enfranchised by the joint effect of s 41 of the Constitution and the franchise law of their particular State.

However, there is a further confusion contained in the wording of s 41, arising from the phrase "has or acquires a right to vote" in State elections. Quick and Garran point out[80] three possible interpretations of this: first, that the right to vote in State elections being considered may be acquired at any time under a State law

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76 For discussion of debate in the Conventions on the clause which became s 41, see above.

77 Work cited at footnote 6.

78 Quick and Garran, at 484.

79 See above.

80 Quick and Garran, at 486.

passed at any time; secondly, that the right may be acquired at any time, but only under a State law passed before the federal franchise is fixed by a law of the Commonwealth; and thirdly, that the right must have been acquired by the particular person before the federal franchise was fixed by such federal law. The learned authors concluded from examination of Holder's comments in the debates (discussed earlier) that he did not intend the first interpretation, and I would agree that he did not. He stated quite clearly that the stage at which "the regulation of the franchise is within the power and authority of the State ... ends ... when the federal Parliament passes a law fixing the franchise".[81] However, with respect, I am not convinced that what Holder intended, and what the draftsmen and delegates to the Convention may have intended, is what the Constitution, on its words, actually says. Suppose that a federal franchise Act in 1902 prescribed manhood suffrage; that Victoria in 1908 enacted full adult suffrage; and that a particular Victorian woman attained the age of 21 years and became entitled to vote in Victoria in 1910. Would she not then be an adult person who had acquired a right to vote at elections for the more numerous House of the Parliament of her State, and therefore entitled to vote at federal elections thereafter, within the wording of s 41?

The denial of this view involves putting a gloss on the wording of s 41, so that it would read:

> No adult person who at the date of establishment of the Commonwealth has or before the passage of a law of the Commonwealth establishing a federal franchise acquires a right to vote ...

Surely it is not permissible to make such an extension to the wording of the section, when that extension is not implicit in the section as it stands.

If, however, Quick and Garran were right in dismissing the first possible interpretation of "has or acquires", it would be necessary to decide between the second and third interpretations, as to which, they suggest, Holder himself was not clear. The conflict is between a protection of people actually having a right to vote in their State at the time the federal franchise was established, on the one hand and, on the other, a protection of the State franchise as it existed at the time of the establishment of the federal franchise. To give an example, again in terms of female suffrage, South Australian law gave adult women a right to vote in State elections. If a federal law then established manhood suffrage in 1902, would a South Australian woman who attained the age of 21, and thus became entitled to vote in State elections, in 1903 be a person who had "acquired" a right to

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81 *Convention Debates, Adelaide*, at 1195.

vote within s 41, or would that section protect only those women who became entitled to vote in South Australia before 1902? Quick and Garran argued that:[82]

> The Federal Parliament being empowered to deal with the qualification, 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.

They suggested that, in order that s 41 should give effect to that intention, it would be necessary either "to construe 'acquires' as meaning 'acquires before the framing of the federal franchise'" or to construe the phrase "no adult person ... shall ... be prevented ..." as referring to "a deprivation taking effect at the time of passing of the federal law - not a continuous deprivation enduring under the federal law".[83] They considered that both constructions had the same effect - and that it was the true construction.

The first point to make about this argument is that the indented quotation is not relevant to a resolution of the conflict between the second and third interpretations but is, instead, a rejection of the first. The second interpretation of s 41 does *not* involve a State conferring a right to vote by fresh legislation after the enactment of the federal franchise. It involves a person acquiring qualifications, enacted by the State before the enactment of the federal law, at a date after that federal enactment.

Even if we confine our attention to that part of the Quick and Garran argument which is relevant to the second interpretation versus third interpretation debate, their suggested construction of "prevented" would limit the application of s 41 to the first appearance of a federal franchise law. I believe that there is no indication in the section or in the Convention Debates that such a limitation was intended. If there were such a limitation involved, it would mean that, in circumstances where the first federal franchise law enacted adult suffrage, if the Commonwealth Parliament had quickly repented of its rashness and repealed that Act, substituting for it one which allowed only manhood suffrage, South Australian women would not then have been protected by s 41, because at the time of the *first* federal franchise taking effect, they were not "prevented" from voting in federal elections.

The "true" construction suggested by Quick and Garran must therefore stand, if at all, on their reading of "acquires". As to this, they argued that "acquires" means "becomes qualified", so that a

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82 Quick and Garran, at 487.

