

Research Paper  
No. 17 2001–02

## Voters and the Franchise: the Federal Story



ISSN 1328-7478

© Copyright Commonwealth of Australia 2002

Except to the extent of the uses permitted under the *Copyright Act 1968*, no part of this publication may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior written consent of the Department of the Parliamentary Library, other than by Senators and Members of the Australian Parliament in the course of their official duties.

This paper has been prepared for general distribution to Senators and Members of the Australian Parliament. While great care is taken to ensure that the paper is accurate and balanced, the paper is written using information publicly available at the time of production. The views expressed are those of the author and should not be attributed to the Information and Research Services (IRS). Advice on legislation or legal policy issues contained in this paper is provided for use in parliamentary debate and for related parliamentary purposes. This paper is not professional legal opinion. Readers are reminded that the paper is not an official parliamentary or Australian government document. IRS staff are available to discuss the paper's contents with Senators and Members and their staff but not with members of the public.

Published by the Department of the Parliamentary Library, 2002

## Voters and the Franchise: the Federal Story

The Vision in Hindsight: Parliament and the Constitution: Paper No. 16

### ***Vision in Hindsight***

*Vision in Hindsight* is a Department of the Parliamentary Library (DPL) project for the Centenary of Federation.

*The Vision in Hindsight: Parliament and the Constitution* is a collection of essays each of which tells the story of how Parliament has fashioned and reworked the intentions of those who crafted the Constitution. The unifying theme is the importance of identifying Parliament's central role in the development of the Constitution. A number of essays have been commissioned and will be published, as IRS Research Papers, of which this paper is the sixteenth.

Eleven of these papers were selected for inclusion in the final volume, *Parliament: The Vision in Hindsight*, G. Lindell and R. Bennett, eds, Federation Press, Sydney 2001.

A Steering Committee comprising Professor Geoffrey Lindell (Chair), the Hon. Peter Durack, the Hon. John Bannon and Dr John Uhr assisted DPL with the management of the project.



Centenary of Federation 1901-  
2001



## Enquiries

Information and Research Services publications are available on the ParlInfo database.

On the Internet the Department of the Parliamentary Library can be found at: <http://www.aph.gov.au/library/>

IRS Publications Office

Telephone: (02) 6277 2778

# Contents

Major Issues . . . . .	i
Introduction . . . . .	1
The System of Representative Government . . . . .	1
The Founders Vision . . . . .	1
Voters . . . . .	2
The Constitution and the Franchise . . . . .	2
Pre-Federation Franchise in the Colonies . . . . .	7
The Development of the Federal Franchise . . . . .	8
Gender . . . . .	10
Indigenous Peoples . . . . .	12
Commonwealth Franchise Act 1902 . . . . .	12
World War I & World War II . . . . .	15
Commonwealth Electoral Act 1949 . . . . .	15
The 1960s . . . . .	16
Commonwealth Electoral Amendment Act 1983 . . . . .	17
Age . . . . .	17
World War I . . . . .	18
World War II . . . . .	18
Vietnam War . . . . .	19
The 1970s, 1980s and 1990s . . . . .	19
Non-European Migrants . . . . .	20
Commonwealth Franchise Act 1902 . . . . .	20
Commonwealth Electoral Act 1925 . . . . .	21
Commonwealth Electoral Act 1961 . . . . .	22
Offenders . . . . .	22

Commonwealth Franchise Act 1902 . . . . .	22
Reform and Attempts at Reform . . . . .	23
The Institutionalised Poor and the Franchise Bill 1902 . . . . .	24
Mental 'Incapacity' . . . . .	25
Members of Unlawful Associations. . . . .	25
Entrenchment of the Franchise: Limiting the Role for Parliament . . . . .	26
The Vision in Hindsight . . . . .	28
Endnotes . . . . .	29



## Major Issues

The Australian Constitution expressly creates a system of representative government. Regular, direct and popular election for members of the federal Parliament is the centrepiece of this system. Sections 7 and 24 of the Constitution respectively provide that the members of the Senate and the House of Representatives shall be composed of members 'directly chosen by the people'. Sections 5, 13 and 28 provide that elections are to be held at least every three years. Within these parameters, the framers left much of the detail about elections and voting to Parliament.

In 1901, a Franchise Bill was introduced into the Commonwealth Parliament. It provided a right to vote in federal elections for any adult who had resided in the Commonwealth for at least six months. This attempt to secure a broadly-based suffrage and establish perhaps 'the most representative Parliament, according to the truest principles of democracy, ... in the world'<sup>1</sup> did not survive. Although opposition was expressed to female suffrage, women were enfranchised by the *Commonwealth Franchise Act 1902*. However, other groups in the community were expressly excluded. Indigenous Australians, 'non-European' migrants, certain offenders, and those of 'unsound mind' were disenfranchised, subject to the constraints of section 41 of the Constitution.

Section 41 owes its place in the Constitution to attempts at the Adelaide Convention of 1897–98 to constitutionally entrench adult female suffrage in federal elections. These attempts failed. However, a compromise was reached based on the idea that those women who were qualified to vote under State law should be not deprived of that right at federal elections. This compromise is reflected in the section:

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.

These words are ambiguous, and have been debated from the time of the first Parliamentary debates on franchise laws and through argument in a number of High Court cases. Legislators, bureaucrats, litigators and jurists have considered whether section 41 guarantees a right to vote in federal elections to anyone entitled to vote at elections for the more numerous House of a State Parliament or whether its reach is either more limited or entirely spent—for instance, only preserving the voting rights of anyone enfranchised before the passage of the *Commonwealth Franchise Act 1902*.

In general, a narrow view of section 41 has been adopted. An attempt failed in the 1920s to convince the High Court that section 41 protected the rights of a Japanese-Australian, whose application to enrol to vote in federal elections had been rejected on the basis that he was disqualified under the *Commonwealth Electoral Act 1918* for being an 'aboriginal native of ... Asia'. In the 1970s, an argument that South Australians should be able to vote in Commonwealth elections because South Australian law had lowered the voting age to 18 years was rejected by the Court.

While section 41 has not provided a constitutionally guaranteed right to vote, the Commonwealth Parliament has, over the course of the 20th century, generally legislated to remove rather than extend exclusions on voting. These reforms came slowly. For example:

- amendments made in 1925 enabled limited numbers of 'non-European' migrants<sup>2</sup> to vote in Commonwealth elections
- Indigenous Australians who had served in the Defence Forces during World War II or who had been enfranchised under State law were given the Commonwealth franchise in 1949
- in 1961 the remaining disqualifications on 'aboriginal native[s] of ... Asia, Africa, or the Islands of the Pacific' were repealed
- all Indigenous Australians were given the vote in Commonwealth elections in 1962 (but enrolment did not become compulsory until 1983), and
- in 1973 the voting age for all Commonwealth electors was lowered to 18 years.

However, a number of issues remain. First, it must be remembered that the Commonwealth Parliament has legislated on the basis that it has a largely unfettered power to set the boundaries and content of the Australian system of representative government, including the qualifications of voters. Second, some groups remain disenfranchised. For instance, voting rights for prisoners remains a contested issue. And the *Crimes Act 1914* retains provisions, first inserted in 1932, that would ban the members of unlawful associations and their affiliates from voting for a period of seven years after the body has been declared as an unlawful association.

How can a broadly based suffrage be guaranteed and protected? While section 41 may be a spent force, perhaps we should turn again to the Constitution for a right to vote. In the short-term, the words 'directly chosen by the people' in sections 7 and 24 of the Constitution may limit the degree to which the Commonwealth can restrict the federal franchise. As McTiernan and Jacobs JJ said in *Attorney-General (Cth); Ex rel McKinlay v. Commonwealth*:

the long established universal adult suffrage may now be recognised as a fact and as a result it is doubtful whether ... anything less than this could now be described as a choice by the people.<sup>3</sup>

In the longer term, the lack of a clear constitutional right to vote is a reason to consider constitutional reform.



## Introduction

This Paper<sup>4</sup> charts the development of Australian law dealing with eligibility to vote and methods of voting in federal elections. It does so by first examining relevant provisions in Australia's foundational legal document—the Commonwealth Constitution. These provisions enable the Parliament to legislate on elector qualifications and elections. They impliedly establish a system of representative democracy and include the much-disputed section 41 of the Constitution. That section influenced the drafting of the *Commonwealth Franchise Act 1902* and has provoked debate about whether it provides a constitutional right to vote. The Paper then examines the history of Commonwealth franchise legislation from the time of the First Parliament to the present day. This history shows that Parliament has legislated on the basis that its power to determine the franchise and method of voting in Commonwealth elections is largely uncircumscribed by the Constitution—save for the limited and now spent impact of section 41. However, recent High Court decisions suggest that the system of representative government entrenched by other sections of the Constitution may fetter the Parliament's power to restrict the franchise and method of voting. It is to these potential constitutional limitations that the Paper finally turns.

## The System of Representative Government

### The Founders Vision

The Australian Constitution was drafted at two Conventions held in the 1890s. The delegates were deeply influenced by their British heritage and assumed that the Australian federation would be steeped in the Westminster traditions of representative and responsible government. However, the Westminster system was inadequate as a model for an Australian federal government that was to be based upon a written constitution.

The other obvious comparative models were the written constitutions of Switzerland, Canada and the United States.<sup>5</sup> Neither the Swiss nor the Canadian models were as compelling as that of the United States. Switzerland, which had become a federation in 1848 and had revised its Constitution in 1874, possessed a language and political traditions alien to the Australian drafters. The Canadian Constitution might at first have appeared to be the appropriate model given its creation of a federal structure under the British Crown. However, the Canadian Constitution was rejected because it was believed to give too much power to the central government. The framers of the Australian Constitution instead gave primacy to the United States Constitution. As Sir Owen Dixon, a former Chief Justice of the High Court, has remarked:

The framers of our own federal Commonwealth Constitution (who were for the most part lawyers) found the American instrument of government an incomparable model. They could not escape from its fascination. Its contemplation damped the smouldering fires of their originality.<sup>6</sup>

Hence, the Australian Constitution, like that of the United States, incorporates a separation of powers, entrenches the position of the High Court and balances the relative powers of the smaller and larger States by, for example, creating a Senate in which the States are equally represented.

