ARTICLES

The Australian Diaspora and the Right to Vote

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At any given time over 900 000 Australians are abroad. Yet only 63 036 overseas votes were cast in the 2001 Federal Election. This article examines the Australian law in this area and contrasts it with the law of other nations. While residency has been a traditional means of sorting out those who can vote from those who cannot, the authors conclude that change is needed. While not all overseas Australians should be permitted to vote, the authors argue for law reform as well as for the investigation of measures such as the creation of a special electorate for overseas voters.

AT any given time, a significant proportion of the Australian population is overseas. This 'diaspora' is now being discovered and the media and public institutions are beginning to explore the implications.[1] The diaspora itself is also starting to argue for changes to Australian law and policy. Most prominent is the Southern Cross Group, which has been formed as an international non-profit advocacy and support organisation for Australians living abroad. Its mission is to work 'for changes to existing law and policy where these adversely affect the Australian expatriate community'.[2] It operates on the basis that 'the Australian expatriate community is an integral part of Australia in a globalising world, despite the fact that its members are geographically outside Australia's territorial

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1. See eg B Havenhand & A MacGregor (eds) *Australian Expats: Stories from Abroad* (Newcastle: Global Exchange, 2003); P Fray 'The Expat Explosion – One Million Hit the Exits' *The Sydney Morning Herald* 31 May 2003, 1.
2. Southern Cross Group 'Who Are We?' <http://www.southern-cross-group.org/general/whoarewe.html> para 3.

boundaries'.[3] Since its inception in 2000, the Southern Cross Group has had considerable success at placing issues onto the political agenda.[4]

The federal Parliament is also addressing these issues. In October 2003, the Senate asked its Legal and Constitutional References Committee to 'inquire into Australians living overseas: the factors driving them there, their needs and concerns, as well as the economic and social implications for Australia'.[5] An important question before the Committee is the extent to which Australians living overseas should be entitled to vote in elections for the federal Parliament. This requires a reassessment of assumptions about who should be able to vote in Australian elections and the procedures and laws that govern that process. In particular, it requires reassessment of the traditional assumption that voting is determined by residency and that political communities are constituted by only those people who live in a certain geographical area.

Surprisingly, the right of citizens residing overseas to vote has not been the subject of significant research or analysis in Australia or abroad. Our examination of Australian, British, Canadian, New Zealand and American election laws and research uncovered little on the subject, with no Australian or Canadian research in the area, one British and one New Zealand journal article and, as a result of the attention given to the 2000 US presidential election, a smattering of American articles.[6] To date, the most far-reaching study has been from North American political scientists André Blais, Louis Massicotte and Antoine Yoshinaka as part of their more general analysis of election laws.[7] That study demonstrates that, for a long period, requiring actual residence in a country for voting purposes was a standard requirement of many national election laws. It is only relatively recently that countries have begun to relax their laws to allow overseas voting. In making this change, many nations have followed a similar path. They have first granted the right to vote to military personnel stationed overseas on the basis that the circumstances of their service should not deprive them of a say in how the country is governed.[8] This was then

3. Ibid, para 4.
4. For example, the Joint Standing Committee on Electoral Matters credit the group for coordinating a submission campaign that resulted in 90 submissions to a recent inquiry (just under half of the total number of submissions) addressing the issue of overseas voting: Joint Standing Committee on Electoral Matters *The 2001 Federal Election: Report of the Inquiry into the Conduct of the 2001 Federal Election and Matters Related Thereto* (Canberra: AGPS, 2003) para 2.176 ('JSCEM Report'). The report spent 17 pages addressing the concerns of the organisation: ibid 64-81.
5. For more information, see Senate *Inquiry into Australian Expatiates* <http://www.aph.gov.au/senate/committee/legcon_ctte/expats03/index.htm>. The Committee was to report by 5 October 2004, but will now report at a later date due to the 9 October federal election.
6. See eg TE Dark 'Americans Abroad: The Challenge of a Globalized Electorate' in American Political Science Association *PS Online* (Oct 2003) 733-740.
7. A Blais, L Massicotte & A Yoshinaka 'Deciding Who Has the Right to Vote: A Comparative Analysis of Election Laws' (2001) 20 Electoral Studies 41, 56.
8. Ibid, 56.

extended to diplomats and other civil servants living abroad.[9] It is at this point that the treatment of expatriates differs among nations. Some have found that preserving the right to vote of civil and military servants, while disenfranchising other citizens who happen to be abroad, be it for study, travel, work, international assistance or the like, is discriminatory, and have passed legislation preserving the right to vote for all its overseas citizens.[10] Others retain the position that, in general, a person should not be able to vote unless they have maintained a physical connection to the nation.[11]

These different approaches can reflect the social, cultural and economic aspirations of a country. In some nations with a high rate of emigration, preserving the right of expatriates to vote may send the message that they are still part of the national community and are welcome to return.[12] On the other hand, others argue that expatriates do not have much, if any, interest in the running of their country of origin, especially if they do not pay taxes. Still others insist that the monetary costs and the possibility of fraud produced by including expatriates in the electoral process are not worth their inclusion. Many also believe that granting the right to vote to expatriates who are simultaneously entitled to vote in their country of current residence is an unacceptable privilege.[13] Overall, Blais, Massicotte and Yoshinaka conclude that there is 'little consensus' among nations on the issue.[14]

This article examines Australian law as it relates to the voting rights of its citizens who are either permanently or temporarily living abroad. Part I sets out the extent of the Australian diaspora. Part II examines the current Australian law and its legislative history. The Australian situation is compared to that of other nations in Part III. In Part IV we asses whether reform is warranted and set out the options for reform in Part V.

I. THE AUSTRALIAN DIASPORA

Australia is not unique among developed nations in having a high number of its citizens living or working abroad. In fact, while at any given time over 900 000 Australians, or around 4.3 per cent of the population, are abroad[15] (with 720 000 of

9. Ibid.
10. Ibid.
11. Ibid.
12. Ibid.
13. Ibid.
14. Ibid, 41.
15. Southern Cross Group 'Estimated Number of Australians Overseas as at 31 December 2001' (DFAT, 2002); G Hugo, D Rudd & K Harris *Australia's Diaspora: Its Size, Nature and Policy Implications* Information Paper No 80 (Melbourne: CEDA, 2003) 21 ('Hugo Report'); Commonwealth Department of Foreign Affairs and Trade *Annual Report 2001–02*, 137. As this last figure is based on estimates provided each year by the overseas posts of the Department of Foreign Affairs and Trade, it only counts those Australians who have informed the Embassy that they reside abroad and thus probably underestimates the actual figure. A similar phenomenon has been shown to exist in the US: Dark above n 6, 734.

them residing abroad either temporarily or long term),[16] the United States has at least seven million citizens (2.5 per cent of the population) living abroad and New Zealand has over 850 000 of its citizens, a staggering 21.9 per cent of the population, living overseas (with 355 765 residing in Australia).[17]

The number of Australians *temporarily* residing abroad is increasing. Over 330 000 Australians (1.7 per cent of the population) were temporarily residing outside Australia in 2001, a significant increase over the 189 207 (1.18 per cent of the total population) in 1986.[18] The number of *permanent* departures of citizens and long-term movements of Australian residents is also rising. In 1991/92, 29 122 Australian residents (including both Australian-born and migrants) departed Australia permanently, whereas in 2001/02 the number had risen to 48 241. The long-term movement of residents is also increasing. In 1991/92, there were 115 162 long-term departures from Australia, whereas in 2001/02, 171 446 Australians departed on a long-term basis.[19]

Younger, more educated Australians are the main group of emigrants, with over 40 per cent of departures coming from the 20-34 year age bracket and around 70 per cent of emigrants employed in managerial, administrative or other professional occupations (as compared with 40 per cent of the total Australian population).[20] The unemployment rate for emigrants is far lower than for the total population, with emigrant males unemployed at a rate at 0.5 per cent and females at around 1 per cent, as compared with 8 per cent and 6.6 per cent in the total population (using ABS 2001 Census figures), respectively.[21] A 2003 survey found that most Australian-born emigrants currently residing abroad left Australia for the following reasons: employment opportunities (42.6 per cent), professional development (32.4 per cent), higher income (32.4 per cent) and promotion/career advancement (23.7 per cent).[22]

Of these people, 79.3 per cent 'Still Call Australia Home', even though only 50.7 per cent intended to return to Australia.[23] While Australian expatriates are spread

16. JSCEM Report above n 4, para 2.178.
17. Hugo Report above n 15, 21. Due to the difficulties in collecting data, many commentators believe the American figures are grossly understated: see Dark above n 6.
18. Hugo Report above n 15, 19.
19. Hugo Report above n 15, 25-27. Long-term departures do not include the many Australians who live and work abroad but who return to Australia at least on a yearly basis. Statistics produced by the Department of Immigration and Multicultural and Indigenous Affairs still count these individuals as 'short-term' departures. The number of permanent and long-term departures from Australia to the UK has increased from 14 657 in 1994/95 to 30 739 in 2001/02; the numbers to the US have increased from 6 495 to 10 766; and to NZ from 4 838 to 6 019 in the same timeframe: see Hugo Report above n 15, 29.
20. Hugo Report above n 15, 37.
21. Hugo Report above n 15, 36; Australian Bureau of Statistics *2001 Census*. Overall, the *2001 Census* reported that 660 709 Australians (7.4% of the labour force) were unemployed.
22. See Hugo Report above n 15, 44.
23. Hugo Report above n 15, 50.