83 See footnote 82.

person has not "acquired" a State vote within s 41 until that person has fulfilled the qualifications governing that State vote. Returning to the example, a South Australian woman did not become qualified to vote until she had attained the age of 21 years. Thus, she would not have acquired the right to a State vote before the framing of the federal franchise if she did not attain the age of 21 years until after the federal franchise law was introduced. While this interpretation of "acquires" as "becomes qualified" is acceptable, the Quick and Garran limitation of protection under s 41 to people thus acquiring a vote before the introduction of a federal franchise law still depends on that gloss which is, I believe, without justification. The "true construction" of s 41 on its clear wording, in my opinion, protects people who acquire a right to a State vote, whenever they acquire it, or "become qualified" for it, if the federal franchise at that time, or at any future time, does not include them.

It is one thing to state that this is how s 41 should be interpreted. It is another to take issue with such respected commentators as Quick and Garran, who had both been personally involved in the constitution-making process. In addition, it is not only they, but other learned writers also (and several members of the first Parliament) who have argued for a restricted interpretation of s 41. Harrison Moore, in the first edition of his *The Constitution of the Commonwealth of Australia*[84] (which predated the 1902 *Commonwealth Franchise Act*), limited the protection given to people whose right to vote at State elections comes from a State law passed either before the establishment of the Commonwealth or, at the latest, before the passage of the federal franchise law. His hesitation as to the date at which such protection ceases resulted from his uncertainty about the meaning of s 30 of the Constitution:

> 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 the Parliament of the State.

Professor Harrison Moore believed that s 30 meant that, until a federal franchise law was passed, the franchise for Commonwealth elections in each State should be that which at the time of the establishment of the Commonwealth was the franchise in that State. But he did not express a decided opinion. The effect of s 30 on s 41 was therefore open:[85]

> If the true construction of s 30 be the "law in force in each State at the establishment of the Commonwealth", then under s 41 any

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84 Harrison Moore, W, *The Constitution of the Commonwealth of Australia*, London, John Murray, 1st ed, 1902, at 107 - 109.

85 Work cited at footnote 84, at 109.

> person who at that time has, or who at any time afterwards acquires a right under that law to vote for the more numerous House of the State Parliament, may vote in federal elections, whatever law be established by the Commonwealth Parliament. If on the other hand, s 30 means laws enacted by the State Parliament at any time before the establishment of a federal franchise by the Commonwealth Parliament, s 41 presents some difficulties of construction. It would probably mean *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.

He was thus rejecting the third possible interpretation put forward by Quick and Garran and adopting their second possible interpretation (or a modification thereof). Clearly, he rejected also the first Quick and Garran interpretation (which I have argued is the correct one). Harrison Moore's rejection of this first interpretation was predicated on his arguments as to the effect of s 30 on s 41.[86] However, I do not believe that s 41 must be tied to s 30. The two sections have completely different concerns. Section 30 deals with the interim period before a federal franchise is established by the Commonwealth Parliament (and such an interim period was inevitable, since there could be no Commonwealth Parliament to establish such a franchise without there first being federal elections. Some provision had to be made as to the qualification to vote in that first election, at least). Section 41 deals with the possibility of a federal franchise, after its establishment by the Parliament, narrower than that of a State. There is no interim nature built into it.

A (somewhat hesitantly) restricted interpretation of s 41 was given by HS Nicholas in his *The Australian Constitution*:[87]

> Section 41 is a prohibition and a safeguard but its precise meaning is not clear. Two opposing views have been held: (1) that the section applies only to persons entitled to vote in a State election at the commencement of the *Commonwealth Franchise Act* of 1902, (2) that it is a permanent safeguard preventing the Commonwealth from depriving any State elector of the right to vote at a Commonwealth election. In *Muramatis* [sic] *v Commonwealth Electoral Officer (WA)* (32 CLR 500) Higgins J appears to have taken the second view but the question was not discussed by the other members of the Court and no decision was given. The Commonwealth authorities appear to

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86 In the second edition of his work, published in 1910, Professor Harrison Moore effectively dismissed s 41 from consideration - merely stating in a footnote that: "Secs 30 and 41 of the Constitution present some difficulties of construction which were important so long as the electoral franchise was governed by State law, and might have been important if the Commonwealth had adopted a franchise narrower than the States. The wide franchise adopted, however, makes it unnecessary to recur to the matters discussed in the first edition of this book ..." *The Constitution of the Commonwealth of Australia*. Melbourne, Maxwell, 2nd ed, 1910, at 126, note 2.