Like the United States Constitution, the Australian Constitution expressly creates a system of representative government, that is, government of the people by their elected representatives. The centrepiece of this system is regular elections for members of the federal Parliament by the Australian people. Thus, sections 7 and 24 of the Constitution respectively provide that the members of the Senate and the House of Representatives shall be composed of members 'directly chosen by the people'. Section 25 shows that even though section 24 (unlike section 7) does not mention 'voting', such a system of selection was clearly intended. Sections 5, 13 and 28 provide that elections are to be held at least around every three years. Other sections in the Constitution are also consistent with the creation of a system of representative government. For example, sections 8 and 30 speak of the qualifications of voters for the Senate and House of Representatives, respectively.

While the Constitution establishes the parameters of representative government, the framers' intention was to leave most of the detail to the new federal Parliament. Hence, section 8 states that the federal Parliament 'may make laws prescribing the method of choosing senators, but so that the method shall be uniform for all States', while section 31 enables Parliament to legislate for the conduct of elections for the House of Representatives.<sup>7</sup> Sections 16 and 34, respectively, also enable the Parliament to establish the qualifications of members of the Senate and House of Representatives.<sup>8</sup> Of course, the qualifications as set by Parliament under these sections cannot override the mandatory disqualification of members for the matters set down by sections 44 and 45 of the Constitution, such as where a person has been convicted of treason.

## **Voters**

### **The Constitution and the Franchise**

An objective of some of the framers of the Australian Constitution was to secure the right to vote for women. At the Adelaide session of the 1897–1898 Convention, Frederick Holder, the Treasurer of South Australia, proposed that the draft constitution contain the following clause: 'Every man and women of the full age of twenty-one years, whose name has been registered as an elector for at least six months, shall be an elector.'<sup>9</sup> By this provision, Holder sought to extend, at least in regard to federal elections, the right to vote enjoyed by South Australian women since 1894. The attempt failed, Adye Douglas, the President of the Legislative Council of Tasmania, protesting 'I do not see why it should be forced upon people

who do not want it, simply because South Australia has got it'<sup>10</sup> and 'I have not found a single woman yet who is anxious for this franchise'.<sup>11</sup> The proposal was defeated by 23 votes to 12.<sup>12</sup>

Holder then suggested a compromise that would allow women who were qualified to vote under the law of their State to also be able to vote for the new federal Parliament. This preserved the ability of each State to determine its own franchise, at least until the federal Parliament enacted a national franchise. Holders' compromise was approved by 18 votes to 15<sup>13</sup> and is expressed in section 41 of the Constitution, which states:

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.

This provision guaranteed women the right to vote at Commonwealth elections only where they were given the right by their own State. Thus, in 1901 only women in South Australia and Western Australia were able to vote in federal elections.

Section 41 is the closest that the Constitution comes to expressly conferring a right to vote in federal elections. However, it only operates where a State law already allows a person to vote. Moreover, the section does not actually confer a right. It is worded as a restriction upon the power of the Commonwealth to pass certain laws. It does not vest any individual entitlement.<sup>14</sup> The language of section 41 is also prone to ambiguity. This is compounded by its history. Particular difficulty is associated with the words 'who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State'. Four main interpretations are possible; namely, that section 41 guarantees the right to vote in federal elections to:

1. any person who is entitled to vote for the more numerous House of the State Parliament
2. that class of persons who had acquired the entitlement to vote for the more numerous House of the State Parliament before the enactment of a uniform federal franchise
3. any person who had acquired the entitlement to vote for the more numerous House of the State Parliament before the enactment of a uniform federal franchise, or
4. any person who had acquired the entitlement to vote for the more numerous House of the State Parliament at the time of Federation.

The first option offers the widest guarantee. While it has less support from the drafting history of section 41 than the other options, it is the reading most consistent with a literal wording of the section.<sup>15</sup> The third option is more narrow. Unlike the second option, it would not entitle to vote South Australian women coming of age after the federal franchise had come into effect, but would only apply to those individual women who had acquired the vote prior to that date. The Commonwealth provided for a uniform federal franchise shortly after

Federation in the *Commonwealth Franchise Act 1902* (Cwlth). This Act came into force on 12 June 1902. If the third option were correct, section 41 would have no further work to do once all those people who had acquired a right to vote in a State up until 12 June 1902 had died. On the other hand, if the fourth option were correct, section 41 would be spent when those people who had acquired a right to vote in a State up until 1 January 1901 had died.

There is support for each of these options in the early works on the Australian Constitution. Writing in 1901, John Quick and Robert Garran tentatively argued for the third option, finding that section 41 was merely a transitional provision designed to preserve the voting rights of South Australian women until the new Commonwealth Parliament could enact a uniform federal franchise.<sup>16</sup> They based their support for the third option, as opposed to the second, on the fact that section 41, in acting upon an 'adult person', concerns individuals and not classes of people. Although Quick and Garran found that the word "acquires" in section 41 should be taken to mean 'acquires before the framing [of] the federal franchise', they weakened this conclusion by stating that 'it may certainly be argued that 'acquires' is not expressly limited in point of time'.<sup>17</sup>

In the first edition of his book *The Constitution of the Commonwealth of Australia*, written in 1902, Harrison Moore argued that section 41 should be given a meaning corresponding to either the second or the fourth option. According to Moore, the correct meaning depended upon that given to section 30 of the Constitution, which provides: 'Until the Parliament otherwise provides, the qualification of electors of members of the House of Representatives shall be in each State that which is prescribed by the law of the State as the qualification of electors of the more numerous House of Parliament of the State'. If section 30 referred to the 'law in force in each State at the establishment of the Commonwealth', then the fourth option should be preferred.<sup>18</sup> On the other hand, if section 30 'means laws enacted by the State Parliament at any time before the establishment of a federal franchise by the Commonwealth Parliament', section 41 would 'probably' accord to the second interpretation.<sup>19</sup> Moore did not develop his argument further nor suggest which option he considered to be the correct construction.<sup>20</sup> However, he did reject the interpretation offered by Quick and Garran, that is, the third option. Moore said of this option: 'But such an operation of the law would be so partial and anomalous as to constitute a strong reason for rejecting altogether the limitation of time'.<sup>21</sup>

The Convention Debates are of some assistance in discovering the intentions of the framers of section 41. At the 1897–1898 Convention, Holder apparently intended that section 41 be limited by the enactment of a federal franchise.<sup>22</sup> For example, he stated: 'What I wish is that these rights should be preserved which have been acquired up to the time that the Commonwealth makes its franchise.'<sup>23</sup> The contribution of others is inconclusive.<sup>24</sup> It was clearly a concern that section 41 might operate to enable the States to modify the federal franchise. Edmund Barton (NSW), subsequently Australia's first Prime Minister and one of the first members of the High Court, argued that: 'To give a state the power, after the Federal Parliament is established, of altering the composition and character of the Legislature and the legislation of the Commonwealth certainly would be

unwise.<sup>25</sup> Isaac Isaacs (Vic.), later a Justice of the High Court and Australia's first Australian Governor-General, suggested that the clause should be amended to make clear that this was not the intention by altering the clause to begin: 'Any elector who has, at the establishment of the Commonwealth, or who afterwards, and before the Parliament prescribes the qualification of electors for the Houses of Parliament, acquired a right to vote'.<sup>26</sup> This amendment was not adopted.

In the debate in the federal Parliament over the Commonwealth Franchise Bill 1902, there is not only support for the second or third option options, but also for the first option.<sup>27</sup> Section 4 of the *Commonwealth Franchise Act 1902* provided that Australia's Aboriginal peoples could not vote at federal elections. In the debate over section 4, the issue arose of how the section might be affected by section 41 if a State were to subsequently give Aboriginal peoples the right to vote in State elections. In the House of Representatives, Isaacs (Protectionist, Indi) stated:

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.<sup>28</sup>

Subsequently, in the Senate, Sir John Downer (Protectionist, SA), a member of the 1891 and 1897–1898 Conventions, was even clearer in supporting the first option:

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 that we may pass now upon this matter will be subject to the existing or future law of any State.<sup>29</sup>

Overall, the historical evidence is inconclusive on the ambit of section 41. There is support in contemporary materials and by persons who participated in the drafting of section 41 for each of the four interpretations outlined above. It is clear that the section was designed to give recognition in federal elections to State electoral qualifications. However, there was no commonly held view as to who might be entitled to this recognition and for what time. In any event, the intended purpose of section 41 must be reconciled with the literal meaning of the section, which does not suggest any limitation of the type set out in the second, third or fourth options.

The High Court has had to grapple with section 41 on only a few occasions. The first opportunity came in 1923 in *Muramats v Commonwealth Electoral Officer (WA)*.<sup>30</sup> Jiro Muramats was born in Japan and naturalised in Australia. His application to be enrolled to vote in federal elections was rejected on the basis that he was disqualified under section 39(5) of the *Commonwealth Electoral Act 1918* (Cwlth) for being an 'aboriginal native of ... Asia'. He took the matter to the High Court, where he argued that because he was entitled to be enrolled in Western Australia under section 17 of the *Electoral Act 1907* (WA), section 41 protected his right to vote in federal elections. This argument failed, but

not because of a narrow reading of section 41. Instead, it was held that section 41 did not apply because Muramats was not even entitled to be enrolled in Western Australia. Higgins J nevertheless gave some support for a broad interpretation of section 41, stating that if Muramats had not been disqualified in Western Australia, 'his right to vote at elections for the [Western Australian] Assembly, and therefore to be enrolled on the Commonwealth roll, would seem to be clear'.<sup>31</sup>

The next time section 41 came before the High Court was in 1972 in *King v Jones*.<sup>32</sup> At the time of Federation, and for many years afterwards, the voting age across Australia was set at 21 years. Under the *Constitution Act Amendment Act (No. 2) 1970 (SA)*, the South Australian Parliament, like the New South Wales and Western Australia Parliaments before it, reduced the voting age for State elections from 21 to 18 years. Until 1973, it remained a requirement that a person be at least 21 years old to vote in federal elections.<sup>33</sup> Three South Australians aged between 18 and 21 years applied to be placed on the Commonwealth electoral roll. Their applications were rejected. It was argued in the High Court that, as they were qualified to vote for the more numerous House of the South Australian Parliament, section 41 applied to also allow them to vote in federal elections. The Court unanimously rejected this argument. It did so on the ground that the plaintiffs could not be considered to be 'adult person[s]' under section 41. The Court interpreted 'adult' to give it the 'commonly accepted meaning' that it held at the time of Federation, that is, a person who had attained 21 years.<sup>34</sup>