Table 1: Overseas voters at recent federal elections

Region	1998 Election	1999 Referendum	2001 Election
Europe	29 564	27 721	25 864
Asia	24 913	20 175	25 116
Africa	889	623	592
North America	5 426	5 161	5 581
South America	478	332	356
Oceania/New Zealand	3 816	3 943	5 507
Total	**65 086**	**57 955**	**63 036**

throughout the world, over half live in the United Kingdom (200 000), Greece (135 000), the United States (84 000) or New Zealand (68 000).[24]

Despite the high numbers of Australians overseas on any federal election day, few actually vote. The figures in Table 1 above were produced by the Report of the Joint Standing Committee on Electoral Matters (JSCEM) of the federal Parliament on the number of overseas voters at recent federal elections.[25]

Surprisingly, only 5 822 of the 63 036 votes cast in the 2001 election by overseas voters were by expatriate Australians with Eligible Overseas Elector (EOE) status.[26] This means that most of the votes cast overseas were by Australians on short-term visits.

II. AUSTRALIAN LAW

Overseas voting under current federal law

Section 93 of the Commonwealth Electoral Act 1918 grants the right to vote to all Australian citizens who have attained 18 years of age as well as to British subjects whose names were on the electoral role immediately before 26 January 1984. This right is not only a fundamental right and privilege, but is also a basic entitlement of citizenship that should only be withdrawn if there is a strong justification. Australian

24. Southern Cross Group above n 15.
25. See JSCEM Report above n 4, 65 (Table 2.8); Southern Cross Group *Overseas Voting Comparisons – 1998, 2001 Federal Elections and 1999 Referendum: Total Votes Issued by Each Overseas Post*. Over half of the overseas votes were cast in London, Hong Kong and Singapore, with only six other overseas posts (Dili, New York, Bangkok, Auckland, Dublin and Washington) issuing more than 1 000 ballot papers.
26. JSCEM Report above n 4, 2.182. See below Part II.

law recognises three areas where the right to vote is lost. First, section 93(8)(a) denies the right to vote to a person who 'by reason of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting'.

Secondly, section 93(8)(b) denies the franchise to any person who 'is serving a sentence of three years or longer for an offence against the law of the Commonwealth or of a State or Territory'; section 93(8)(c) denies the franchise to any person who 'has been convicted of treason or treachery and has not been pardoned'. These disqualifications reflect the (contested) idea that, upon conviction, a person loses some of their rights as a citizen, including their political rights, of which the right to vote is one example.[27] Australia is not alone in denying the right of convicted persons to vote. Many nations, including the United States (where voting is a constitutional right), also deny the franchise to convicted persons.[28]

The third exception is set out in section 94(1) and concerns expatriate Australians. Interestingly, it does not expressly disenfranchise overseas Australians, but is instead cast in positive terms:

> 94(1) An elector who:
> (a) is enrolled for a particular Subdivision of a Division; and
> (b) has ceased to reside in Australia, or intends to cease to reside in Australia; and
> (c) intends to resume residing in Australia (whether in that Subdivision or elsewhere) not later than six years after ceasing to reside in Australia;
> may apply to be treated as an eligible overseas elector. The application must be in the approved form and signed by the elector, and must be made to the Divisional Returning Officer for that Division.

The following 15 subsections, combined with section 94A (which deals with enrolment from outside Australia), set out in detail the practices and procedures of overseas voting.

The effect of these provisions is that Australian citizens moving overseas who are already on the electoral roll can remain enrolled by registering with the Australian Electoral Commission (AEC) as an 'Eligible Overseas Elector' if the following three conditions are satisfied:

> (i) they are leaving Australia within three months, or apply for Eligible Overseas Elector status within three years after the day on which they ceased to reside in Australia (and are still enrolled at their previous Australian address);[29]

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27. See generally J Fitzgerald & G Zdenkowski 'Voting Rights of Convicted Persons' (1987) 11 CLJ 11.
28. For more prisoner disenfranchisement, see G Orr 'Ballotless and Behind Bars: The Denial of the Federal Franchise to Prisoners' (1998) 26 Fed L Rev 55; Blais, Massicotte & Yoshinaka above n 7, 57-58.
29. Commonwealth Electoral Act 1918 (Cth) s 94(1A)–(1B).

(ii) they are going to be overseas for up to six years;[30] and
(iii) they intend to return permanently to Australia.[31]

Australian citizens living overseas who are not on the electoral roll, but who would be eligible if they were in Australia, can enrol as an EOE from outside Australia if they left Australia in the previous two years, live outside Australia for career or employment purposes (or those of their spouse), and intend to resume residence in Australia within six years of the date of their departure.[32] The 'reason for leaving Australia' condition is not imposed on Australians already enrolled who apply for EOE status.[33]

Prior to 1998, those wishing to apply for EOE status were required to be already enrolled to vote in Australia. Australians living overseas who were not enrolled, or who had been removed from the roll (because they were no longer resident in Australia or because they failed to vote in a federal election), could not enrol as an EOE.[34] The JSCEM, in its review of the 1996 election, recommended that the law be amended to allow Australians overseas to enrol.[35] During parliamentary debate, Laurie Ferguson MP, then a member of the JSCEM, stated:

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30. Ibid, s 94(1).
31. Ibid. The Southern Cross Group argued that the six-year provision is impossible to verify and monitor given that people's intentions and plans change over time. The group recommended that the Electoral Act be amended so that no intention to return to Australia within any timeframe be required for Eligible Overseas Electors: see Southern Cross Group *Enrolment and Voting in Australian Federal Elections for Australian Citizens Overseas* (Submission No 148 on 'Inquiry into the 2001 Federal Election') (Canberra, 12 Jul 2002) 15. The group further contended that the 'intention to return' provision is in breach of Article 25 of the International Covenant on Civil and Political Rights (stating, generally, that every citizen should have the right to take part in a national election), but the JSCEM refuted the claim by noting that the 'six-year rule' is 'effectively nullified by the Electoral Act's provision for extending [Eligible Overseas Elector] status beyond six years (one year at a time), so long as a person states that they eventually intend to return to Australia': JSCEM Report above n 4, paras 2.211–2.212.
32. Commonwealth Electoral Act 1918 (Cth) s 94A. The ability to enrol while overseas was added by the Electoral and Referendum Amendment Act 1995 (Cth). Prior to that time, electors were only able to apply for EOE status in the three months before they left Australia. The JSCEM and Parliament felt the previous law was 'too restrictive' and extended the provisions to allow enrolled Australians to apply for EOE status within one year of leaving Australia: JSCEM Report above n 4, para 2.197. Several electors highlighted that overseas Australians could not enrol to vote in Australian elections because they had missed the new one-year cut-off limit. While the JSCEM did not recommend extending the one-year deadline for EOE enrolment, the government introduced the current two-year cut-off as part of amendments to the Electoral Act in 1998: see JSCEM Report above n 4, paras 2.199-2.200.
33. The Southern Cross Group argued that this requirement cannot be justified and that it discriminates against several groups, including retirees and backpackers. The Group stated: 'The provision would seem to indicate that those who depart Australia for the more noble purpose of employment are somehow more worthy of the right to enrolment and therefore the right to vote while they are overseas': Southern Cross Group above n 31, 17.
34. See Commonwealth Electoral Act 1918 (Cth) consolidated as at 6 January 1997.
35. JSCEM Report above n 4, para 2.202.