87 Sydney, 1948, at 54.

> have taken the view that Parliament was at liberty to impose disqualifications on electors who had not been enrolled in a State in the year 1902 ...

Lumb and Ryan also preferred a narrow interpretation in *The Constitution of the Commonwealth of Australia.*[88] They referred to the three possible interpretations of Quick and Garran and stated:[89]

> The latter two interpretations are narrow ones and would mean that s 41 has only a historical significance. Nevertheless they do seem to accord with the scope of s 30. It seems contrary to the intention of that section to uphold the power of a State parliament to modify the federal parliamentary franchise once that franchise had been determined by the federal Parliament, thereby conferring a right to vote on additional categories of persons.
>
> The preservation of the right to vote would therefore seem to rest on a choice between the second and third interpretations. The literal interpretation of the section supports the third interpretation, viz, that the individual himself (or herself) must be enfranchised before the first Commonwealth electoral law is passed, that right being preserved until death or other event which would omit him (or her) from the electoral roll. Whether this or the second interpretation is adopted is of no current importance. In either case, the effect of s 41 is of historical significance only.

The effect of s 41 was discussed in the debates of the Parliament on the Commonwealth Franchise Bill in 1902. The question arose whether s 41 would render unconstitutional a provision for manhood suffrage or a provision denying the franchise to Aborigines (who had voting rights in some States).[90] The discussion showed a surprising lack of understanding by some members of the history and meaning of s 41. Its existence showed clearly that the Constitution envisaged the possibility of a federally-legislated franchise narrower than that in some States.[91] However, in debate as to what the section meant, those members who realised this expressed differing opinions as to whether, by virtue of s 41, subsequent State laws could override the franchise established by the Commonwealth Parliament. Some members took the view of the commentators quoted above - that only State laws passed before the

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88 Sydney, 2nd ed, 1977.

89 Work cited at footnote 88, at 60.

90 See discussion of the Aboriginal franchise in the various States, above.

91 As was recognised by Senator Pulsford (NSW), one of the most intransigent opponents of female suffrage: "Section 41 of the Constitution itself contemplates such a Bill as I desire to see passed." (Parliament of Australia, First Parliament, 1st Session, Debates, Senate, Vol IX, at 11570 - 1.)

enactment of a Commonwealth franchise Act were covered. Senator O'Connor said:[92]

> That means that until we legislate, the States have the power to pass any legislation upon the subject they like ... But once we pass a law dealing with elections and electoral rights, it can be altered by no State legislation afterwards.

Senator Playford argued that:[93]

> Senator Harney strained the meaning of the words "has or acquires" in section 41 of the Constitution and suggested that the words "or acquires" means for all time, and that the States are able at any time to give a special right, and that it must then become the law of the Commonwealth. The thing is absurd ... Directly we deal with it, and pass a uniform franchise for the whole of the Commonwealth, no State can interfere with it in any way whatever.

In contrast to these two views,[94] other members (and a larger number) accepted that a State law, whenever passed, would, by virtue of s 41, override a narrower Commonwealth franchise. Senators Matheson and Harney said:[95]

> the true meaning of the section is this - that, notwithstanding the passage of this Bill, any State can, for all time, unless some other Constitution is made, give any rights it thinks proper, for its own State Parliament; and section 41 says that the rights given in respect of State Houses shall also be exercised in reference to the Commonwealth Parliament.

Senator Ewing argued:[96]

> If the Convention had intended to give the Commonwealth exclusive jurisdiction in this matter, they would have provided for it in section 51 of the Constitution, which deals with subjects in regard to which we have sole jurisdiction.

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92 Work cited at footnote 91, at 11585 - 6.

93 Work cited at footnote 91, at 11592.

94 And those even more restrictive - that of Senator Higgs who considered a Commonwealth franchise narrower than that of any State unconstitutional (work cited at footnote 91, at 11570); and that of Senator Nield, who believed, on the lines of the third Quick and Garran interpretation, that the protection of s 41 had to have been individually acquired by the date of the first federal *Franchise Act*, (work cited at footnote 91, Vol X, at 13004).

95 This passage from Senator Harney was in support of interjections by Senator Matheson (work cited at footnote 91, at 11587 and 11585, respectively).

96 Work cited at footnote 91, at 11590. Senator Ewing appears to have been mistaken as to the section concerned. It is s 52 which deals explicitly with the exclusive jurisdiction of the Commonwealth. Most of the legislative powers given to the Commonwealth in s 51 are concurrent.