The Court's finding that the plaintiffs were not 'adult persons' meant that it did not need to address wider issues, including the four options outlined above. However, some judges commented on these issues. J. Menzies, for example, gave unqualified support to an interpretation of section 41 which was not limited in time, that is, the first option. He stated:

The character of section 41 is that of a permanent constitutional provision. It is not a provision to make temporary arrangements for the period between the establishment of the Constitution and the making of Commonwealth laws. It applies to a person, who, in 1901, had or who, in the future, acquires particular voting rights by the laws of a State.<sup>35</sup>

The issue of whether section 41 is limited by the enactment of the federal franchise arose in *R v Pearson; Ex parte Sipka*.<sup>36</sup> Late in the afternoon of 3 February 1983, Prime Minister Malcolm Fraser called a snap federal election for 5 March 1983. On 4 February 1983, proclamations were made to the effect that the writs for the election would be issued later that day. This meant that, under section 45(a) of the *Commonwealth Electoral Act 1918 (Cwlth)*, persons who had not yet enrolled had until 6pm that day, instead of the normal several days, if they wished to be able to vote in the election. The four plaintiffs sought enrolment after that time and were placed on the electoral roll for New South Wales. However, they were refused enrolment for the federal election due to section 45(a). They brought an action in the High Court claiming that they were entitled to vote in the federal election due to section 41. Their action was heard on 16 and 17 February 1983, with the Court handing down its decision on 24 February 1983.

The High Court found, with Murphy J dissenting, that section 41 was merely a transitional provision. It was held that it should be given the meaning set out in the third option, that is, that 's. 41 preserves only those rights which were in existence before the passing of the *Commonwealth Franchise Act 1902*'.<sup>37</sup> The majority consisted of two joint judgments each made up of three judges. Gibbs CJ, Mason and Wilson JJ recognised that their conclusion involved giving section 41 a narrow construction. However, they found that 'this construction of the section is supported not only by obvious considerations of policy, but also by the history of the section'.<sup>38</sup> The policy they referred to was that if section 41 were not limited in time it would stand as a continuing barrier to the Commonwealth being able to maintain a uniform franchise. A State could unilaterally amend that franchise, perhaps to the benefit of its own residents, and 'It is impossible to suppose that results of this kind were intended'.<sup>39</sup> Brennan, Deane and Dawson JJ delivered a judgment to the same effect. They recognised that:

It follows, of course, that the practical effect of section 41 is spent. Most of the electors who acquired a right to vote at federal elections under sections 30 and 8 of the Constitution would have died. Since 12 June 1902, when the *Commonwealth Franchise Act* came into force, no person has acquired a right to vote the exercise of which is protected by section 41.<sup>40</sup>

Murphy J dissented in arguing for a wide construction of section 41 corresponding to that set out in the first option. His approach was very different from that of the other judges. He characterised the provision as 'one of the few guarantees of the rights of persons in the Australian Constitution'.<sup>41</sup> As such, it:

should not be read narrowly. A right to vote is so precious that it should not read out of the Constitution by implication. Rather every reasonable presumption and interpretation should be adopted which favours the right of people to participate in the elections of those who represent them.<sup>42</sup>

He then went on to interpret section 41 according to its literal 'plain meaning', that is, as 'a constitutional guarantee that every adult person who has a right to vote at State elections shall not be prevented by any Commonwealth law from voting at federal elections'.<sup>43</sup>

Today, there is no-one alive who could claim the benefit of the section on the interpretation reached by the High Court in *R v Pearson; Ex parte Sipka*. In 1988, the Constitutional Commission described section 41 as a 'dead letter' and recommended that it be removed from the Constitution.<sup>44</sup>

## Pre-Federation Franchise in the Colonies

Section 41 is not the only way that the Constitution recognised State electoral laws for the purposes of Commonwealth elections. Under sections 30 and 31 of the Constitution, the 1901 federal elections were conducted under State franchise laws.<sup>45</sup> Further, the pre-federation franchise in the colonies provided a reference point for debates in the First

Parliament about the Franchise Bill 1902. The content of the *Commonwealth Franchise Act 1902* partly reflects colonial laws about voter qualifications and disqualifications, as well as being influenced by section 41 of the Constitution.

At Federation, women could vote in South Australia and Western Australia. 'Aboriginal natives of Australia, Asia or Africa' were disqualified from voting in Western Australia. 'Aboriginal natives of Australia, India, China or the South Sea Islands' could not vote in Queensland unless they were property owners. In the Northern Territory of South Australia, only natural born British subjects (with the exception of Indian immigrants), and Europeans or Americans who had been naturalised as British subjects could vote. In New South Wales and Victoria Aboriginal Australians were not specifically disqualified but in general could not vote because they received charitable assistance. Disqualifications based on charitable assistance were also found on the statute books of Queensland and Western Australia. Four colonies denied the vote to those of unsound mind and anyone convicted of treason or a felony who was still under sentence or had not been pardoned. Other criteria for disqualification existed in New South Wales (for example, habitual drunkards, idle and disorderly persons). Members of the armed forces and police services were disenfranchised in New South Wales and Queensland.<sup>46</sup>

## The Development of the Federal Franchise

This section looks at voters explicitly discriminated against under Commonwealth franchise laws. It does not, however, consider all of those effectively disenfranchised as a result of legal rules. For example, until the enactment of the *Commonwealth Electoral Legislation Amendment Act 1983*, no special arrangements existed for people with disabilities such as quadriplegia; for electors in the Antarctic who had been disenfranchised and for itinerant people.

On 5 June 1901, the Franchise Bill 1901 was introduced into the House of Representatives by the Protectionist Government of Edmund Barton (Hunter, NSW). In his Second Reading Speech for the companion Electoral Bill 1902, Senator Richard O'Connor (Protectionist, NSW), Government Leader in the Senate, described the Government's plans for a Commonwealth franchise in the following way:

... the franchise proposed recognises one ground, and one ground only, as giving a right to vote, and that is residence in the Commonwealth for six months or over by any person of adult age. That franchise is the broadest possible one. There is no class of the community left out ... I think the Commonwealth will have reason to congratulate itself when that measure is passed into law, as I have no doubt it will be, on having the most representative Parliament, according to the truest principles of democracy, which exists in the world.<sup>47</sup>

On 3 April 1902, the Franchise Bill 1901 was withdrawn. A substantively identical bill, the Franchise Bill 1902, was introduced into the Senate on 4 April 1902. It is not clear why this occurred. However, the workload of the lower Chamber<sup>48</sup> and a view that,

tactically, it was preferable to have the States' house, the Senate, discuss it first may explain the decision.<sup>49</sup> In the Senate, Senator O'Connor remarked that it was 'in the interests of the business of the Government and in the interests of the measure itself that it should be introduced here.'<sup>50</sup> And later, in the House of Representatives, Home Affairs Minister Sir William Lyne (Protectionist, Hume) commented: '... we have been so continuously occupied during the last 12 months that no opportunity has been afforded for discussing the measure here.'<sup>51</sup>

Clause 3 of the Franchise Bill 1902 gave the vote to any adult inhabitant of Australia resident for six months who was a 'natural born or naturalized subject of the King'. Only those 'attainted of treason' or convicted and under sentence for an offence attracting a penalty of 12 months imprisonment were disqualified from voting.<sup>52</sup> Clause 4 explicitly protected adult voters whose rights were preserved by section 41 of the Constitution.<sup>53</sup>

The long title of the proposed legislation was 'A Bill to provide for an Uniform Federal Franchise'. Senator O'Connor recalled the Constitutional Convention's vision of a parliament representing 'the whole of the people of Australia'<sup>54</sup> and remarked that a uniform franchise based in Commonwealth law was the only 'rational' basis for Commonwealth elections.<sup>55</sup> The rationale for and nature of a uniform Commonwealth franchise was explained by Senator Edward Harney (Free Trade, WA):

It would be an anomaly if we found members of this Senate coming here to discuss matters of Australian interest sent by mandates of different degrees and of different characters ...

... It is impossible for us to narrow in any degree, and if we desire to have a uniform franchise we must accept the widest franchise that exists in any one of the States.<sup>56</sup>

However, as foreshadowed in Senator O'Connor's Second Reading Speech,<sup>57</sup> the breadth of the franchise contemplated by clause 3 was contested in both Chambers. Debate focused on women, Indigenous peoples and 'coloured' migrants, with some attention devoted to offenders, the institutionalised poor, and those of 'unsound mind'. Forming a backdrop to these proceedings were tensions between the view that there should be a uniform franchise for Commonwealth elections, the different qualifications for voting existing in each of the States and the Northern Territory of South Australia, the much-disputed and misunderstood requirements of section 41 of the Commonwealth Constitution, constitutional provisions dealing with Indigenous peoples<sup>58</sup> and provisions governing the qualifications for parliamentary office.<sup>59</sup> Self-interest also played a part. To quote Reid and Forrest:

The architects of the Constitution placed great faith in the capacity of the elected Senators and Members to design statute law for a system of representative self-government, notwithstanding that they would be legislating in their own interest.<sup>60</sup>

Additionally, 'the absence of a developed party structure [meant that] each member participating in the legislative process felt comfortable in opening up new avenues of amendment.'<sup>61</sup>

## Gender

Female suffrage occupied the greatest amount of Senate debating time on the Franchise Bill 1902. Politically, philosophically and in terms of sheer weight of numbers this was a significant reform—with the Government estimating that over 750 000 new voters would be added to the electoral rolls.<sup>62</sup>

Although the question of voting rights for women went to a division only in the House of Representatives,<sup>63</sup> opponents put their views on record. They claimed that women did not want the vote<sup>64</sup> and already exercised considerable informal influence through their roles as wives, mothers and sisters.<sup>65</sup> They said that women should not be burdened by the franchise, that they were unlikely to bring an independent mind to the ballot box (in effect giving their husbands or sons an additional vote) and that the record in South Australia<sup>66</sup> showed that decreasing numbers of women were choosing to vote. Senator Edward Pulsford (Free Trade, NSW) added:

... it [the franchise] will tend to the vulgarization of women, ... it is an introduction of elements which will not strengthen political life, but which will tend to lessen the strength of domestic life.<sup>67</sup>

Further objections were made to women's suffrage '... as a tory vote, as a conservative vote.'<sup>68</sup> Others claimed that it would gradually train '... women to become masculine creatures ... entirely [unfitted] to discharge the functions which properly belong to their sex'.<sup>69</sup>

The Bill's Second Reading debate in the Senate concluded without a division being called.<sup>70</sup> In Committee, on 10 April 1902, Senator Pulsford unsuccessfully moved that clause 3 be amended to restrict the franchise to adult males. Although some Senators expressed 'in principle' objections to female suffrage, few were prepared to vote against it or the Bill. In some cases, desire for a uniform Commonwealth franchise was decisive,<sup>71</sup> others acknowledged the weight of numbers supporting the measure.<sup>72</sup>

Many parliamentarians who supported women's suffrage did so eloquently—drawing on the principles of representative democracy and recognising that women should have a voice in framing the laws that affected them and reforming the laws that oppressed them. Others looked to the future, expressing the hope that New South Wales, Victoria, Queensland and Tasmania would be encouraged to follow the Commonwealth's example.<sup>73</sup> Senator O'Connor remarked:

I see no reason in the world why we should continue to impose laws which have to be obeyed by the women of the community without giving them some voice in the election of the members who make those laws.<sup>74</sup>

And Senator Anderson Dawson (Labor, Qld) commented that:

... the ideal representative government is a collection of persons possessing a knowledge and experience of life, and wisdom enough to use it for the benefit of the general community. Can anyone say that all knowledge and experience is concentrated in the male being?<sup>75</sup>

Senator Norman Ewing (Free Trade, WA) asked:

Can it be asserted that women have no interest in the laws we make for the government of the country? Can it be pretended that they have no interest in the divorce and matrimonial laws in connexion with which they labour under such distinct disadvantages today?

... we require representation on the part of the oppressed and the oppressed in these cases are in my humble opinion the women. ... and inasmuch as every man in this country is given the right to take part in the making of the laws that control him so ... a similar right should be extended to women, irrespective altogether of the question of a uniform franchise.<sup>76</sup>

Senator James Stewart (Labor, Qld) contrasted the conditions under which some women worked with the pious concerns of opponents of female suffrage who argued that it might be degrading:

The very men who say that giving a woman a vote would degrade here, have not the slightest compunction about making her a drudge ... It is not degrading for her to scrub a floor ... or to be put into a factory where she will have to work for nine or ten hours a day for a wretched pittance.<sup>77</sup>

The Bill was passed in the Senate on 11 April 1902. In the House of Representatives, the Bill secured a Second Reading by 29 votes to six on 23 April 1902.

The need to guarantee women's suffrage and ensure that the meaning of the word 'adult' was not misinterpreted as the result of a strict application of 'English precedents'<sup>78</sup> led Attorney-General Alfred Deakin (Protectionist, Ballarat) to move an amendment to clause 3. As amended the clause gave the vote in Commonwealth elections to 'all persons not under twenty-one years of age whether male or female married or unmarried' not who were not otherwise disenfranchised, met residency criteria and were British subjects. The provision remained unchanged for over seven decades. In 1983 the Joint Select Committee on Electoral Reform recommended that the words 'male or female married or unmarried' be omitted 'in accordance with current views on gender and marital status'—a recommendation incorporated into the *Commonwealth Electoral Legislation Amendment*

*Act 1983*<sup>79</sup> which changed the phrase to read 'all persons ... who have attained the age of 18 years'.

## Indigenous Peoples

### Commonwealth Franchise Act 1902

Of more general concern for the First Commonwealth Parliament than votes for 'white' women was the question of Indigenous suffrage. The non-discriminatory nature of the original Franchise Bill 1902 was, to a large extent, the result of the policy goal of a uniform franchise operating within the constraints of section 41 of the Constitution. The Barton Government was also inclined to view Aboriginal people with some sympathy. Senator O'Connor explained the Government's position in this way. First, he said, the disenfranchisement of Aborigines who were 'settled members of the community' was not worthy of serious consideration.<sup>80</sup> Second, he considered that Australia's Indigenous peoples should be treated not only 'fairly, but with some generosity' given that they were a 'failing race'.<sup>81</sup> Third, he commented that:

... it would be a monstrous piece of savagery on our part, to treat the aboriginals, whose land we were occupying, in such a manner as to deprive them absolutely of any right to vote in their own country, simply on the ground of their colour, and because they were aboriginals.<sup>82</sup>

However, in both the Senate and the House of Representatives, a uniform franchise giving the vote to Indigenous Australians was roundly attacked. Unashamedly racist opinions were expressed about Indigenous peoples—particularly Indigenous women. Various Senators and Members were hostile to the possibility of Indigenous Australians being elected to Parliament—given sections 16 and 34 of the Constitution<sup>83</sup> and the relevant parts of the Electoral Bill 1902<sup>84</sup> (then before the Parliament). The latter provisions meant that anyone entitled to vote in a House of Representatives election could be nominated as a Senator or Member. The Commonwealth's first parliamentarians also voiced concerns about the electoral consequences of an Indigenous franchise in northern Australia.

Some Senators estimated that there were 200 000 Indigenous peoples of all ages in Australia and expressed fears that the votes of those living in Queensland, the Northern Territory and Western Australia would be manipulated by 'old crusted conservative' squatters.<sup>85</sup> Senator George Pearce (Labor, WA) remarked that:

We have to remember also that in the north-west of Western Australia we have large numbers of aborigines living upon the sheep and cattle stations. ... Allow the squatters to get them put upon the roll, and who is the returning officer when the election comes around but the squatter himself? What is to prevent him enrolling all the blackfellows on his run and manipulating their votes at election times ...<sup>86</sup>

In contrast to the much-lauded virtues of 'white' women—variously described as 'the fair sex',<sup>87</sup> 'elevated above [men]',<sup>88</sup> having 'a too refined intelligence'<sup>89</sup> and being endowed

with 'sacred functions'<sup>90</sup>—parliamentarians saved their most vituperative comments for Indigenous women. 'Surely', said Senator Alexander Matheson (Free Trade, WA) 'it is absolutely repugnant to the greater number of people of the Commonwealth that an aboriginal lubra or gin—a horrible, degraded, dirty creature—should have the same rights, simply by virtue of being 21 years of age, that we have, after some debate to-day, decided to give to our wives and daughters.'<sup>91</sup> On 10 April 1902, he suggested that clause 4 of the Bill be amended by the insertion of the following words:

No aboriginal native of Australia, Asia, Africa, or the islands of the Pacific, or persons of the half blood shall be entitled to have his name placed on an electoral roll, unless so entitled under section 41 of the Constitution.<sup>92</sup>

However, Senator Gregor McGregor (Labor, SA) moved that the word 'Australia' be omitted from Senator Matheson's proposed amendment, remarking:

In the majority of States those aborigines who have shown that they are intelligent enough to exercise the franchise are entitled to do so, but they have only availed themselves of the right to a limited extent, and no evil consequences have resulted ... I should be very sorry if we took away a right from a declining race like the aborigines ...<sup>93</sup>

By a majority of 12 to eight votes, the Senate voted to omit the word 'Australia' and then agreed to the amendment (as amended).<sup>94</sup>

In the House of Representatives, two amendments relating to Indigenous Australians were agreed to. The first, proposed by Sir William Lyne, removed the disqualification in clause 4 on 'persons of the half-blood'.

Mr H. B. Higgins (Protectionist, North Melbourne) then successfully moved<sup>95</sup> that the word 'Australia' be re-inserted into clause 4. He argued that giving the vote to Australian Aborigines was 'a ridiculous franchise', and that it was not underpinned by any 'constitutional obligation'.<sup>96</sup> Higgins' amendment was supported by Sir Edward Braddon (Free Trade, Coventry) on the ground that it would prevent the vote being given to Aboriginal women.<sup>97</sup> Few took issue with the proposal—one being Mr Hugh Mahon (Labor, Coolgardie) who expressed his disappointment that:

... the Government had decided to accept an amendment which places a stigma upon the race that held this continent long before white people came here.<sup>98</sup>

Nevertheless, Mahon's view of his Indigenous compatriots differed little from that of his colleagues:

... I am free to admit that there is perhaps no lower type of humanity on this planet than the aboriginal of Western Australia. I believe also that it is impossible for the average aboriginal to understand any political question, or to vote with intelligence. At the same time I do not think the first Australian National Parliament should place upon the statute-book a prohibition against the native races of the continent, and a stigma upon their name. We could easily prevent these people from being enrolled, without leaving

ourselves open to reproach, by providing in the Electoral Bill that no aboriginals shall be enrolled unless they are able to read, write, and understand the English language.<sup>99</sup>

The idea of a literacy test for electoral enrolment was supported by Mr James Ronald (Labor, Southern Melbourne) who remarked:

To draw a 'colour line' and say that because a man's face is black he therefore is not able to understand the principles of civilization, is misanthropic, inhumane, and unchristian.<sup>100</sup>

However, the Government supported the Higgins' amendment to clause 4 disenfranchising Indigenous Australians. Sir William Lyne remarked:

We saw some difficulty in the way of making the law uniform, because we knew there were a large number of wild blacks in the northern territory of South Australia, in northern Queensland, and in Western Australia, who could be half-tamed so that they could be roped in, like wild horses, to have their names placed upon the roll. I do not think there can be any objection to adopting the amendment submitted by the honourable member for Northern Melbourne.<sup>101</sup>

Section 41 of the Constitution was also called in aid of the amendment. Sir William Lyne commented that the amendment could not disenfranchise any Indigenous person protected by section 41. Mr Isaac Isaacs (Protectionist, Indi) argued that section 41 guaranteed the Commonwealth franchise to anyone entitled to a State vote under future State laws—thus taking the view that Indigenous peoples could achieve the vote at future Commonwealth elections by operation of State laws.<sup>102</sup>

The Franchise Bill 1902 was then returned to the Senate,<sup>103</sup> which agreed to the amendments made by the House of Representatives.<sup>104</sup> Senator O'Connor considered it more important for the Bill to pass both Houses than for the Senate to insist on the enfranchisement of Indigenous Australians and risk the defeat of the legislation.<sup>105</sup> Senators also voiced concerns about the effect of an Indigenous vote, given the numbers of Indigenous peoples in Western Australia, and about the possibility of an Indigenous woman being elected to the Commonwealth Parliament.<sup>106</sup> Only Senator Lt-Colonel John Neild (Free Trade, NSW) spoke against the House of Representatives amendment:

While the law stands as it is, and there is no bar to any one in the community, unless he is in an asylum or a gaol, exercising his vote, whether he is drunk or whether he is sober, it is only reasonable that the franchise should be granted by the Commonwealth to men who vote but seldom, and who certainly, as the original landlords of Australia, are entitled, in my humble view, to vote in the Commonwealth ...<sup>107</sup>

The Senate also agreed to the House of Representatives amendment that removed the Senate's disqualification of Aboriginal people of mixed descent.<sup>108</sup>

As passed by the Parliament, clause 4 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.