> The committee considered that there were quite onerous requirements on Australian citizens who went overseas for a period and could find themselves off the rolls despite a continuing interest in Australian politics.... [T]he committee agreed that they should not be burdened by unnecessary requirements. However, the committee was unanimous in its concern that it did not want a situation like that in the Cook Islands or Italy where people who have no contact or relationship with the country any longer can be flown in, in mass numbers, for election day. The committee's provision therefore tries to find a balance.[36]

The Electoral and Referendum Amendment Act 1998 (Cth) implemented the recommendation and Australians can now enrol from outside Australia, provided that they apply for EOE status within two years after the day on which they ceased to reside in Australia. They can do so in the Division for which they last had an entitlement to be enrolled (ie, their last address in Australia) or, if that is not relevant, the Division of their next of kin, or the Division in which they were born, or the Division with which they have the 'closest connection'.[37]

The Act limits EOE status to those persons who intend to resume residing in Australia not later than six years after ceasing to reside in Australia.[38] Prior to the enactment of the Electoral and Referendum Amendment Act, the timeframe for intention to resume residing in Australia was three years.[39] If, however, after leaving Australia, EOEs realise they will be away for longer than six years, they can apply (no later than three months before the expiry date of their EOE status) to have that status extended by one year.[40] Although the Act does not state whether this extension can be repeated in the following year, the JSCEM Report claims that '[t]he effect of these provisions is that overseas Australians with [EOE] status may continue voting in Australian elections indefinitely, so long as they state an intention to return eventually to Australia'.[41]

Voting is not compulsory for overseas Australians.[42] Instead, EOE status is a system of 'use it or lose it'. This means that, if a person does not vote or apply for a postal vote at a federal election, their status as an EOE is forfeited and their enrolment is

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36. *Hansard* (HR) 24 Mar 1998, 1416.
37. Commonwealth Electoral Act 1918 (Cth) s 94A(3). These provisions closely resemble the provisions for enrolment for itinerant voters in s 96 of the Act.
38. Ibid, s 94(1)(c)–(d).
39. Joint Standing Committee on Electoral Matters *Report of the Inquiry Into All Aspects of Conduct of the 1996 Federal Election and Matters Related Thereto* (Canberra: AGPS, 1997) 47-48. In its report, the committee recommended: 'The qualifying period [for intention to return to Australia] of three years or less under s 94 of the Act should be extended to six years (with the retention of the capacity, under ss 94(8) and 94(9), for electors to apply for further extensions on a year-by-year basis)'.
40. Commonwealth Electoral Act 1918 (Cth) s 94(8)–(9).
41. JSCEM Report above n 4, para 2.189.
42. Commonwealth Electoral Act 1918 (Cth) s 245(17).

cancelled.[43] However, overseas voters who have been removed from the roll because they failed to vote at an election may apply to be reinstated if they still meet the requirements in sections 94 and 94A.[44] At the 2001 federal election, there were 10 636 EOEs on the electoral roll, with 5 822 (54.7 per cent) who voted.[45]

The current provisions impede many overseas Australians from participating in the electoral process. The relatively few Australians living overseas who are enrolled as an EOE is likely to be a consequence, among other things, of the complexity of the enrolment provisions. This may be, in part, by design. The JSCEM, in the course of analysing the proposals put forward by the Southern Cross Group, stated:

> Australians living overseas must demonstrate a continued interest in Australian political affairs if they are to retain their right to vote whilst not resident in Australia. Hence, the committee does not support the removal of the 'intention to return to Australia' or the 'use it or lose it' provisions of the Electoral Act.[46]

There may even be more solid support for the interpretation that the provision is meant to apply only to those Australians temporary residing abroad. The Explanatory Memorandum for the 1983 Bill that first introduced overseas voting for civilian Australians stated:

> [The amendments] relate to the enrolment entitlements of electors who are *temporarily living overseas* but who *intend to return to live in Australia* within three years of their departure from Australia.[47]

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43. Ibid, ss 94(13)(c), 94(14)(b). The AEC explained that the basis for this arrangement (and the equivalent requirement for itinerant electors) is that: 'Bearing in mind that itinerant and overseas enrolment is not compulsory, this is a roll-cleansing mechanism allowing the AEC to remove from the roll itinerant and overseas electors when they no longer have an intention or eligibility to be enrolled in this way': AEC *Sixth Submission in Response to Questions on Notice* (Supplementary Submission No 199 on 'Inquiry into the 2001 Federal Election') (Canberra: 20 May 2003) 7.
44. The Southern Cross Group submitted that this provision should be removed from the Electoral Act, arguing that its effect is to impose compulsory voting on overseas Australians with EOE status. The Group further submitted that, in most cases, once EOE have been removed from the roll they are not eligible for re-instatement because they no longer meet the legislative requirements (in particular the two-year time limit for application). The Group questioned how 'this stance can be consistent with the fact that voting is not compulsory while a citizen is overseas?' Submission of the Southern Cross Group above n 31, 25; JSCEM Report above n 4, para 2.217.
45. AEC *Further Submission in Response to Questions on Notice* (Supplementary Submission No 186 on 'Inquiry into the 2001 Federal Election') (Canberra, 26 February 2003) 6; AEC *Behind the Scenes: The 2001 Election Report* (Canberra, 2002) 9.
46. JSCEM Report above n 4, para 2.231.
47. Ibid, para 2.228 (quoting the Commonwealth Electoral Legislation Amendment Bill 1983 – Explanatory Memorandum, paper no 15428/1983, 18 – Clause 24) (emphasis added).

Legislative history and policy

The Commonwealth Electoral Act as passed in 1918 did not deal directly with the issue of overseas citizens, but presumably barred them from voting as the Act made no provision for postal votes from overseas, voting at overseas missions and the like. Part VI, entitled 'Qualifications and Disqualifications for Enrolment and for Voting', granted the right to vote to a person who had obtained the age of 21, who had lived in Australia for six months continuously and who was a natural-born or naturalised subject of the King.[48] This was the starting point for Australian electoral legislation. The law today is quite different from this original vision, but the law on voting by Australians living overseas has not been achieved by one change. Instead, progress has been made by a series of one-off amendments. Indeed, the current difficulties with the law reflect its disjointed legislative history and a failure to grapple with the underlying policy and the constitutional issues.

The Act was amended in 1953 granting some overseas Australians the right to vote. Section 39A ensured that the franchise extended to members of the Australian Defence Forces currently outside Australia.[49] The Act was further amended in 1966 to give members of the Defence Force who have been on 'special service' and who have not attained the age of 21 years the right to vote, regardless of whether they are inside or outside Australia at the time that the writ for the election is issued.[50] In 1973, the Act was amended to lower the voting age generally to 18 years, but there was no mention of overseas voters.[51]

The first major reform for overseas voters came in 1983, when sections 39A and 39B were amended to provide that an elector whose name appears on the Roll for a Subdivision of a Division who intends to cease to reside in Australia for a period of not more than three years can stay on the Roll and be treated as an EOE and allowed

48. See Commonwealth Franchise Act 1902 (Cth) s 3. Section 4 also disqualified any 'aboriginal native of Australia, Asia, Africa or the Islands of the Pacific except New Zealand' from having their name on the roll or from voting in any federal election, subject to s 41 of the Australian Constitution.
49. See Commonwealth Electoral Act 1953 (Cth). The amendment also deemed non-military personnel who accompany a part of the Defence Force overseas to be members of the Defence Force. The Act was further amended in 1961 to exclude temporary entry permit holders (for the purposes of the Migration Act 1958 (Cth)) and prohibited immigrants from voting: see Commonwealth Electoral Act 1961 (Cth) s 4 (inserted new s 39(5)). The 1961 amendments also stated that 'an Aboriginal native of Australia is not entitled to enrolment [to vote]' unless that person is entitled to enrol in the State elections in the State where they reside or have been a member of the Defence Force: see ibid, s 4 (inserted a new s 39(6)).
50. Commonwealth Electoral Act 1966 (Cth). The Act conditions the rights of British subjects who, prior to the special service, had lived in Australia for six months continuously: s 3 (inserted new s 39A(3)(a)–(e)).
51. Commonwealth Electoral Act 1973 (Cth) ss 3–8.

to vote in the Subdivision, provided that the person applied in writing for such a designation within one month of 'the day on which he intends to cease to reside in Australia'.[52] If the voter did not return to reside in Australia within [three] years or 'ceased to have the intention to resume residing in Australia within three years', he or she ceased to be recognised as an EOE[53] However, a person could apply, within three months before the expiration of the relevant period, to be treated as an EOE for a further one year period.[54] The Act also provided that either the spouse or children of an eligible elector ('living at a place outside Australia so as to be with or near the Eligible Overseas Elector') who had not reached the age of 18 when they left Australia can be added to a Division and treated as an EOE, provided that they intend to return to reside in Australia within three years after the day the person reaches the age of 18.[55] The reason for disenfranchising Australians continuing to reside overseas beyond three years is not clear. A reading of *Hansard* (1983), when the Commonwealth Electoral Legislation Amendment Act introduced the provision regarding overseas voters, sheds little light on the reason for the alteration.[56]

Further reform was achieved by the Electoral and Referendum Amendment Act 1998, which amended section 94A to change the three year overseas residency requirement to a period of six years. The Explanatory Memorandum sheds no light on the reason for the change,[57] but the 1996 Report of the JSCEM does attempt to explain its recommendation that the qualifying period be changed from three years to six years by using the example of Australia's Ambassador to Belgium, Luxembourg and the European Union, Mr ER Pocock AM, and his wife, who, because they were living outside Australia for more than three years, were deleted from the roll in 1991 on the basis of non-residence. While most of the discussion on the matter centred on an amendment allowing government representatives on postings outside Australia to remain on the roll, the JSCEM widened the recommendation to any Australian who resides overseas for purposes of career or employment. Otherwise, no discussion can be found on the public record detailing why the change from three to six years was put forward.[58]

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52. Commonwealth Electoral Legislation Amendment Act 1983 (Cth) s 24 (inserted a new s 39A(1)-(4)).
53. Ibid (inserted a new s 39A(5)).
54. Ibid (inserted a new s 39A(8)). The Act is not clear on whether an elector can make multiple requests to be an EOE.
55. Ibid (inserted a new s 39B(1)).
56. See eg *Hansard* (HR) 2 Nov 1983, 2216. In 1990, s 94 of the Act (formerly s 39) was further amended but did not directly address overseas voting: see Electoral and Referendum Amendment Act 1989 (Cth) s 33.
57. See Electoral and Referendum Amendment Bill 1997, Explanatory Memorandum, 3 Dec 1997, 11.
58. Currently, an elector can apply for EOE status within two years of departing Australia. In October 2003, the government accepted a recommendation to change the two year period to three years, but no legislation was introduced to bring about the change by the time of the calling of the October 2004 federal election.