Senator Downer stated:[97]

> The laws, as they exist now in the States, defining the right to vote shall continue, though in each State they may be divergent, and laws in future passed by each State deciding who shall vote shall also prevail, notwithstanding any law we may pass to the contrary. So that any law we pass now upon this matter will be subject to the existing or future laws of any State.

And Mr Isaacs said:[98]

> If it is ever desired by one or more of the States to invest the aboriginals within their territory with the franchise for the more numerous State House, they will come under section 41 of the Constitution, which then gives them the right to vote for the Federal Parliament.

PH Lane, like the five parliamentarians just quoted, adopted a broad interpretation of s 41. Speaking of the effects of that section on s 30, he said:[99]

> First, an adult person - that is a person of the age of twenty-one years ... who has a current State voting right - cannot be prevented from voting federally by a s 30 law which prescribes an age in excess of twenty-one years. Second, an adult person who has certain qualifications ... which give him a current State voting right cannot be prevented from voting federally by a s 30 law which prescribes qualifications in excess of the State qualifications ...
>
> I speak of a "current" State voting right because it seems to be that s 41 should be read in an ambulatory way. Section 41 lets in a person who "acquires a right to vote" at State elections. Historically, a particular person may have come to acquire this voting right after Federation; for instance, he may have been a minor at Federation in 1901. Between the later date and 1901 the State franchise may have changed, and s 41 itself makes no suggestion that it is only concerned with State franchise laws gelled as at 1901.

Lane then made a footnote reference to *King v Jones*.[100] Given the example used, this passage does not necessarily go further than an adoption of the second Quick and Garran interpretation in preference to their own preferred third interpretation. It does not necessarily extend the s 41 protection to people acquiring State voting rights under State laws postdating the establishment by Commonwealth law of a federal franchise. However, that extension is strongly

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97 Work cited at footnote 91, Vol X, at 13006.

98 Work cited at footnote 91, at 11979. Isaacs' phrasing - "If it is *ever* desired by *one* or more States ..." - suggests he was unaware that "*it*" had *already* been desired by three - Victoria, New South Wales and South Australia. See above.

99 Lane, PH, *The Australian Federal System*, Sydney, 2nd ed, 1979, at 41 - 2.

100 (1972) 128 CLR 221.

suggested by Lane's use of the words "current" and "ambulatory", and by his footnote reference to the judgment of Gibbs J in *King v Jones*. The footnote points out that:[101]

> Gibbs, without deciding definitely, favoured a day-to-day reading of s 41, apart from the phrase "adult person". The other Justices in *King v Jones* also used current South Australian legislation in a s 41 context.

Another distinguished academic commentator on the Constitution, Professor Geoffrey Sawer, also preferred a broad interpretation of s 41. In an opinion to the Select Committee on the Voting Rights of Aborigines, established by the House of Representatives in 1961, on the question "whether s 41 is prospective in operation, or applies only to those who were qualified at the date when the first *Commonwealth Franchise Act* came into operation", he stated that "[t]he prospective view seems clearly the correct one ...".[102] This is the apparent choice, too, of Michael Coper.[103] In discussing Constitutional guarantees of civil rights, he says of the Quick and Garran construction of s 41 that its delivery is[104]

> almost apologetic, evidently recognising that it is the wide interpretation adopted by Justice Murphy [in *Re Pearson*, as to which see below] which is suggested by the ordinary and natural meaning of the words, or, to use the slightly more pejorative expression favoured by Justice Murphy, the "plain" meaning of the words. When the plain meaning of the words coalesces with a generous reading of a constitutional guarantee, the argument in favour of that interpretation must be considered to be strong indeed.

As suggested by Nicholas,[105] the High Court decision of *Muramats v Commonwealth Electoral Officer (WA)*[106] gave implied support to the broad interpretation of s 41. The case concerned a Japanese, naturalised in Victoria, who became enrolled to vote in Western Australia under s 17 of the Western Australian *Electoral Act* of 1907. Section 17 provided that any person of 21 years or over, natural-born or naturalised British subject, six months resident in Western Australia, and one month resident in the electoral district concerned, was entitled to be enrolled and to vote, subject to the disqualifications in s 18. Section 18 disqualified from being enrolled, or if enrolled from voting, *inter alia*, every Aboriginal native of Australia, Asia, Africa or the Islands of the Pacific. Muramats claimed to be entitled to be enrolled as a voter in Commonwealth

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101 Lane, work cited at footnote 99, at 42.