## **World War I & World War II**

In the First Commonwealth Parliament, some arguments against female suffrage were based on the view that '[a]ll political privileges are based on political duties'<sup>109</sup>—the ultimate political duty being armed service in defence of the nation. Australia's involvement in overseas conflicts generated a number of proposals, albeit limited ones, to extend the franchise to Indigenous Australians and young Australians. As Summers has remarked, Indigenous peoples served with distinction in both World Wars.<sup>110</sup>

During World War I suggestions were made that Indigenous peoples should be enrolled to vote at Commonwealth elections if they could pass a test prescribed by the Electoral Registrar.<sup>111</sup> However, an amendment to this effect during debate on the Commonwealth Electoral Bill 1918 was defeated in the Senate 15 votes to seven.<sup>112</sup> And, despite the hopes of some that Aboriginal enlistment would lead to full citizenship rights during World War II,<sup>113</sup> it was not until after the end of that war that on going, if minor, reforms were made to the Commonwealth franchise relating to Indigenous peoples.

## **Commonwealth Electoral Act 1949**

In 1949, Indigenous peoples were entitled to enrol and vote in State elections in New South Wales, Victoria, South Australia, Tasmania. In Queensland, they were disqualified from voting. In Western Australia and the Northern Territory their voting rights were conditional. In Western Australia, an Indigenous person could apply for a certificate of citizenship under the *Natives (Citizenship Rights) Act 1944*, if a magistrate issued a certificate the certificate-holder was deemed to be no longer an Aboriginal and instead to have all the duties and liabilities of a British subject—including the right to vote. Serving and former members of the armed forces could vote in the Northern Territory, as could any Aboriginal person declared fit to perform the duties of a citizen.

The Commonwealth Electoral Bill 1949 was introduced by the Chifley Labor Government on 3 March 1949 and gave Aboriginal people the right to vote at Commonwealth elections if either they were enfranchised under a State law or they were or had been a member of the defence forces.<sup>114</sup> 'To our eternal shame', said Mr Arthur Calwell (Labor, Melbourne), 'we have not treated the aborigines properly ...'<sup>115</sup> adding:

At last, our consciences have been stirred, and we are now admitting some of our obligations to the descendants of Neanderthal man, whether he be full-blood, half-caste or three-quarter-caste.<sup>116</sup>

For its part, the Opposition acknowledged 'uneasiness at the way in which we, as a people, have treated the aborigines who are the true natives of the Australian continent'.<sup>117</sup>

However, the consciences of neither the Government nor the Opposition were stirred sufficiently to propose a right to vote for all Indigenous peoples at Commonwealth elections. Mr Kim Beazley, Snr (Labor, Fremantle) indicated that the Government felt itself constrained by State electoral laws although he suggested it would be a good thing if:

The Commonwealth returning officer in each State had, himself, the right to classify aborigines and half-castes as having a sufficient standard.<sup>118</sup>

As amended in 1949, the *Commonwealth Electoral Act 1918* enfranchised any aboriginal native of Australia who:

- (i) 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;
- (ii) is or has been a member of the Defence Force.<sup>119</sup>

## **The 1960s**

In May 1961, the Labor Opposition moved to delete provisions in the Commonwealth Electoral Bill 1961 which would have re-enacted those parts of the *Commonwealth Electoral Act 1918* that effectively denied certain Aboriginal people the right to enrol and vote at Commonwealth elections.<sup>120</sup> Mr E. G. Whitlam (Labor, Werriwa) commented that an Aboriginal person was denied the vote '... not because he is in any way inferior to his fellow citizens, but because he is an aboriginal.'<sup>121</sup> However, the Liberal-Country Party Government of Robert Menzies opposed the amendment, arguing that it would pre-empt the deliberations of a House of Representatives select committee established to examine Indigenous voting rights. The Opposition amendment was defeated 57 votes to 39.<sup>122</sup>

The House of Representatives Select Committee on Voting Rights of Aborigines reported later in 1961. It estimated that if voting rights were extended to Aborigines at Commonwealth elections about 30 000 extra persons would be enfranchised. And it found that many Indigenous ex-service personnel who had been enfranchised by the *Commonwealth Electoral Act 1949* were unaware of their right to vote. The Committee recommended that all Indigenous peoples should be entitled to vote but that enrolment should be voluntary, commenting: 'These people have not perceived the relevance of parliamentary elections to their lives, so to compel enrolment would be harsh'.<sup>123</sup> However, it dismissed suggestions that criteria such as literacy, employment, financial status, or receipt of public assistance should determine whether Aboriginal people should be able to vote 'on the ground that they are not applicable to the electorate at large'.<sup>124</sup>

The Government responded to the Committee's report by introducing the Commonwealth Electoral Bill 1962, asserting that the legislation would '... proclaim to the world that the representatives of all sections of the Australian community are determined to ensure that the aboriginal people of Australia enjoy complete political equality with the rest of the community.'<sup>125</sup> The *Commonwealth Electoral Act 1962* gave Indigenous peoples the option of enrolling to vote at Commonwealth elections.<sup>126</sup> However, voting was compulsory for anyone enrolled. The Act also contained a number of provisions creating specific offences of bribery and undue influence in relation to Indigenous peoples.<sup>127</sup> The Labor Opposition attempted to amend the Bill to preserve compulsory Indigenous enrolment for Commonwealth elections in New South Wales and Victoria. In these two States, Aboriginal people were already enfranchised under State laws which made enrolment compulsory and had been able to vote at Commonwealth elections since the commencement of the *Commonwealth Electoral Act 1949*. However, the Labor amendment was unsuccessful.<sup>128</sup>

The *Commonwealth Electoral Act 1962* repealed subsection 39(6) of the *Commonwealth Electoral Act 1918*—the subsection which at that time excluded Aboriginal people from voting in Commonwealth elections unless they were entitled to vote in State elections or were a member of the Defence Forces.<sup>129</sup> The 1962 Act also provided that the compulsory enrolment and transfer provisions contained in section 42 of the *Commonwealth Electoral Act 1918* did not:

... apply to a person who is an aboriginal native of Australia except to the extent that such a person may, if he so chooses, comply with [the enrolment or transfer of enrolment provisions contained in subsection 42(1) of the Act].<sup>130</sup>

### **Commonwealth Electoral Amendment Act 1983**

Formal equality for Indigenous voters at Commonwealth elections did not come about until 1983. The *Commonwealth Electoral Amendment Act 1983*, sponsored by the Hawke Labor Government, implemented many of the recommendations of the First Report of the Joint Select Committee on Electoral Reform—including the proposal that enrolment for and voting in Commonwealth elections should be compulsory for Indigenous Australians.<sup>131</sup>

### **Age**

As originally introduced, clause 3 of the Franchise Bill 1902 enfranchised 'adult persons'. However, the clause was amended in the House of Representatives to enfranchise 'persons not under 21 years of age' as a result of doubts about the technical meaning of the word 'adult'.<sup>132</sup>

## World War I

The question of lowering the voting age was raised during World War I. During debates on the Commonwealth Electoral (War-time) Bill 1917,<sup>133</sup> Mr William Finlayson (Labor, Brisbane) unsuccessfully proposed that all members of the armed forces aged 18 years should be enfranchised. He successfully moved a similar amendment in November 1918 during debate on the Commonwealth Electoral Bill 1918.<sup>134</sup> Consequently, the Bill, as introduced into the Senate, would have enfranchised:

(c) every member of the forces, according to the definition of such in the Commonwealth Electoral (War-time) Act 1917.<sup>135</sup>

In the Senate, John Grant (Labor, NSW) unsuccessfully moved an amendment to lower the general voting age to 18 years saying:

I say that, intellectually, the young man and young woman of eighteen years of age is equal to the average citizen, and, in many respects, surpasses him in education and intelligence.<sup>136</sup>

While the Senate rejected Senator Grant's amendment, the *Commonwealth Electoral Act 1918* enabled all current and former members of the forces to vote at Commonwealth elections during the war and for three years after the end of hostilities—if they were either residents or British subjects.<sup>137</sup> Senator Pearce (Nationalist, WA) said:

We propose this as an acknowledgment that, by their military service, they have earned the full rights of citizenship.<sup>138</sup>

No minimum age was specified. It was estimated that between 20 000 and 30 000 soldiers would be entitled to vote as a result of the amendment.<sup>139</sup>

## World War II

The issue of a reduced voting age for service personnel was again raised during World War II.<sup>140</sup> The Commonwealth Electoral (War-time) Bill 1943,<sup>141</sup> introduced by the Curtin Labor Government reduced the voting age to 18 years of age for all service personnel. However, the Opposition successfully moved an amendment to restrict the lowered voting age to those who had seen service overseas. The spectre of Communism and issues of gender appear to have prompted this move. Senator Philip McBride (United Australia Party, SA) remarked:

It would be a short step for this Government, again under the influence of the Communists, to [give] a vote also to minors engaged in war work in government factories, and then, no doubt, it would not be long before we found the Government advocating that all persons over the age of eighteen years should have a vote.<sup>142</sup>

And, said Senator John Spicer (Liberal, Vic):