The Constitution

The Constitution and the structure it establishes for federal elections in Australia appears to have played little or no role in determining whether overseas Australians can vote. Certainly, the Constitution says nothing directly on the issue. Section 41 grants the right to vote in federal elections to any 'adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State'. However, the High Court held in *R v Pearson; Ex parte Sipka*[59] that the section only applies to a person who had acquired the entitlement to vote at the State level before the enactment of the uniform federal franchise in the Commonwealth Franchise Act 1902. The section is accordingly spent.

A more likely source of any constitutionally protected voting right for expatriate Australians lies in sections 7 and 24. Section 7 states that, 'The Senate shall be composed of senators for each State, *directly chosen by the people of the State*, voting, until the Parliament otherwise provides, as one electorate'. Section 24 provides that, 'The House of Representatives shall be composed of members *directly chosen by the people of the Commonwealth*'.[60] If expatriate Australians form part of 'the people' referred to in sections 7 and 24, their right to vote may be guaranteed by the Constitution.

Sections 7 and 24 have already given rise to an implied freedom of political communication.[61] An implication of a right to vote would seem even more strongly connected to the language and subject-matter of the provisions.[62] After all, these provisions require a 'choice' by 'the people', which, as section 7 makes clear, is to be made by electors 'voting' at the ballot box. High Court decisions on sections 7 and 24 have not addressed whether each Australian is vested with a constitutionally guaranteed right to vote. That issue could arise if a person such as an expatriate Australian living overseas for more than six years decided to challenge the denial by the Commonwealth Electoral Act of his or her capacity to vote.

Obiter dicta from judges of the High Court have raised the question whether sections 7 and 24 limit the Commonwealth's power to restrict the federal franchise under the Commonwealth Electoral Act. In *Attorney-General (Cth); Ex rel McKinlay v Commonwealth,*[63] McTiernan and Jacobs JJ said:

> The long established universal adult suffrage may now be recognized as a fact and as a result it is doubtful whether, subject to the particular provision in section 30, anything less than this could now be described as a choice by the people.[64]

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59. (1983) 152 CLR 254.
60. Emphasis added.
61. See eg *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.
62. See, on the idea of an implied right to vote, A Twomey 'The Federal Constitutional Right to Vote in Australia' (2000) 28 Fed L Rev 125.
63. (1975) 135 CLR 1.
64. Ibid, 36.

In *McGinty v Western Australia,*[65] Toohey J argued that 'according to today's standards, a system which denied universal adult franchise would fall short of a basic requirement of representative democracy'. Gaudron[66] and Gummow JJ[67] also supported the idea that universal adult suffrage is now entrenched in the Australian Constitution. Gaudron J said:

> Notwithstanding the limited nature of the franchise in 1901, present circumstances would not, in my view, permit senators and members of the House of Representatives to be described as 'chosen by the people' within the meaning of those words in sections 7 and 24 of the Constitution if the franchise were to be denied to women or to members of a racial minority or to be made subject to a property or educational qualification.[68]

Only Dawson J rejected this.[69] In *Langer v Commonwealth,*[70] McHugh J supported entrenchment of the franchise by stating that 'it would not now be possible to find that the members of the House of Representatives were "chosen by the people" if women were excluded from voting or if electors had to have property qualifications before they could vote'.[71]

If this dictum is correct, as seems likely given its broad support and strong textual foundation in sections 7 and 24, it gives rise to the question whether universal adult suffrage as entrenched in the Constitution extends to Australian citizens who live overseas. This would probably be determined not according to the standards of 1901, but according to the notion of the Constitution as a evolving document that today embodies a very different notion of 'the people'.[72] After all, the dicta above suggest that women could not now be denied the franchise, yet many women could not vote in the first federal election held in 1901,[73] and, while the Commonwealth Franchise Act 1902 (Cth) extended the vote to women, section 4 simultaneously denied it to any 'aboriginal native of Australia'. Indigenous Australians were not granted the right to vote until 1962.[74]

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65. (1996) 186 CLR 140, 201.
66. Ibid, 221–222.
67. Ibid, 287.
68. Ibid, 221–222
69. Ibid, 183.
70. (1996) 186 CLR 302.
71. Ibid, 342. Cf *McGinty v Western Australia* (1996) 186 CLR 140, McHugh J 243.
72. See J Goldsworthy 'Originalism in Constitutional Interpretation' (1997) 25 Fed L Rev 1.
73. See M Sawer 'Enrolling the People: Electoral Innovation in the New Australian Commonwealth' in G Orr, B Mercurio & G Williams (eds) *Realising Democracy: Electoral Law in Australia* (Sydney: Federation Press, 2003) 52-65, especially 58-60.
74. Even then, unlike other Australians, it was not compulsory for Aborigines to enrol to vote: Commonwealth Electoral Act 1962 (Cth). Equality for Indigenous people at Commonwealth elections did not eventuate until 1983, when the Commonwealth Electoral Legislation Amendment Act 1983 (Cth) made enrolment for and voting in Commonwealth elections compulsory for Aboriginal Australians.

A challenge to the denial of voting rights to some expatriate Australians would involve the High Court determining who constitutes 'the people' under sections 7 and 24. It may be that this would be decided by reference to a more legally precise concept such as citizenship, which is itself not referred to in the Constitution but has been used in constitutional interpretation elsewhere.[75] Of course, this would need to be qualified by other considerations such as a person having reached an age at which they could be expected to vote, say 18 years, and other factors that may affect the capacity of a person to make the 'choice' referred to in sections 7 and 24.

In the absence of authority, expatriates might argue that they form part of 'the people', as they are Australian citizens. The primary argument against them could be based upon the fact that section 7 refers to 'the people of *the State*' and section 24 to 'the people of *the Commonwealth*'.[76] The meaning to be given to the last two words of each is unclear. It may be that 'the State' and 'the Commonwealth' refer in each case to a political entity constituted in broad terms by citizens living both in and outside Australia, or it may refer to a geographical location in which voters must live or have a sufficient connection with. If the latter is correct, and sections 7 and 24 exhaustively provide for who can choose the representatives in the two federal Houses, expatriate Australians and anyone else who do not form part of 'the people' of the relevant geographical area may even be constitutionally prohibited from voting.

This uncertainty means that it is not possible to say whether expatriate Australians possess a right to vote under the Constitution. The High Court has yet to affirm, except in the obiter dicta of individual judges, that sections 7 and 24 even confer an implied right to vote. None of these dicta have analysed the nature of any such right, nor has any attention been given to groups currently disenfranchised under the Commonwealth Electoral Act, such as certain prisoners and Australians living overseas. Resolution of the issue would require the High Court to develop a conception of the political community created by sections 7 and 24 that is charged with the selection of the members of the federal Parliament. The outcome would depend upon the composition of the High Court at the time the matter came before it as well as upon how community standards and views continue to evolve about the role that Australian citizens living overseas should play in the nation's political life. Even if overseas Australians are not seen today as playing an important role in the political community so as to form part of 'the people', this may change in what is a rapidly evolving global society. There are certainly examples where groups once excluded from the franchise are now thought to form a necessary part of it: women, people aged 18–20, and Indigenous Australians.

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75. See *Street v Queensland Bar Association* (1989) 168 CLR 461 on the interpretation of the words 'a subject of the Queen' in s 117 of the Australian Constitution. But compare *Singh v Commonwealth* [2004] HCA 43 (9 Sep 2004).
76. Emphasis added.

A residency-based franchise means that an elector who moves out of a jurisdiction cannot continue to vote within that jurisdiction. In Australia, for example, this means that a voter who has lived in Queensland cannot continue voting in that State after he or she has moved to Western Australia. The High Court's acceptance of this idea of residency-based voting at the State level may make the argument for the constitutional recognition of overseas voting more difficult.[77] The issue has arisen in the context of section 117 of the Constitution, which provides:

> 117. A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

In determining the extent to which residents of one State can be treated differently in another State so as not to breach section 117, the High Court has recognised that it is permissible to prevent out-of-state residents from voting. In *Goryl v Greyhound Australia Pty Ltd*,[78] Dawson and Toohey JJ stated:

> The most obvious example of differential treatment which lies outside section 117 is the exclusion of non-residents from voting in a State election. Clearly, that is something which would not be prohibited by section 117 even if it did amount to the imposition of a disability upon non-residents or discrimination against them. But it might also be said that there is no disability or discrimination because the very nature of a State election, which is to elect representatives for the residents of the State, dictates that residence be a qualification of voters. Non-residents have no part to play in the election of representatives for residents.[79]

It may be that different considerations, such as conceptions of citizenship, arise when the jurisdiction involved is not a State but the nation itself. However, the statement of Dawson and Toohey JJ could provide a general rationale for the disenfranchisement of people not living within a geographical area.