102 *Report*, Appendix IV, at 38.

103 *Encounters with the Australian Constitution*, Sydney, 1988.

104 Work cited at footnote 103, at 312.

105 Work cited at footnote 87, at 33.

106 (1923) 32 CLR 500.

elections by virtue of s 41 of the Constitution. His claim was unsuccessful. Though enrolled under s 17 of the Western Australian Act, he was not entitled to vote in Western Australia because he was disqualified under s 18. He was not therefore a person "who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State" within s 41 and, by virtue of that section, entitled to vote in federal elections, unless he could show that he was not in fact covered by the disqualification in s 18 of the Western Australian Act. This he attempted to show by arguing that he was not "an aboriginal native" of Japan. The High Court rejected this argument, holding that "aboriginal native" of a place meant those people who were of the stock that inhabited that place at the time that Europeans came to it.[107] Chief Justice Knox, Gavan Duffy and Starke JJ simply held that they were of the opinion that the Magistrate, against whose order Muramats had appealed, was right. Justice Higgins discussed the case more fully, but the bulk of his decision was taken up with interpretation of the phrase "aboriginal native". However, in questioning whether Muramats' enrolment under s 17 entitled him to Commonwealth enrolment by virtue of s 41, he impliedly accepted that the case was one to which s 41 could apply, provided Muramats was entitled to vote in Western Australia. Since the Western Australian Act under which Muramats had enrolled as a State elector postdated the *Commonwealth Franchise Act*, it would seem that Higgins J accepted the broad interpretation of s 41. Otherwise, the case could have been dealt with much more briefly.

The support for the broad interpretation to be drawn from *Muramat's* case is inferential only. The judgments of the members of the High Court in *King v Jones*[108] provided much stronger authority for that interpretation, even though, as Lane said,[109] there was no definite decision there to that effect. The case concerned three people aged between 18 and 21, who were entitled to vote in South Australia as a result of the *Constitution Act (Amendment) Act (No 2)* 1970-71 (SA) which conferred the right to vote at elections for members of the House of Assembly in South Australia upon every person who is at least 18 years of age. The three applicants sought to have their names placed on the Commonwealth Electoral Register. At that time, the *Commonwealth Electoral Act* still required a minimum age of 21 years for federal electors. The applicants claimed to be entitled to be enrolled on the Commonwealth Electoral Register by virtue of s 41 of the Constitution as adult people who had acquired a right to vote in elections for the more numerous House of the Parliament of their

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107 This blithely Eurocentric interpretation of this phrase is reminiscent of the reasons advanced for the delay, discussed earlier, in extending the federal franchise to non-whites.

108 (1972) 128 CLR 221 (hereafter, "*Jones*").

109 See above.

State. They argued on various grounds that they were "adults" within the meaning of the section. Their applications were rejected by the High Court.

There were two possible ways in which the rejection of these applications could be justified. The first was by limiting s 41 to protect State electors only in respect of a right to vote based on State franchise laws passed prior to the first federal franchise law in 1902. Whether the second or third interpretation of s 41 by Quick and Garran were adopted, the applicants would still fail since the South Australian Act on which they based their claim was passed in 1970-71. The second avenue of rejection was to hold that, even if s 41 protection applied to post-1902 State franchise laws, it was limited to adult people, and that "adult" in the section meant people of 21 years or over. The judges of the High Court all adopted the second approach - they denied that the applicants were adults within the meaning of the section. It was therefore unnecessary for them to decide whether the section applied to rights acquired under State laws passed after 1902. But had they been prepared to hold that s 41 did *not* so apply, the case could have been very quickly disposed of.

Although, given their Honours' approach, this question did not require to be decided, several members of the Court expressed an opinion on it, however, in favour of the broad interpretation. Chief Justice Barwick left the matter open. He stated that:[110]

> The States, of course, retain the right to determine the franchise for the election of the more numerous House of the State Legislature. That is a circumstance which could be relevantly significant if s 41, in referring to a person who "acquires a right to vote", included persons who at any time subsequent to the commencement of the Constitution acquire a right under an electoral law of a State passed subsequent to such commencement ... this matter of construction of s 41 is one as to which it is unnecessary to express an opinion in order to discuss this applicant's submissions. But at least the possibility of such a construction has a bearing on the draftsmen's assumptions.