It is sheer nonsense to suggest that, because a typist has ceased to work in civil employment and has gone into the Army, and put on a uniform, and now, instead of taking a tram to her office she takes a tram to Victoria Barracks, and types all day, she is entitled to the same privilege as a man who has sacrificed everything and served overseas in the defence of his country.<sup>143</sup>

The *Commonwealth Electoral (War-time) Act 1943* enabled qualified members of the Forces to vote. Qualified members included members of the Forces aged under 21 years who had served or were serving outside Australia and discharged members of the Forces aged under 21 years who had served outside Australia.<sup>144</sup>

### **Vietnam War**

Another war, this time in Vietnam, again raised the issue of the voting age of members of the defence forces. Conscription was introduced in Australia in 1964. During debate on the Commonwealth Electoral Bill (No. 2) 1965,<sup>145</sup> the Labor Opposition moved an amendment to lower the voting age to 18,<sup>146</sup> pointing out that young people were well-educated, paid taxes and could marry. Further, said Fred Daly (Labor, Grayndler):

The Government is prepared to send Australian men anywhere in the world to fight for this country, but it will not extend to them, if they happen to be under 21 years of age, the right to vote and to decide whether this Government should be in office and responsible for calling them up. No wonder it does not want to give the under 21 year-olds a vote ... it realises that among the people today who are under 21 years of age there are many who will be conscripted by the Government and who would vote against the Government which introduced the conscription legislation.<sup>147</sup>

However, the Government's view was that the majority of young people were not politically mature until they turned 21 years of age:

Although the Government believes that there may be some justification for reducing the franchise age of service-men who are at present on active service outside Australia, there is little justification for a general reduction in the age of voters.<sup>148</sup>

It was not until 1966 that an amendment sponsored by the Holt Liberal-Country Party Government was made to the *Commonwealth Electoral Act 1918*<sup>149</sup> enfranchising service personnel who were or had been on active service or service within the strategic reserve in South-East Asia. However, the amendments did not encompass national servicemen under the age of 21 who had not served in Vietnam.<sup>150</sup>

### **The 1970s, 1980s and 1990s**

Attempts by the Labor Opposition in 1968, 1971 and 1972 to amend the *Commonwealth Electoral Act 1918* to reduce the voting age to 18 were unsuccessful. The Act was finally amended in 1973—as part of the legislative program of the Whitlam Labor

Government.<sup>151</sup> In 1983, the Commonwealth Electoral Act was further reformed to enable 17 year olds to provisionally enrol. Once provisionally enrolled a person who turns 18 after the close of the rolls and before election day can vote.<sup>152</sup>

Attempts to lower the voting age still further have been unsuccessful. In 1996, Senator Christobel Chamarette (Greens, WA) introduced the Commonwealth Electoral Amendment (16 and 17 Year Old Voluntary Enrolment) Bill. The Bill provided for voluntary enrolment for 16 and 17 year olds but, once enrolled, voting would have been compulsory. The Bill was read a first time on 26 June 1996. Debate was adjourned and was not revisited in the Senate.<sup>153</sup>

## **Non-European Migrants**

### **Commonwealth Franchise Act 1902**

As introduced into the Senate, Franchise Bill 1902 did not discriminate against naturalised 'coloured'<sup>154</sup> migrants. Like the proposal for an Indigenous franchise this was partly because the Government believed it would have minimal impact. In the case of Indigenous voters, the Government believed that Aboriginal people were dying out. In the case of 'coloured' migrants, the Government pointed to the effect of State Chinese Restriction Acts and the passage of the Commonwealth *Immigration Restriction Act 1901*.<sup>155</sup>

It appears ... that, in view of the provisions of the Immigration Restriction Act, which will enable us practically to shut out altogether any influx of coloured persons into Australia, whether British subjects or not, we might regard the matter only from the point of view of those who are here already ... Once having naturalized any of these coloured people, and given them rights of citizenship in relation to the holding of property and in other directions, it would be a mistake to deprive them of the right to aid in making the laws. What is one of the strongest arguments for a white Australia? Surely it is that we do not want to have in our community any section which is in a servile condition.<sup>156</sup>

However, 'coloured' migrants—especially Chinese-people in the Northern Territory and Queensland were considered an electoral threat. Senator Miles Staniforth Smith asked:

What would be the result if, under this Bill, those coloured people [in the Northern Territory] had the right to vote, and any person the right to stand for the Federal Parliament? It would be possible, and in fact probable, that we should have a Chinaman in this Parliament as representative of the Northern Territory, for I understand that the Chinese are the most populous race there ...<sup>157</sup>

Senator McGregor observed that:

... with respect to Chinese, Japanese, Africans, and other aliens, who are much more dangerous than the aborigines, I should be quite willing to take some step.<sup>158</sup>

If the Chinese were considered 'dangerous', South Sea Islanders were considered to be easily manipulable by the Government of Queensland.<sup>159</sup> Senator Pearce cautioned:

We have to remember that there are somewhere about 80 000 of the coloured races in Australia apart from aborigines. ... We would have in Queensland such a large coloured alien vote that allied to the existing conservative vote it would be able to defeat the rest of the white voters in Queensland.<sup>160</sup>

The enfranchisement of migrants from Africa, Asia, the West Indies, India or the South Pacific was also opposed on the basis of differences in culture, politics and religion and the undesirability of their influencing federal politics.<sup>161</sup> Senator Matheson categorised his objection '... as a racial one.'<sup>162</sup> He described 'coloured' migrants as 'idolators' and added 'it must be borne in mind that any person who is entitled to be a voter is also entitled to be a candidate for Parliament'.<sup>163</sup>

A Senate amendment disenfranchising 'coloured' immigrants was enthusiastically<sup>164</sup> supported in the House of Representatives but modified to exclude Maori from its operation—an amendment agreed to by the Senate when the Bill was returned there. Both Chambers noted that Maori were represented in the New Zealand Parliament and would have '... as keen an interest in any proposed legislation as would any white man.'<sup>165</sup> There seems to have been a general view of Maori as intelligent, 'highly civilised'<sup>166</sup> people who were unlikely to come to Australia in any large numbers—unlike the 'Asiatic hordes [who] would come if they got the opportunity.'<sup>167</sup> The prospect of New Zealand joining the federation was also influential—Senator O'Connor remarked that there was no prospect of federation if Maori were discriminated against by Australian laws.<sup>168</sup> The only amendment made to clause 4 by the Senate when it considered the House of Representatives' amendments was to simplify a reference to New Zealand.<sup>169</sup> This Senate amendment was agreed to by the House of Representatives.<sup>170</sup>

As passed by both Houses, section 4 of the *Commonwealth Franchise Act 1902* provided that:

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.

### **Commonwealth Electoral Act 1925**

Disqualifications from voting in Commonwealth elections first imposed in 1902 on non-European migrants remained largely unchanged until 1961.

In 1925, British-Indians who met the residency requirements of the *Commonwealth Electoral Act 1918* and some naturalised 'Asiatic'<sup>171</sup> Australians were exempted from the disqualification.<sup>172</sup> The amendment relating to British India flowed from the Imperial Conference in 1921 which acknowledged the 'incongruity between the position of India as an equal member of the British Empire and the existence of disabilities upon British

Indians lawfully domiciled in some other parts of the Empire'<sup>173</sup> and resolved to remove it. When it introduced the Commonwealth Electoral Bill 1925 into the Senate, the Bruce-Page Government emphasised that there were only 2300 Indian residents in Australia and that their numbers would not increase because of the Immigration Restriction Act.<sup>174</sup> Once assured that the White Australia Policy was not endangered, Senators and Members supported the Bill.<sup>175</sup>

The Bill<sup>176</sup> also extended the franchise to 'naturalised Asiatics' who had previously been disqualified from voting at Commonwealth elections for a variety of reasons.<sup>177</sup> The Government stressed:

That may sound somewhat alarming, but there is really no occasion for alarm, since there are relatively few naturalized Asiatics<sup>178</sup> in Australia.<sup>179</sup>

As amended in 1925, subsection 39(5)<sup>180</sup> of the *Commonwealth Electoral Act 1918* 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 or retained on any roll or to vote at any Senate election or House of Representatives election unless:

- (a) he is so entitled under section forty-one of the Constitution;
- (b) he is a native of British India;
- (c) he is a person to whom a certificate of naturalization has been issued under a law of the Commonwealth or of a State and that certificate is still in force, or is a person who obtained British nationality by virtue of the issue of any such certificate.

### **Commonwealth Electoral Act 1961**

The *Commonwealth Electoral Act 1961* removed the disqualification on 'aboriginal native[s] of ... Africa, or the Islands of the Pacific'.<sup>181</sup> The amendment was accompanied by little Parliamentary discussion or comment—the words simply being described by the Menzies' Government as 'objectionable and outmoded'.<sup>182</sup>

## **Offenders**

### **Commonwealth Franchise Act 1902**

The Franchise Bill 1902 disenfranchised anyone '.. attainted of treason, or ... convicted and ... under sentence or subject to be sentenced for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer ...' It was Senator O'Connor who also suggested that the reference to Commonwealth or State laws should be replaced with a reference to offences in 'any part of the King's dominions'<sup>183</sup> — an expression with wider reach than found in some State laws. The amendment was agreed to with virtually no debate.<sup>184</sup>

## Reform and Attempts at Reform

In general, the Commonwealth franchise has been progressively expanded since federation. However, the issue of offender voting remains contested although it is estimated that less than one-third of Australian prisoners voted at the 1996 election.<sup>185</sup> Despite a legislative relaxation on offender voting in 1983 and 1995 and the uncertain meaning of the current provision,<sup>186</sup> further attempts at reform have been unsuccessful and concerted efforts have been made to disenfranchise all prisoners.

The First Report of the Joint Select Committee on Electoral Reform recommended that only those offenders serving a sentence for an offence against Australian law carrying a maximum penalty of at least five years imprisonment should be disenfranchised. This recommendation was incorporated in the *Commonwealth Electoral Legislation Amendment Act 1983*.<sup>187</sup>

In 1986, the Joint Standing Committee on Electoral Matters recommended that all sentenced offenders, except those convicted of treason or treachery, should be entitled to vote at Commonwealth elections.<sup>188</sup> The proponents of reform were motivated by both practicality and principle. The basis of the disqualification was not the actual sentence imposed on the offender but the potential sentence for the offence—information unknown to prison authorities who were required under section 109 of the *Commonwealth Electoral Act 1918* to forward to the Electoral Commissioner a list of persons under sentence for an offence attracting a maximum penalty of five years imprisonment. And, not only did the disqualification bear no relation to the seriousness of an individual's offence, it imposed an additional punishment and did not promote rehabilitation.