III. THE LAW IN OTHER NATIONS

The 2001 study of national electoral systems by Blais, Massicotte and Yoshinaka found that overseas citizens retain the right to vote for an indeterminate period in 33 of the 63 democratic countries. In the other 30 countries, the right of overseas citizens to vote is restricted or lost, with 20 of those nations automatically disenfranchising this group and the remaining 10 granting a right to vote in the home country for a period ranging from 3 to 20 years.[80] More than half of the former

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77. This was accepted, for example, by the members of the High Court in *Street v Queensland Bar Association* above n 75.
78. (1994) 179 CLR 463.
79. Ibid, 485-486 (footnote omitted). See also *Street* above n 75, eg Deane J 528.
80. Blais, Massicotte & Yoshinaka above n 7, 44-50, 56.

United Kingdom colonies disfranchise citizens residing abroad, while the United Kingdom does not prevent its overseas citizens from voting until they have been abroad for 20 years.[81]

In the 33 countries in which overseas citizens retain the right to vote for an indeterminate period, a few have complicated rules governing the voting of overseas citizens. For instance, German citizens living in the European Union retain their right to vote indefinitely, while Germans living in any other country keep it for only 10 years.[82] In Bolivia and Brazil, citizens residing abroad keep their right to vote only for presidential elections, while Portuguese citizens retain the right to vote for legislative elections only.[83] Interestingly, Dutch citizens residing abroad retain their right to vote, except for those residing in the Dutch Antilles or in Aruba who have not been resident in the Netherlands for at least 10 years.[84] The picture is certainly diverse. In addition, in many instances, the right to vote seems to be more symbolic than real. For example, in 10 nations citizens residing abroad must return to the country in order to cast their vote on Election Day.[85] Such arrangements exist in, among other nations, Barbados, the Czech Republic, Italy, Malta, St. Lucia and Slovakia.

It is clear that Australia is not alone in limiting the right of its overseas citizens to vote. For the purposes of comparison, we now examine in more detail four jurisdictions – the United Kingdom, New Zealand, Canada and the United States – which share many historical, democratic, economic and cultural similarities with Australia. The United Kingdom, New Zealand and Canada all have provisions comparable with the Australian law. In contrast, the United States, which we examine in more detail, does not limit the voting rights of its citizens residing abroad.

United Kingdom

In the United Kingdom, section 1 of the Representation of the People Act 1985 was amended in 2000 to provide that a person qualifies as an overseas elector if he or she, on the application date, is not in the United Kingdom and if he or she satisfies either of two sets of conditions.[86] The first set of conditions are that:

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81. Ibid.
82. Ibid, 57.
83. Ibid.
84. Ibid.
85. Ibid.
86. In the words of the Home Secretary, Jack Straw, the Act was amended to 'modernise [British] electoral procedures'. Unfortunately, neither *Hansard* nor the Explanatory Notes to the Representation of the People Act 2000 (UK) shed much light on the reasons for the amendments. See UK *Hansard* (HC) 18 Nov 1999, Pt 3. *Hansard* does, however, reveal that the move from disenfranchisement after five years of overseas residency to 20 years in 1989 was a heavily debated and a contentious decision. See UK *Hansard* (HC) 30 Nov

(i) the person has previously been entered on the register of electors;
(ii) the entry was made on the basis that the person was resident at that address;
(iii) the entry in the register was in force at any time falling within the period of 20 years ending immediately before the application date;[87] and
(iv) subsequent to that entry ceasing to have effect no other entry was made in respect of any other address.

The second, alternative set of conditions is that:

(i) the person was last resident in the United Kingdom within the period of 20 years ending immediately before the application date;[88]
(ii) the person was by reason only of their age incapable of being included on the register on the last day on which they were resident in the United Kingdom; and
(iii) the address at which the person was resident on that day was a place in respect of which a parent or guardian was him or herself validly registered at the time.

New Zealand

In New Zealand, section 80 of the Electoral Act 1993 restricts the categories of New Zealand citizens and permanent residents who can be registered as electors. Section 80(1)(a) states that a New Zealand citizen who is currently outside New Zealand and who has not been in New Zealand within the last three years may not be registered as an elector. In addition, section 80(1)(b) provides that a permanent resident of New Zealand (not being a New Zealand citizen) who is not currently in New Zealand and who has not been in the country within the last 12 months is similarly debarred. Section 80(3) excludes from the operation of the these two subsections public servants, members of the Defence Force, a head of a Foreign Affairs mission or post, an employee of New Zealand Trade and Enterprise and/or their spouses, de facto partners or children.[89]

1999, Pt 11. It seems some MPs wanted to disenfranchise every overseas resident while others wanted to give expatriates 25 years to vote: Pts 11–16. Interestingly, since the extension in 1989, the number of overseas voters has actually decreased from 34 454 in 1991 to 13 677 in 2004: Pt 16. With over three million British citizens living abroad, the Act has been called a disappointment: Pt 22. During the debates over the 2000 amendments, the idea of amending the cut-off to a five-year period was seriously discussed: see eg Pts 21 & 27. For more on the history of British overseas voting, see P Tether 'The Overseas Vote in British Politics 1982-1992' (1994) 47 Parl Affairs 73.

87. Prior to 1989, the period was five years: see Representation of the People Act 1989 (UK) C 28, s 1.
88. Prior to 1989, the period was five years: see ibid, s 2.
89. Although no literature could be found to explain why New Zealand adopted the method it did, the fact that over 20% of its citizens reside overseas could explain the less strict requirements. For more on the effect of emigration from New Zealand, see R Kerr 'The Brain Drain: Why New Zealanders Are Voting with Their Feet' (2001) 17(2) Policy 3.

Canada

In Canada, Part 11, Division 3 of the Canada Elections Act 2000 deals with 'Special Voting Rules' for 'Electors Temporarily Resident Outside Canada'. Section 221 states that an elector temporarily resident outside the country can vote in an election if his or her name is entered on the register of such electors. Importantly, section 222(1) provides that a person may be entered on the register if:

(i) at any time before making the application they resided in Canada;
(ii) they have been residing outside Canada for less than five consecutive years before making the application; and
(iii) they intend to return to Canada to resume residence in the future.

Section 222(2) excludes from the operation of the second limb public servants, members of international organisations of which Canada is a member, people who live with such people, and people who live with a member of the Canadian armed forces.

United States

By contrast, the Uniformed and Overseas Citizens Absentee Voting Act 1987 grants any United States citizen over the age of 18 the right to vote for federal office. Amended in 1994, section 107(5) of the Act defines an 'overseas voter' as:

(i) an absent uniformed services voter who, by reason of active duty or service, is absent from the United States on the date of the election involved;
(ii) a person who resides outside the United States and is qualified to vote in the last place in which the person was domiciled before leaving the United States; or
(iii) a person who resides outside the United States and (but for such residence) would be qualified to vote in the last place in which the person was domiciled before leaving the United States.[90]

Hence, in the United States there is no residence, time or intention requirement. The question is simply one of citizenship. This was not always the case. Until 1955, no United States citizen residing overseas at the time of an election was entitled to vote.[91] In 1955, Congress passed the Federal Voting Assistance Act in an effort to

90. 42 USC 1973ff-6 (1994), as amended. The Act repealed the Federal Voting Assistance Act 1955 (42 USC 1973) and the Overseas Citizens Voting Rights Act of 1975 (42 USC 1973).
91. It might be argued that the framers of the US Constitution did not intend to allow non-residents to vote in federal elections. One of the US founding fathers, Alexander Hamilton, believed that the prospect of foreign influence in the selection of the president was the main threat to the integrity of the presidency: (1987) 68 The Federalist 93-94.

extend the right to vote to military personnel who were absent from their place of residence during primary, general or special elections.[92] The purpose of the Act was to preserve the right to vote for military personnel overseas by 'recommending' that the state legislatures implement the Act's proposals.[93] While all states had extended the right to vote by 'absentee ballot' to military personnel under the Federal Voting Assistance Act by 1968, civilians residing overseas were not granted the same rights[94] until Congress amended the Act to include citizens 'temporarily residing abroad and engaged in business, the professions, teaching, the arts and other walks of life'.[95] However, the amendment had limited reach, as only slightly more than a half of the 50 states introduced legislation in line with the Act, resulting in discriminatory treatment of civilian citizens residing abroad.[96]

In an effort to standardise the law, Congress passed the Overseas Citizens Voting Rights Act 1975 to 'assure the right of otherwise qualified private United States citizens residing outside the United States to vote in Federal elections'.[97] The primary motive for extending the right to vote for overseas Americans was the protection of the national right to vote: 'We recognize the principle that the right to vote for national officers is an inherent right and privilege of national citizenship, and that Congress retains the power to protect this right and privilege under both the Necessary and Proper Clause and the 14th amendment'.[98] The Overseas Citizens Voting Rights Act re-enfranchised overseas citizens by '[simplifying] absentee voting registration procedure' and eliminating strict residency requirements formerly imposed on overseas citizens.[99] This left the two federal Acts inconsistent in a