The assumption to which His Honour referred related to s 128 of the Constitution, which provides for referenda for constitutional amendments and which states that "... until the qualifications of electors of members of the House of Representatives becomes uniform ...", the votes in a referendum were to be counted in a particular way, indicating that the draftsmen assumed that, with the passage of a Commonwealth Act establishing a federal franchise, the qualification of electors would be uniform. Chief Justice Barwick went on:[111]

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110 *Jones*, at 232.

111 *Jones*, at 232 - 3.

> The draftsmen were I think in error in treating the uniformity of qualification of electors as necessarily following upon the passage by the Parliament of a law governing the franchise for the election of the House of Representatives ... clearly enough, s 41 can operate to affect that uniformity, particularly if rights obtained under State electoral legislation passed subsequent to the commencement of the Constitution are relevant to the operation of that section ...

While His Honour does not purport to decide the matter, I would suggest that his argument as to the incorrect assumptions regarding s 128 indicate an implicit favouring of the broad interpretation of s 41.

Justice Gibbs examined the discussion by commentators and, while eschewing expressing a final opinion, seemed in favour of the broad interpretation. He mentioned that:[112]

> [e]arly distinguished commentators on the Constitution expressed views as to s 41 which, if correct, would be fatal to the applicant's contentions at the very outset.

He quoted the restrictive interpretations of Quick and Garran and Harrison Moore, and went on:[113]

> In my opinion, [s 41] speaks at the date of the Constitution and refers to a right to vote which any adult person then has or subsequently acquires. The word "acquires" is not subject to any express qualification as regards time or otherwise, and can only be read as meaning "acquires under a law in force at the date of the establishment of the Commonwealth" or "acquires before the framing of the federal franchise" if the context indicates that it should be impliedly qualified in that way. It may be argued that the words "prevented by any law of the Commonwealth from voting" do carry the implication that if it were not for the passing of the Commonwealth law in question, the person would have been able to vote at Commonwealth elections, or, in other words, that s 41 only invalidates a law which disqualifies from voting at Commonwealth elections persons who at the date when the law was passed were qualified to vote at them. On the other hand, a law which establishes a franchise might be said to have the continuing operation of preventing from voting all those persons to whom the franchise is not extended.

His Honour rejected as "impossible to accept" Harrison Moore's interpretation of s 41 as protecting only people qualified under State laws in force at the time of the establishment of the Commonwealth, and stated also that:[114]

> the view of Quick and Garran that s 41 assures the right to vote at Commonwealth elections only to persons whose right to vote at State elections was acquired before the framing of a franchise by the

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112 *Jones*, at 257.

113 *Jones*, at 258 - 9.

114 *Jones*, at 259.

> Commonwealth Parliament, although perhaps deriving some support from the use of "prevented", is far from clearly correct ...

Justice Stephen was also prepared to assume in favour of the applicants that s 41:[115]

> applies to any "adult person" who at any time acquires by amendment of State electoral legislation a right to vote at relevant State elections

although he did not expressly decide to such effect, and noted the "possible alternative interpretations"[116] of Quick and Garran, Harrison Moore and Nicholas.

In referring to the words "who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State", though not basing his decision on that part of the section, Walsh J also favoured a broad interpretation:[117]

> ... for present purposes I assume that they are 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 qualification of electors.

His Honour acknowledged, however, that there had been "some discussion by commentators" on the matter.

Finally, Menzies J decided the case on the basis of the meaning of "adult", but, in expressing his opinion on the other matters of interpretation of s 41, he quite categorically took the broader approach:[118]

> 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 [note, not "acquired"] particular voting rights by the laws of a State.

However, despite these remarks favouring a broad interpretation, the High Court finally adopted the narrow view in *Re Pearson; Ex parte Stipka*[119] in 1983. In a joint judgment, Gibbs CJ, Mason and Wilson JJ held "that s 41 preserves only those rights which

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115 *Jones*, at 267.

116 *Jones*, at 267.

117 *Jones*, at 251.

118 *Jones*, at 246.