An amendment incorporating the Joint Committee's recommendation was introduced by the Hawke Labor Government in the Electoral and Referendum Bill 1989 but was rejected by the Senate.<sup>189</sup>

The Joint Standing Committee's report on the 1993 election endorsed the earlier Committee's recommendation and an amendment along those lines was again introduced in 1995—this time by the Keating Labor Government.<sup>190</sup> However, in July 1995 Acting Prime Minister Kim Beazley (Labor, Swan) announced that the Government would not proceed with the amendments and instead would 'look at ways of streamlining the current arrangements'.<sup>191</sup> The result was the amendment of the *Commonwealth Electoral Act 1918* to disenfranchise any person serving an actual sentence of five years or longer.<sup>192</sup>

In 1996 the Joint Committee, by then dominated by Coalition members, recommended that anyone serving a prison sentence of any length for an offence under Australian law be disqualified from voting. The majority commented:

... this Committee believes that its predecessor's recommendation was entirely inappropriate. While rehabilitation is an important aspect of imprisonment, equally important is the concept of deterrence, seeking by denial of a range of freedoms to

provide a disincentive to crime. Those who disregard Commonwealth or State laws to a degree sufficient to warrant imprisonment should not expect to retain the franchise.<sup>193</sup>

As introduced by the Howard Coalition Government, the Electoral and Referendum Amendment Bill (No. 1) 1999 disenfranchised all prisoners.<sup>194</sup> However, the relevant provisions were defeated in the Senate.

The subject of voting rights for sentenced offenders has most recently been considered by the Joint Standing Committee on Electoral Matters in its report on the 1998 election. The majority report supported the view of some of its predecessors that the restrictions on prisoner voting should be relaxed but concluded that '... the current legislation should stand until there is sufficient and widespread public support for a change.'<sup>195</sup> The issue remains a live one. On 1 March 2001, the Government tabled its response to the Joint Standing Committee's report on the 1998 election. Among other things it said:

In responding to this report, the Government wishes to take the opportunity to foreshadow that it will also be pursuing the following reforms:

#### Abolition of the Vote for Prisoners

The Government believes that this matter, a recommendation of the JSCEM report into the 1996 election, should again be pursued. At present, only prisoners serving a sentence of five years or more lose their right to vote. The Government believes that the right to vote should be revoked for all prisoners.<sup>196</sup>

At the time of writing, no legislation had been introduced into the Parliament to amend the Commonwealth Electoral Act by denying the vote to all prisoners.

## **The Institutionalised Poor and the Franchise Bill 1902**

On 10 April 1902, the Government proposed to amend the Franchise Bill to disenfranchise those receiving 'charitable relief as an inmate of a public charitable institution'. It took the view that anyone resident in such an institution was 'withdrawn absolutely from contact with ordinary life and public affairs, [and] should not be in a position to exercise full political rights'.<sup>197</sup> Some Senators supported the amendment fearing that the votes of large numbers of frail and infirm people could be manipulated. However, other Senators criticised it as both unjust and unjustifiable—because it targeted only those in institutions, not the homeless or people receiving state pensions:

Why should an aged man—or an aged woman—who has fulfilled all his duties in life up to the time when he was incapacitated and compelled, because there was no legitimate system of old-age pensions, to go into a public institution, be deprived of the right to vote?<sup>198</sup>

The Government chose not to press its amendment when it was pointed out that no similar disqualification existed under South Australian law<sup>199</sup>—and that as a consequence of section 41, the amendment could not apply uniformly throughout Australia.

## **Mental 'Incapacity'**

While not present in the original Franchise Bill 1902, a proposal to disenfranchise those of 'unsound mind' was agreed to with little debate in 1902.<sup>200</sup> The *Commonwealth Electoral Legislation Amendment Act 1983* altered the disqualification to provide that a person who 'by reason of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting' cannot enrol or vote at a federal election.<sup>201</sup> This amendment was made in response to the First Report of the Joint Select Committee on Electoral Reform which commented that:

The wording 'unsound mind' is most imprecise. The Committee recommends review of this wording with a view to excluding on the ground only those persons who are incapable of making any meaningful vote.<sup>202</sup>

The provisions relating to the disqualification of those of 'unsound mind' were further amended by the *Electoral and Referendum Amendment Act 1989* to require that an objection to a person's enrolment on this ground be accompanied by a doctor's certificate.<sup>203</sup>

## **Members of Unlawful Associations**

The only new category of disqualified persons added to Commonwealth electoral law since the enactment of the *Commonwealth Franchise Act 1902* relates to certain members of unlawful associations. An 'unlawful association' is defined in section 30A of the *Crimes Act 1914* as a body which advocates or encourages the overthrow of the Constitution by revolution or sabotage, the overthrow of any government or organised government or the destruction of Commonwealth property. The expression also encompasses a body affiliated with an organisation which advocates or encourages those things.

In 1932, the *Crimes Act 1914* was amended to ban executive members of 'unlawful associations' from enrolling or voting for a period of seven years from the date of the declaration. This, and other disabilities imposed on unlawful associations was said to be 'necessary'.<sup>204</sup>

The danger to the body politic is to be feared, not from the Communist Party directly, but from various other organizations, dissociated in name, but in reality directing Communist activities in the Commonwealth.<sup>205</sup>

Section 30FD has not been substantively amended since its enactment in 1932.<sup>206</sup> In 1983, the Human Rights Commission concluded that disqualification for an arbitrary period of a person who may have had no knowledge of the matter leading to a declaration, especially

in the case of an organisation affiliated with an unlawful association, amounted to an unreasonable restriction on the right to vote contrary to Article 25(b) of the International Covenant on Civil and Political Rights. The Commission recommended that section 30FD be amended to 'limit its application to persons who had, at all relevant times, knowledge of the matter giving rise to the association's being declared to be an unlawful association'.<sup>207</sup> However, no action has ever been taken to amend or repeal section 30FD.

## **Entrenchment of the Franchise: Limiting the Role for Parliament**

Since 1901, the federal Parliament has legislated on the basis that it has a largely unfettered power to set the boundaries and content of the Australian system of representative government. The Constitution was not seen as a significant impediment to whichever version of representative government the Parliament might wish to implement. Certainly, the Constitution places few express limits upon the power of the Parliament to set the method of voting for either house or the qualifications of voters. Hence, the Parliament has legislated widely on such qualifications as well as upon which persons are included in or excluded from the franchise.

In recent years, the leeway afforded to the Parliament has been narrowed by the High Court's interpretation of the Constitution. The Court has asserted its own role in defining the content of the system of representative government. It has found that implications can be drawn from text of the Constitution that limit federal legislative power.

*Australian Capital Television Pty Ltd v Commonwealth*<sup>208</sup> involved a challenge to the *Political Broadcasts and Political Disclosures Act 1991* (Cwlth), which added a new Part IIID dealing with 'Political Broadcasts' to the *Broadcasting Act 1942* (Cwlth). Section 95B imposed a blanket prohibition on political advertisements on radio or television during federal election periods. There were similar bans for Territory elections under section 95C and for State and local government elections under section 95D. Exceptions to the ban were made for policy launches, news and current affairs items, talkback radio programs and advertisements for charities which did not 'explicitly advocate' a vote for one candidate or party. Division 3 of Part IIID established a scheme of 'free time' for political advertising. Of the total time available, 90 per cent was reserved for parties represented in the previous Parliament who were fielding a minimum number of candidates. Units of 'free time' could be used for a two-minute telecast or one-minute radio broadcast by a single speaker, 'without dramatic enactment or impersonation', accompanied in a telecast by a picture of the speaker's head and shoulders.

Part IIID clearly fell within the Commonwealth's power over broadcasting in section 51(v) of the Constitution or under the Commonwealth's power with respect to federal elections. The question before the Court was therefore whether Part IIID was invalid because it infringed a constitutionally guaranteed freedom of political communication. The Court, with Dawson J dissenting, found that such an implication could be found in the Constitution. Mason CJ, Deane, Toohey and Gaudron JJ held that Part IIID was wholly

invalid. McHugh J found that Part IIID was invalid except in relation to section 95C, which concerned Territory elections. Brennan J found that Part IIID was not invalid as it could be reconciled with the implied freedom as a reasonable restriction on political communication. The reasoning of Mason CJ was typical of the majority. He found that the Act would favour:

the established political parties and their candidates without securing compensating advantages or benefits for others who wish to participate in the electoral process or in the political debate which is an integral part of that process.<sup>209</sup>

The majority judges gave little weight to the views of the Parliament, which in the Report of the Joint Standing Committee on Electoral Matters, *Who Pays the Piper Calls the Tune*, had determined that the Act was a necessary response to problems such as corruption in the political process.<sup>210</sup>

The High Court in *Australian Capital Television* relied upon the words 'directly chosen by the people' in sections 7 and 24 of the Constitution. These words harbour many potential implications. The word 'directly' indicates that electors are to cast their choice for candidates without any intervening stage, such as an electoral college.<sup>211</sup> The word 'chosen' is more significant. The 'choice' mandated by sections 7 and 24 would be frustrated by any law that provided that there could only be one candidate per electorate, or indeed a limited number of candidates per electorate. It would also be inconsistent with a law that limited eligibility to stand for office to members of a particular political party, or indeed a law that provided that members of a certain organisation could not stand for election. A 'choice' implies, if nothing more, a free and 'genuine choice',<sup>212</sup> perhaps even an informed choice. Each of these possibilities could restrict the scope for the federal Parliament to itself determine the content of the system of representative government.

It appears that the High Court may apply sections 7 and 24 of the Constitution to prevent the Commonwealth from limiting the federal franchise. Even though the High Court held in *R v Pearson; Ex parte Sipka* that such a right is not conferred by section 41 of the Constitution, this does not preclude sections 7 and 24 supporting an implied right to vote. After all, these provisions require a 'choice' by the 'people'. Decisions on these sections have not addressed the question whether each Australian is vested with a constitutionally guaranteed right to vote. The question might arise if a person, excluded under section 93(8)(b) of the Commonwealth Electoral Act because he or she is serving a sentence of five years or longer for an offence against the law of the Commonwealth or of a state or territory,<sup>213</sup> were to seek a declaration as to his or her entitlement to cast a vote.