92. *Bush v Hillsborough County Canvassing Bd* 123 F Supp 2d 1305, 1307 (ND Fla 2000).
93. Ibid, 1307-1308.
94. *Bush* above n 92, 1308.
95. Ibid; see also Act approved 18 Jun 1968, Pub L No 90-343, 82 Stat 180, 180-81 (1968) (repealed 1986).
96. Ibid: 'Only 28 States and the District of Columbia enacted statutes "expressly allowing absentee registration and voting in Federal elections for citizens 'temporarily residing' outside the United States"'. However, of the states that did implement this amendment, insistence on residency requirements provided obstacles that civilian citizens overseas found difficult to meet.
97. Ibid. The Overseas Citizens Voting Rights Act required in part: 'Each citizen residing outside the United States *shall* have the right to register absentee for, and to vote by, an absentee ballot in any Federal election in the State...' (emphasis added): s 3, 89 Stat 1142.
98. 121 Cong Rec 39,731 (statement of Rep Hays at Ohio) (1975). A less likely theory posed is that the Act 'seeks to ensure not only the right to vote in Federal elections, but also the right to international travel and settlement which must be reaffirmed in light of increased numbers of citizens travelling and living abroad': ibid, 39,732.
99. *Bush* above n 92, 1309. One court, however, declared that the Act infringed upon the voting rights of domestic citizens. In *Casarez v Val Verde County* 27 f Supp 2d 749 (1998), a large number of ballots received from overseas military voters were improperly cast in close local elections for sheriff and county commissioner, exceeding the margin of victory in both races. While these military voters were qualified to vote for federal offices, they were not state residents and thus were ineligible to vote in the local elections. The District Court enjoined the results of the election, finding that the improper inclusion of the overseas vote could have diluted the Hispanic vote in violation of the Voting Rights Act.

number of ways. The situation remained unresolved until 1978, when Congress amended the two acts.[100] Despite the best efforts of Congress, some States remained unable to adequately implement the federal guidelines into an effective state statutory scheme, thus leaving the situation discriminatory, contradictory or simply unintelligible well into the 1990s.[101]

IV. SHOULD THE SYSTEM BE REFORMED?

The franchise, through a process of exclusion and inclusion, defines a political community. As with most, if not all, modern democracies, the franchise is, in both conceptual and political terms, residency-based. This reflects the fact that, traditionally, political communities possessed the inter-relationships and obligations produced by sharing the same physical space. In fact, British scholar Robert Blackburn has written that: 'The key concept of the modern right to vote is residency in the constituency'.[102] History shows that this statement is correct, to a point. While voting rights are usually defined by residency, exceptions have also developed in many nations.

It has also been suggested that one reason why so few Australian expatriates have EOE status is that many have an impression that the Australian Taxation Office (ATO) refers to the electoral roll in assessing a person's residency for tax purposes.[103] Several submissions to the JSCEM indicate that Australians moving overseas for employment reasons 'find it advantageous to be treated by the ATO as non-residents for tax purposes'[104] and further reveal that 'accountants, lawyers and financial planners often advise clients moving overseas to apply to the AEC to have their names removed from the electoral roll'.[105] This information is incorrect,[106] but an

100. Ibid. See also Act approved 4 Nov 1978, Pub L No 95-593, 92 Stat 2535 (1978) (repealed 1986). The deficiencies noted by the Committee on House Administration, in part, are as follows: 'The fact that State laws were not uniform and the existence of substantial disparities "as to filing requirements and deadlines, the right to register and vote absentee, and other provisions relating to absentee voting by persons recovered under the Federal Voting Assistance Act"': ibid 1309–1310.
101. See *US v Florida* No 80-1055 (ND Fla 1982) (consent decree). The US sought injunctive relief to remedy the failure of defendants (the State of Florida) to ensure that US citizens located abroad, who are guaranteed by the OCVRA or the FVAA the right to vote by absentee ballot in federal elections conducted by the State of Florida, receive absentee ballots on a date sufficiently preceding election day to permit them to return their ballots in a timely manner. See also *Oregon v Mitchell* 400 US 112, 292 (1970).
102. R Blackburn *The Electoral System in Britain* (New York: St Martins' Press, 1995) 73.
103. JSCEM Report above n 4, para 2.256.
104. Ibid, para 2.257.
105. Ibid.
106. In response to the submissions, the ATO asserted that, 'historically, the courts have placed next to no emphasis on electoral roll registration as a determinant of residency status. At most it would be a factor only where it was one of and was consistent with a series of factors which indicated that a person was either a resident or not a resident': JSCEM Report above

argument could be made that a person should not be entitled to participate in the democratic process if that person does not have the same obligations as citizens in residence. In this regard, a twist can be put on the old American adage 'No taxation without representation' so that it reads 'No representation without taxation'!

Another justification for disenfranchising overseas citizens may be to avoid a large block of expatriate voters loyal to a foreign power from influencing the outcome of an election. This almost occurred in the United States in 2000, when a block of expatriates who had emigrated to Israel nearly proved decisive in the Presidential election. Press accounts observed that these American-Israelis might turn out in large numbers for the Democratic Party ticket, enthused by the vice-presidential candidacy of Senator Joseph Lieberman, the first person of the Jewish faith nominated for the vice-presidency.[107] The United States embassy in Israel estimated that between 100 000 and 200 000 Americans reside in Israel, either permanently or temporarily, of which 60 000 are registered voters in the United States.[108] Moreover, as many as 2 500 of those American-Israelis are registered Florida voters. In an election decided by a few hundred votes, these overseas voters could have made the difference.[109]

Australia faces a similar issue to the United States. This was recognised in a JSCEM inquiry hearing on 20 September 2002, when Senator Robert Ray raised concerns about dual citizenship and its capacity to allow a person to vote in multiple nations. He stated:

> You could be a resident in Europe and voting for candidates in their local or national elections that insist on agricultural subsidies that absolutely destroy the Australian way of life – and then you are supposed to get a vote within Australia.[110]

Prior to April 2002, an Australian citizen choosing to acquire another citizenship would forfeit their Australian citizenship. However, section 17 of the Australian

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n 4, para 2.258. The ATO further stated that while the Electoral Act allows overseas Australians to be registered as Overseas Eligible Electors for six years (extendable for more), under tax law a person generally ceases to be a resident for tax purposes two years after they cease to reside in Australia: see ATO *2001 Federal Election* (Submission No 194 on 'Inquiry into the 2001 Federal Election') 5.

107. See eg M Kalman 'US Ballots in Demand in Israel' *USA Today* 29 Sep 2000, A10; J Malone 'Absentees: US Voters in Israel Could Be Key for Gore' *The Atlanta Journal–Constitution* 17 Nov 2000, A10; L Kaplow 'Floridians in Israel Casting Crucial Votes' *Palm Beach Post* 9 Nov 2000, 18A.

108. Ibid.

109. See 'Israeli, Palestinian US Citizens Split on Absentee Vote' *Seattle Times* 14 Nov 2000, A4. For more on the controversy surrounding the 2000 US Presidential Election, see D Lowenstein 'Lessons from the Florida Controversy' in Orr, Mercurio & Williams above n 73, 7-25.

110. JSCEM Report above n 4, para 2.250 (quoting Transcript of Evidence, 20 Sep 2002, R Ray, EM113).

Citizenship Act 1948 was then repealed by the Australian Citizenship Legislation Amendment Act 2002 to allow Australians to become citizens of another nation without losing their Australian citizenship.[111] The JSCEM recognised that the effect of this was that expatriate Australians might qualify to enrol and vote for both Australian and overseas elections if they met the requirements of the Commonwealth Electoral Act and any requirements in their new country of citizenship.

A discussion paper on the then proposed dual citizenship arrangements issued by the Australian Citizenship Council noted many arguments against the introduction of dual citizenship and questioned whether dual citizenship would cause problems when 'nations and their members have interests which may be compromised by conflicting allegiances'.[112] Submissions to the JSCEM adopted mixed views on dual citizenship and voting rights. For instance, a submission by the Southern Cross Group stated:

> If I am living in Canada where I have taken out Canadian citizenship ... I would feel no urge to vote in Australian elections. My feeling is that as I am not living in Australia, it would not be fair to impose my views ... on the Australian situation.[113]

Others submissions put forward the view that their financial and personal ties to both Australia and their country of residence entitled them to participate in both countries' elections. Submissions stated that, 'If one has an impact on two cultures, it is not unreasonable to vote in both countries. That is not the same as voting twice;[114] and that 'If I am a citizen of two countries, I may have business, social and other interests in both countries. I may well be paying tax in two countries, even if I am a non-resident of one. Therefore, why shouldn't I be able to vote in two different countries?'[115]

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111. Australians who had already lost their Australian citizenship under s 17 did not have their citizenship reinstated. The JSCEM notes that the Southern Cross Group played a 'significant' role in the campaign to repeal s 17 of the Australian Citizenship Act 1948: JSCEM Report above n 4, para 2.248. 'One of the [group's] arguments for change was that many expatriate Australians wish to take up citizenship of their new country of residence for practical reasons such as to overcome limitations on work, finance, taxation, business, property purchase and the like': ibid, citing Southern Cross Group *Section 17 of the Australian Citizenship Act 1948: Grounds of Repeal and Associated Issues* (Brussels and Washington DC, Jul 2001). The Southern Cross Group 'also argued that expatriate Australians who remain as foreign nationals in their new country of residence do not usually have the right to vote, and in many cases, are excluded from voting in Australian elections because of the restrictions.... Many expatriates therefore do not have [the] right to vote in their homeland (Australia) or their country of residence': JSCEM Report above n 4, para 2.249.
112. Australian Citizenship Council *Loss of Australian Citizenship on Acquisition of Another Citizenship* Discussion Paper <www.citizenship.gov.au/0601paper/07.htm>.
113. Southern Cross Group *2001 Federal Election* (Submission No 187 on 'Inquiry into the 2001 Federal Election') 9.
114. Ibid.
115. Ibid, 10.