119 (1983) 57 ALJR 225 (hereafter, "*Pearson*").

were in existence before the passing of the *Commonwealth Franchise Act* 1902".[120] Their Honours argued that:[121]

> By virtue of s 41 the Commonwealth law which first established the franchise could not have prevented any person who then had a right to vote at elections for the more numerous House of the Parliament of a State from voting at elections for either House of the Parliament of the Commonwealth. But once a Commonwealth law had been passed completely establishing the franchise, no person, not already qualified to vote at Commonwealth elections, could become so qualified by virtue of the Constitution alone. No future law could be said to prevent such persons from voting, since there was nothing in the Constitution or in the law that gave them a right to vote. This construction, which requires that the right to vote to which s 41 refers must have been acquired by the persons concerned before the federal franchise was established, gives a narrow interpretation to s 41. However, this construction of the section is supported not only by obvious considerations of policy, but also by the history of the section. If the section gave a right to vote at Commonwealth elections to any person who, after the Commonwealth franchise was established, became entitled to vote by virtue of amendments to State laws, the result would be that the uniform franchise established under ss 30 and 51(xxxvi) of the Constitution would be subject to amendment by the laws of the various States. The Commonwealth law could in effect be amended by any State law which conferred a more liberal franchise. In other words, any State could, unilaterally, alter the Commonwealth franchise in a way which discriminated in favour of its own citizens. It is impossible to suppose that results of this kind were intended.

Their Honours referred to the views of Harrison Moore and Quick and Garran as supporting a narrow interpretation, and considered "that the third [and narrowest] of the interpretations suggested by Quick and Garran [rejected by even Harrison Moore as too narrow] is the correct one".[122] Their joint judgment said of *King v Jones*[123] that:[124]

> 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 a particular voting right by the laws of a State". No other member of the Court expressed a final view on the question.

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120 *Pearson*, at 228.

121 *Pearson*, at 227.

122 *Pearson*, at 228.

123 (1972) 128 CLR 221.

124 *Pearson*, at 228.

These three judges drew support also from an opinion of Sir Robert Garran in 1914 when Secretary of the Attorney-General's Department. Sir Robert had said:[125]

> ... 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.
>
> 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 an elector by virtue of section 30 cannot, while his State right continues, be disfranchised by Commonwealth law. [Emphasis added.]

Justices Brennan, Deane and Dawson in their turn gave a joint judgment adopting a narrow interpretation of s 41, by reference to "its terms and context and by reference to the circumstances in which the section was to operate immediately after federation",[126] holding that:[127]

> Though it is right to see s 41 as a constitutional guarantee of the right to vote, the means by which that guarantee is secured is itself definitive of the extent of the guarantee. Voting, that is, the exercise of an existing right to vote, at elections of the Commonwealth Parliament cannot "be prevented by any law of the Commonwealth". But s 41 does not in terms confer a right to vote. If a right to vote is claimed by an elector in reliance upon the statutory franchise now prescribed by the laws of the Commonwealth, those laws are definitive of the right and s 41 has no work to do. But if and so long as a right to vote was claimed by an elector in reliance upon the constitutional franchise - whether existing at the establishment of the Commonwealth or the result of a later modification before the prescription of a statutory franchise by the Commonwealth Parliament - s 41 precluded any law of the Commonwealth from preventing the exercise of that voting right. In other words, those who, by State laws, were able to acquire a right to vote at elections of the more numerous House of the State and who, by reason of ss 8 and 30, thereby acquired the right to vote at elections of the Parliament of the Commonwealth, were entitled to continue voting at the latter elections so long as they continued to be entitled to vote at elections of the more numerous House of the State Parliament. They could not be prevented by any law of the Commonwealth from doing so ... The right to vote to which s 41 relates is the constitutional franchise conferred by ss 8 and 30. The purpose of s 41 is clear from its constitutional context: it was to ensure that those who enjoyed the constitutional franchise should

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125 *Opinions of Attorneys-General of the Commonwealth of Australia*, Vol 1, at 695, No 542, quoted in *Pearson*, at 228.

126 *Pearson*, at 234.

127 *Pearson*, at 233.

> not lose it when the federal franchise was enacted. The statute was to govern the subsequent acquisition of the right to vote at federal elections. The persons to whom s 41 applies are the persons who acquired the right to vote pursuant to ss 8 and 30. After the Parliament enacted the *Commonwealth Franchise Act* in 1902 ... no person could acquire the right to vote at federal elections save in accordance with its terms.