Other arguments support voting by expatriates. They can play an important role in promoting developments in their home country. Not only is this achieved through the expatriates remitting money and resources to their home country, but also through increased foreign investment and trade and cultural links with other nations.[116] In addition, possession of Australian citizenship suggests a capacity to determine the course of the political system. While the rights and obligations of citizenship in Australia, as elsewhere, continue to be contested,[117] the preamble to the Australian Citizenship Act 1948 sets out some of the normative connotations normally associated with the idea:

> Australian citizenship represents formal membership of the community of the Commonwealth of Australia; and Australian citizenship is a common bond, involving reciprocal rights and obligations, uniting all Australians, while respecting their diversity; and
>
> Persons granted Australian citizenship enjoy these rights and undertake to accept these obligations by pledging loyalty to Australia and its people, and by sharing their democratic beliefs, and by respecting their rights and liberties, and by upholding and obeying the laws of Australia.

In speaking of rights and obligations, citizenship would normally be seen as including the right to vote. Indeed, the ability to vote, even in a large democracy, can be seen as a vital part of an expatriate's right to self-expression. In this context, a concept of citizenship bounded by the high-water mark of a nation may have made some sense in the past, but makes less sense today. In a world connected by common concerns, such as free and fair trade and the 'War on Terror', and by new forms of communication, it is important to recognise the many Australians who, for whatever reason, are living abroad as part of a global Australian community. As American academic Fred Riggs has suggested:

> No nation today can be seen as a people living just within the boundaries of a state – all nations, instead, are global in the sense that, even though they have a homeland, many of their members live scattered around the globe. [118]

While the historical record is not clear, it would seem likely that Australians living overseas were denied voting rights because, among other things, it was felt that they would lose touch with Australian society and not be knowledgeable enough to make an informed decision. This may have been valid in years past, but in an emerging, interactive, online society such reasoning is not as persuasive. Today, through median such as the internet and satellite and digital television, Australians

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116. See REB Lucas *Diaspora and Development Highly Skilled Migrants from East Asia* (Boston Uni: World Bank, Nov 2001).
117. See eg K Rubenstein 'Citizenship and the Centenary – Inclusion and Exclusion in 20th Century Australia' (2000) 24 MULR 576.
118. FW Riggs 'Diasporas and Ethnic Nations: Causes and Consequences of Globalisation' (Paper presented to the Los Angeles International Studies Assoc, 16 Mar 2000).

overseas can more easily remain in touch. While overseas Australians cannot take part in events or community discussions on day-to-day issues that require a person to live physically within a geographical area, they may still form reasoned judgments on Australian issues and make an informed decision at the polling booth.

It can further be argued that expatriates living abroad form their own community, their own 'polis'. So while Blackburn feels that: '[expatriate voting] flouts two important principles of the British electoral system, namely that the basis of the parliamentary system is the representation of constituencies and that the basis of the right to vote is one of residency in a constituency',[119] he fails to consider that the connection to a particular geographic area or boundary has been slowly eroded and that, at the same time as the franchise has been extended, the world has become 'smaller' as citizens residing abroad are able to remain connected with their country of origin. Indeed, the barriers to engagement in the Australian political process and the formation of opinions about current Australian events may be lower for a person living in New York with access to high speed internet than to a person living in Australia in a remote community that lacks even the most basic communications infrastructure.

V. OPTIONS FOR REFORM

Approximately 900 000 Australians are abroad at any given time, yet only 63 036 votes were cast overseas in the 2001 federal Election.[120] Therefore, a large number of Australians overseas (whether temporarily or permanently) at the time of that election did not make the choice specified in sections 7 and 24 of the Australian Constitution. A larger percentage of Australian citizens overseas on election day should participate in the electoral process. We do not suggest that change would be easy[121] or involve no cost to implement. Increasing the number of overseas voters would require at the very least that the AEC be given sufficient resources to manage the process, including enabling it to maintain an accurate and up-to-date electoral roll.[122]

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119. Blackburn above n 102, 79.
120. JSCEM Report above n 4, 65, Table 2.8; Southern Cross above n 15. Interestingly, approximately 10 000–15 000 votes were issued in the UK and approximately 5 000 in China: Hugo Report above n 15, 23. Cf A Hepworth 'AEC Launches Campaign to Get Expatriates to Vote' *Australian Financial Review* 31 May 2004, 5.
121. One way of facilitating an overseas electorate may be by implementing a system of electronic or internet voting. For more on the possibilities of such systems, see B Mercurio 'Overhauling Australian Democracy: The Benefits and Burdens of Internet Voting' (2002) 21(2) U Tas LR 23; B Mercurio 'Is Assisted Voting Outdated? Using Technology to Allow All Australians to Cast their Ballots in Secret' (2003) 28 ALJ 272; B Mercurio 'Beyond the Paper Ballot: Exploring Computerised Voting' in Orr, Mercurio & Williams above n 73, 230.
122. While it has been argued that increasing the overseas vote will also increase the concerns

Below, we offer three recommendations for achieving greater participation from Australians overseas. First, so as not to exclude the unwitting Australian from the electoral process, the AEC and the government should make the provisions regarding overseas voting more 'visible' and accessible. Secondly, the criteria should be relaxed to enable more long-term overseas Australians to vote. Thirdly, the possibility of having overseas voters cast their ballot in a special electorate designed for expatriate voters should be investigated.

Increase information

It may seem rather elementary, but the first step in raising the level of participation of overseas electors in the Australian election process involves increasing the knowledge and information base of Australians regarding the law governing EOEs. In this regard, we agree with Recommendation 6 of the JSCEM, which states that 'the AEC [should] provide comprehensive information on overseas voting entitlements and enrolment procedures to all electors who contact the AEC about moving overseas'.

Several submissions to the JSCEM asserted that most Australians moving overseas are not aware of the provisions allowing overseas enrolment.[123] The AEC responded by asserting that there are sufficient sources of information available from 'the most obvious sources' on overseas enrolment and voting procedures,[124] including the AEC website (which includes detailed descriptions of the overseas enrolment process and contains application forms), the application form for registration as an EOE (which contains advice regarding how to vote overseas once registered) and through a letter sent to electors when their application for EOE status is accepted (which explains the restrictions on eligibility and how to vote overseas).[125] However, the AEC's response assumes that a person has access to the internet and that he or she has sufficient knowledge to seek out this information.

Several submissions to the JSCEM suggest that these assumptions are incorrect.[126] For example, Caroline Bissey reported that she was removed from the electoral roll after speaking with an AEC officer prior to moving overseas, adding, 'I was not sure what the process would be or what my options were. I was not aware that I could register as an overseas elector and [the AEC officer] never explained to me that I

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of fraud, as these voters would (until the introduction of internet or computerised voting) have to rely on postal voting, we do not accept that to be a strong argument. If it were, we should not allow postal voting in general.

123. Southern Cross Group above n 31, 8.

124. AEC (Submission No 181 on 'Inquiry into the 2001 Federal Election') 4.

125. The AEC also referred to DFAT *Hints for Australian Travellers* <www.smartraveller.gov.au/hints/index.html>: see ibid, 3.

126. JSCEM Report above n 4, 2.238 (citing C Bissey, Submission No 60; S Tobin, Submission No 65; R Stephenson, Submission No 112; K Austin, Submission No 113; L Quinn, Submission No 123 on 'Inquiry into the 2001 Federal Election').

could'.[127] In response, the AEC stated that its records show that Ms Bissey wrote to the AEC advising that she was 'leaving Australia to live overseas', and that she understood that 'if she ever returned to Australia' she should re-enrol. Based on that correspondence, the AEC concluded that Ms Bissey had no fixed intention of returning to Australia and therefore was not eligible for EOE status.[128] The AEC, therefore, did not check with Ms Bissey the timeline of her visit nor did they contact her to explain the voting provisions more fully.

Responding generally to complaints of lack of information about overseas voting entitlements, the AEC stated that it was probable that the majority of those complainants were ineligible for EOE status, and that 'there is no reason to provide information on the EOE register to people who clearly do not qualify under the provisions of the Act'.[129] While the JSCEM sympathised with the AEC's assertion that 'there is no reason to provide information on the EOE register to people who clearly do not qualify under the provisions of the Act', it expressed concern that this lack of information and transparency may lead people to believe that they have been misled by the AEC about their voting rights. Sensibly, the JSCEM felt that the AEC 'should provide information about overseas enrolment entitlements to all people who contact them about moving overseas, rather than only to those people AEC officers believe may qualify for EOE status'. The AEC should undertake a publicity campaign to educate the electorate about the provisions. Fully and freely disclosing the laws regulating overseas voting will alleviate concerns (whether real or perceived) about the lack of information.[130]

Relax the criteria

To achieve higher participation rates in the electoral process among expatriates, Parliament should consider relaxing the restrictions currently placed on overseas voters. The JSCEM has recently recommended that section 94A(1) of the Commonwealth Electoral Act be amended so that expatriate Australians applying for EOE status would no longer be required to state the reason why they left Australia.

127. Bissey, ibid.
128. AEC above n 45, 6.
129. Ibid. A number of submissions also complained of inadequate advice on overseas voting entitlements from DFAT staff at overseas posts. DFAT's response to the JSCEM was that advice on voting rights is an AEC matter, and that overseas posts should be advising enquirers to contact the AEC directly: eg, JSCEM Report above n 4, 2.241 (citing L Dwyer, Submission No 54; J Wulff, Submission No 111; S Blackney, Submission No 118; C Rawson, Submission No 137); DFAT, Submission No 168 on 'Inquiry into the 2001 Federal Election', 2). See also AEC above n 43, 11.
130. Australia could model an improved system on the activities of the US government, which actively promotes the registration of overseas Americans through the internet and, in some countries, through the print and news media. In addition, on several websites, US citizens can register to vote in a matter of minutes: see eg <http://www.overseasvote2004.com/>. On the prospects for internet voting in Australia, see Mercurio above n 121.

We agree with the recommendation. There is no acceptable reason for denying EOE status to citizens enrolling from overseas who did not relocate for career or employment purposes (or for those of their spouse).[131] Despite being impossible to enforce, the rule is also an anomaly given that Australians already enrolled who apply for EOE status are not subject to the same requirement.

We also agree with the JSCEM recommendation that subsection 94A(2) of the Commonwealth Electoral Act be amended so that the current two-year cut off period for application for EOE status be extended to three years.[132] While the previous cut-off of one year could conceivably have been inserted to encourage citizens to enrol as soon as possible after departing Australia, the selection of a two-year cut off was a seemingly arbitrary date. An amendment extending the timeline to three years, a full election cycle, seems more appropriate.

We do, however, depart from the JSCEM recommendations in other respects. Whereas that committee does not feel any further change is warranted, we feel that more extensive amendments are needed in order to include more overseas Australians in the electoral process. This change need not be undertaken as a major shift in policy whereby Australia adopts a United States-type system which allows all of its citizens to vote while abroad. Instead, we believe the goals could be accomplished in a number of different, more limited ways, such as through extending the timeframe for voting rights (similar to the United Kingdom) or by adopting a measure similar to that of New Zealand, whereby an elector would not be disenfranchised so long as he or she returned to Australia within a time period. The latter would mean that, so long as an Australian residing overseas returns to Australia (even for a short visit) within a set timeframe, he or she would be seen as maintaining sufficient ties to Australia to retain Australian voting rights.

Investigate an overseas electorate?

Another way to increase expatriate participation in the Australian electoral process could be to create a special electorate for overseas voters.[133] This would also counter

131. See *Zwickler v AEC* [2001] AATA 929 (9 Oct 2001). The applicant in that case left Australia temporarily to care for her sick husband. She was unaware of her rights in relation to voting before she left Australia and, due to her husband's condition, she resided outside Australia for much longer than anticipated. Having gone overseas for reasons not related to her career or employment or that of her husband she did not satisfy the requirement in s 94A(1)(a) and was refused electoral enrolment from outside Australia. While being 'most sympathetic' to the applicant's situation, the tribunal refused her appeal.
132. The Southern Cross Group submitted that the two-year limit is 'probably the most insidious of all the restrictions on overseas voters': Southern Cross Group above n 31, 11. The Group submitted that those overseas Australians who miss the two-year deadline through ignorance of the law, or other reasons, are disenfranchised and recommended that applications for EOE status or the ability to enrol from outside Australia can be made at any time: ibid, 14.
133. For more information on the possibility of an overseas electorate, see A Leigh 'New Voting

the problem of determining the electorate in which expatriate voters should participate. Several submissions to the JSCEM raised this possibility,[134] with one submission arguing that overseas residents have a 'natural community of interests' and that an overseas electorate would avoid the 'artificial' situation of overseas voters casting ballots in the electorate they last lived in, when they could have been away for quite some time and may not return to live there.[135] The JSCEM Report pointed out that several countries have special arrangements for voters living overseas, including France (which has 12 senators representing French people living abroad); Croatia (which has six members representing Croatians living abroad); and Portugal (which has four deputies in two constituencies representing Portuguese citizens resident overseas).[136] The AEC has stated that while the creation of an overseas electorate would present a number of administrative challenges, none of them is insurmountable.[137]

However, the AEC noted that legal opinion would need to be sought on whether the proposal would be achievable under the Constitution. Section 24 of the Constitution refers to 'members [of the House of representatives] chosen in the several States'. This may imply that the members of that House (other than those representing a Territory) must be chosen from one of the States and not from outside those States, such as from an overseas constituency. It is possible that this might be dealt with by establishing a separate overseas constituency for each State.[138] Section 29 of the Constitution also states, in part, that a 'Division shall not be formed out of parts of different States'. The Attorney-General's Department, in the context of proposals for a separate electorate for Aboriginal and Torres Strait Islanders, has previously advised the AEC that the High Court may construe this section as implying that Divisions must be geographically defined.[139] Again, it is not clear whether that is

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Rights for the Australian Diaspora' in *Democratic Audit of Australia* (Canberra: ANU, Jul 2004); M Duncan, A Leigh, D Madden & P Tynan *Imagining Australia: Ideas for Our Future* (Sydney: Allen & Unwin, 2004).

134. See JSCEM Report above n 4, 2.220 (citing L Reeb, Submission No 21; P Sved, Submission No 48; H & S Brookman, Submission No 75; J Magnin, Submission No 85; R Mair, Submission No 104 on 'Inquiry into the 2001 Federal Election').
135. JSCEM Report above n 4, 2.221; Brookman ibid. Senator Andrew Murray supports a 'whole of Australia' seat for Australians living overseas. Senator Murray commented that it would add 'one extra seat to the House of Representatives – which is neither here nor there – but there would be no chance then, in my view, of a particular electorate being influenced by the deliberate location of Australians overseas on a random basis into that electorate': JSCEM Report ibid, 2.225, citing A Murray 'Transcript of Evidence' (20 Sep 2002) EM 111.
136. JSCEM Report above n 4, 2.222. See also internet sites: French Sénat <http://www.senat.fr/english/role/senate.html>; Electionworld <http://www.electionworld.org/electionparliaments.htm>; Southern Cross Group <http://www.southern-cross-group.org/overseasvotingdirectrepresentos.html>.
137. AEC above n 124, 7.
138. Ibid 6. See also Australian Constitution s 24.
139. AEC above n 124, 6; Australian Constitution s 29.

the case, but it is possible that the creation of a special constituency for overseas voters would require amendment of the Constitution.[140]

While it is too early to recommend such a change to Australia's electoral structure, the possibilities and impediments (constitutional or otherwise) of an overseas electorate should be studied. As other nations have discovered, this could be an effective way of including overseas citizens in the democratic governance of the nation while also placating some of the traditional concerns against their inclusion.

VI. CONCLUSION

Residency in an electoral district has been a traditional means of sorting out those who can vote from those who cannot. This made sense at a time when few Australian lived overseas and when communications technology did not enable a person living overseas to stay abreast of local issues. A franchise determined exclusively by residency makes less sense today when hundreds of thousands of Australians have moved abroad to live and work. It also seems anomalous when the issues that decide election campaigns are not limited to local issues such as taxation, education and health care. As recent Australian elections have demonstrated, international issues can have a powerful effect on election campaigns, such as immigration and refugee policy in 2001, and national security and the war in Iraq in 2004.

We do not conclude that all overseas Australians should be permitted to vote in federal elections. However, we do find that the current rules, which have developed in an ad hoc fashion into a complex and unwieldy body of law, should be refined, and that education about them should be improved. We have also found that the criteria for allowing overseas voting should be relaxed to reflect, among other things, the importance of citizenship as a concept that binds together what is emerging as a global Australian community. Finally, we argue for investigation of more significant, longer-terms change to the structure of the Australian electoral system, in particular the idea of a special electorate or electorates of overseas voters. Such an innovation has been adopted in other nations and should be considered for Australia.

140. This is provided for by way of a referendum under s 128 of the Australian Constitution. Of the 44 proposals put to the Australian people at a referendum, only eight have succeeded. See generally A Blackshield & G Williams *Australian Constitutional Law and Theory: Commentary and Materials* 3rd edn (Sydney: Federation Press, 2002) ch 30.