With respect, though such a scheme would have been quite a sensible one, it does not fit the history of the drafting of the section,[128] nor does it accord with the actual words of the Constitution and the section's positioning within it - the "constitutional context" which the above passage presents as supportive. Section 41 does not say that: "No person who has or acquires a right to vote by virtue of sections 8 and 30" may be deprived of that right by Commonwealth law. It would have been very easy to say that if that is what was meant, and the appropriate place to say it would have been in a second paragraph in s 30. But as the earlier discussion of the Convention debates on the clause which became s 41 shows, it was not Commonwealth electors enfranchised by ss 8 and 30 whom the proponents of s 41 wished to protect. It was State (or at that stage, colonial) electors, enfranchised by the laws of their colony/State. Such people would, by virtue of the temporary franchise established by s 30, be Commonwealth electors until the Commonwealth Parliament exercised its power to legislate for its own franchise. But that constitutional provision is quite separate. The State laws with which s 30 is concerned were those in operation between the date of Federation and the date at which the Commonwealth Parliament "otherwise provide[d]" for its franchise. Whether or not the State laws which call s 41 into operation are similarly limited is a question to be decided by interpretation of s 41. The answer is not determined by s 30. The answer given by Brennan, Deane and Dawson JJ may be the correct one (although I respectfully disagree), but the process by which their Honours arrived at their answer is - again with respect - irrelevant and erroneous.

Justice Murphy dissented from the narrow interpretation. He concluded that "like other constitutional statutory provisions s 41 is presumed to be prospective, ambulatory and constantly speaking. Its words are not transitional",[129] and quoted in support the opinion of Professor Sawer, Professor Lane, and the various judges of the High Court in *King v Jones*.[130]

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128 Which the High Court has traditionally refused to consider - see, for example, Coper, work cited at footnote 103, at 377 - 9.

129 *Pearson*, at 230.

130 (1972) 128 CLR 221.

Nevertheless, with a six to one majority of the High Court supporting the narrow interpretation, the meaning of s 41 has, for the moment at least, been authoritatively determined and, unless the decision in *Re Pearson* is overturned at some future date, in the words of Brennan, Deane and Dawson JJ, "the practical effect of s 41 is spent".[131] Section 41 preserves a right to vote only to those people who were, as individuals, entitled to vote in State elections in 1902 - of whom very few would now be alive! In fact, the Constitutional Commission recommended in 1988 that s 41 be deleted from the Constitution. After referring to the majority opinion in *Pearson*, the Commission's *Final Report* stated that:[132]

> ... for practical purposes section 41 is now a dead letter and the Constitution does not effectively guarantee anyone a right to vote.

and that:[133]

> We have explained earlier that the right to vote guaranteed by [s 41] of the Constitution no longer guarantees to any living person a right to vote in federal parliamentary elections. The section is, in fact, a dead letter. It is for this reason that we recommend that the section be repealed.

However, though this interpretation is - unless and until the High Court overrules it - the law of the land, I am constrained to repeat that it is in error, and that the correct interpretation of what s 41 *says*, whatever the Convention may have meant, is, as stated by Menzies J in *King v Jones*,[134] that it is "a permanent constitutional provision" applying "to a person who, in 1901, had or who, in the future, acquires particular voting rights by the law of a State". This permanent character was stressed by Murphy J in *Re Pearson*,[135] when he pointed out that "[w]here it was intended ... that a constitutional provision was to be transitional, the section is introduced by the words 'Until the Parliament otherwise provides'". Since those words do not appear in s 41, "[t]here is no warrant for reading [them]into s 41".

Conclusion

Admittedly, the policy considerations behind the judgment in *Re Pearson* are strong - the federal franchise should not be capable of infinite extension at the whim of any State. Against that, however,

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131 *Pearson*, at 235.

132 *Final Report of the Constitutional Commission*, Vol One, Canberra, AGPS, 1988, at 129.

133 Work cited at footnote 132, at 144.

134 (1972)128 CLR 221, at 246.

135 (1983) 57 ALJR 225, at 230 - 1.

must be placed the clear words of the section, which gives no indication that it is of temporary application only. The six judges of the majority in *Re Pearson* laid much stress on the relation between ss 8 and 30 and s 41. I would respectfully suggest that there is no such relation. Whether or not a future High Court acceptance of the broad interpretation of s 41 would have any practical significance - whether indeed any claim could be made which would give the High Court the opportunity to reconsider - depends on the future scope of the federal franchise. If attempts to restrict the franchise (as hypothesised earlier) were to be made, the most likely avenues of restriction would be in relation to people whose acquisition of State voting rights would be the result of State laws passed, in most cases, after the passage of the 1902 *Commonwealth Franchise Act*. On the basis of the High Court decision in *Re Pearson*, those people would be outside the protection of s 41. It would be a great pity if we were to come to need that protection (limited as it is), only to find that it had been spirited away at an earlier time of lesser need.