Members of the High Court have approached this issue from the converse, but equivalent, perspective of whether sections 7 and 24 limit the Commonwealth's power to restrict the federal franchise as provided for by section 93 of the *Commonwealth Electoral Act 1918*. The universal adult franchise recognised by several members of the High Court as entrenched by sections 7 and 24 may make the question of a separate implied right to vote obsolete. Whether a personal right to vote, or at least an immunity from legislative and

executive interference with that right, can be implied from the Constitution may be irrelevant when the Commonwealth lacks the power to legislate other than for universal adult suffrage.

In *Attorney-General (Cth); Ex rel McKinlay v Commonwealth*<sup>214</sup> McTiernan and Jacobs JJ stated:

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.<sup>215</sup>

In *McGinty v Western Australia*<sup>216</sup> 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<sup>217</sup> and Gummow JJ.<sup>218</sup> also supported the notion that universal adult suffrage is now entrenched in the Australian Constitution. Only Dawson J rejected this.<sup>219</sup> In *Langer v Commonwealth*,<sup>220</sup> McHugh J supported entrenchment of the franchise by stating that: '[I]t 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'.<sup>221</sup> According to these judges, the right to vote of, say, Australian women or indigenous peoples could not now be abrogated. This would be inconsistent with the requirement that the Federal Parliament is to be 'directly chosen by the *people*' (emphasis added). This conclusion depends upon a view of the Constitution as an evolving document, one that embraces a very different notion of 'the people' at the end of the twentieth century than at the beginning. After all, the uniform federal franchise, as enacted by the *Commonwealth Franchise Act 1902*, extended the vote to women, but, in section 4, denied it to any 'aboriginal native of Australia'.<sup>222</sup>

## The Vision in Hindsight

At the time of its introduction in 1901 and re-introduction in 1902 the Commonwealth franchise bill contemplated an astonishingly broad franchise. The Bill's sponsors and many of its supporters acknowledged the importance of a uniform franchise for a new, national Parliament and the constraints imposed by section 41 of the Commonwealth Constitution. Others spoke of the importance of representative democracy and recognised the need for a democracy to be composed of 'equals'. However, the Senators and Members of the First Commonwealth Parliament were also products of the State franchises that had elected them. They speculated about the voting tendencies of non-European migrants, women and Indigenous peoples. They were concerned about extending the vote to people whom they perceived as 'different' and about the potential for such people to be elected to the parliament and make laws and policy for the nation.

In the end, their vision of a White Australia overcame their desire for a broad-based and uniform suffrage, and only section 41 of the Constitution, albeit in a temporary and limited

fashion,<sup>223</sup> saved the votes of those Indigenous people who might have otherwise been disenfranchised in 1902.

Distrust of 'difference'—in the case of Indigenous peoples and non-European migrants—and speculation about the radical voting tendencies of young people and prisoners helped preserve the original franchise for many decades. It also served to narrow the franchise with the enactment of disqualification provisions for executive members of unlawful associations. It is important to note, however, that this latter instance is the only occasion that the federal franchise has been contracted since its enactment in 1902.<sup>224</sup>

Restrictions on the Commonwealth franchise based on race or ethnic group have long disappeared from the statute books. The law now reflects the multicultural nature of Australian society. Contemporary Commonwealth laws and High Court jurisprudence now acknowledge the principle of universal suffrage. However, questions remain about the content of 'universal suffrage' and whether there is a constitutionally protected right to vote. For example, should the franchise be restricted to Australian citizens and certain British subjects?<sup>225</sup> Should 'overseas electors' have their enrolment cancelled after a certain period or should they retain their entitlement to enrol and vote in Commonwealth elections?<sup>226</sup> Is there a case for extending the franchise to others living permanently in Australia? Should the voting age be lowered further? Should the law continue to disenfranchise certain prisoners and offenders under sentence and members of unlawful associations, and is it constitutionally permissible to do so?

These matters have not been the subject of considered political debate nor have they been discussed in the context of the implications that might flow from the system of representative government established by the Commonwealth Constitution. While section 41 of the Constitution might have been consigned by the High Court to the status of historical curiosity, the system of representative government found in the Constitution may now constrain Parliament's legislative power by grounding a positive right to vote in individuals or by creating limitations on Parliament's power to restrict the franchise.

## Endnotes

- 
1. Senator Richard O'Connor, Senate, *Debates*, 31 January 1902, p. 9530.
  2. Referred to in the law as 'natives of British India' and certain other naturalised persons.
  3. (1975) 135 CLR 1 at 36.
  4. This Paper is current at 31 December 2001.
  5. J. Quick and R. Garran, *The Annotated Constitution of the Australian Commonwealth*, Angus and Robertson, Sydney, 1901 ed, Legal Books, 1995, p. 130.
  6. O. Dixon, 'The Law and the Constitution', *Law Quarterly Review*, vol. 51, 1935, pp. 590 at p. 597. Compare *Attorney-General (Cth); Ex Rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 24 per Barwick CJ.

7. Section 31 states 'Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State for the time being relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections in the State of members of the House of Representatives', while section 51(xxxvi) states that the federal Parliament may legislate for 'Matters in respect of which this Constitution makes provision until the Parliament otherwise provides'.
8. See also R. Bennett, 'Candidates, Members and the Constitution', *Research Paper*, forthcoming, Department of the Parliamentary Library, Canberra 2002.
9. Australasian Federal Convention, Adelaide, 1897, *Debates*, p. 715.
10. *ibid.*, p. 725.
11. *ibid.*, p. 724.
12. *ibid.*, p. 725.
13. *ibid.*, p. 732.
14. *Muldowney v Australian Electoral Commission* (1993) 178 CLR 34 pp. 38–39 per J. Brennan, *Snowdon v Dondas* (1996) 139 ALR 475 p. 483 per the Court.
15. See A. Brooks, 'A Paragon of Democratic Virtues? The Development of the Commonwealth Franchise', *University of Tasmania Law Review*, vol. 12, 1993, pp. 208–48.
16. J. Quick and R. Garran, *The Annotated Constitution of the Australian Commonwealth* op. cit., at pp. 483–487. Garran also supported this view as Secretary to the federal Attorney-General's Department in an advice given on 27 July 1914. See *Opinions of Attorneys-General of the Commonwealth of Australia* (AGPS, 1981), vol. 1, at p. 695.
17. J. Quick and R. Garran, *The Annotated Constitution of the Australian Commonwealth* op. cit., at p. 487.
18. W. H. Moore, *The Constitution of the Commonwealth of Australia*, London, Murray, 1902 at p. 109. Moore's interpretation is actually wider than that set out in option 4. He argued that section 41 would confer the right to vote in federal elections on those people who had such a right at the State level at the time of Federation, 'or who at any time afterwards acquires a right under that law'. *ibid.*, p. 109.
19. *ibid.*, p. 109.
20. Nor did he develop this further in the second edition of his book. In the second edition, in 1910, he had removed the material on section 41, stating in a footnote that section 41 '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 at pp. 107–109, and in *Quick and Garran*, pp. 483–7.' W. H. Moore, *The Constitution of the Commonwealth of Australia*, Legal Books, 2nd ed., 1910, 1997 reprint, p. 126, n 2.
21. W. H. Moore, *The Constitution of the Commonwealth of Australia* (Murray, 1902) p. 109, n 1.

22. Australasian Federal Convention, Adelaide, 1897, *Debates*, p. 1195; Australasian Federal Convention, Melbourne, 1898, *Debates*, vol. 5, p. 1843.
23. Australasian Federal Convention, Adelaide, 1897, *Debates*, p. 732 & 1195.
24. See, for example, Australasian Federal Convention, Melbourne 1898, p. 1853 (Edmund Barton).
25. *ibid.*, p. 1841.
26. *ibid.*, p. 1851.
27. Brooks, *op. cit.*, pp. 236–238.
28. Senate and House of Representatives, *Debates*, 24 April 1902, p. 1 1979.
29. *ibid.*, p. 1 3006, 29 May 1902. See also *ibid.*, p. 1 3005 (Major Albert Gould) ('There is , also, a further power under the Constitution for the enfranchisement of aboriginal inhabitants in the future, if the State in which they reside thinks fit to enfranchise them. Section 41 of the Constitution provides that ... So it appears that under the Constitution Act there is an opportunity for the enfranchisement of the aboriginal inhabitants of any State where they are not enfranchised at the present time.').
30. (1923) 32 CLR 500.
31. *ibid.*, p. 504.
32. (1972) 128 CLR 221.
33. *Commonwealth Electoral Act 1973*, section 39.
34. (1972) 128 CLR 221 p. 234 per Barwick CJ.
35. *ibid.*, p. 246.
36. (1983) 152 CLR 254.
37. *ibid.*, p. 264 per Gibbs C. J, Mason and Wilson JJ.
38. *ibid.*, p. 261.
39. *ibid.*, p. 261.
40. *ibid.*, p. 280.
41. *ibid.*, p. 268.
42. *ibid.*, p. 268.
43. *ibid.*, p. 268.
44. Constitutional Commission, *Final Report of the Constitutional Commission*, Canberra, AGPS, 1988, vol. 1, p. 144.
45. See J. Uhr, 'Rules for Representation: Parliament and the Design of the Australian Electoral System', Department of the Parliamentary Library, *Research Paper no. 29*, 1999–2000.
46. A. Twomey, 'The Federal Constitutional Right to Vote in Australia', *Federal Law Review*, vol. 28, no. 1, 2000, pp. 125–53.

47. Senate and House of Representatives Debates, 31 January 1902, p. 9530.
48. Reid & Forrest point out, 'As proposed laws, [the Electoral Bill and the Franchise Bill] ... took low priority among the spate of bills to draw up the tariff, to establish the public service and judiciary, to co-ordinate posts and telegraphs, to impose restrictions on immigration, and to provide for granting and appropriating supply.' G. S. Reid & M. Forrest, *Australia's Commonwealth Parliament 1901–1988*, Melbourne University Press, 1989, p. 95.
49. For other possible explanations of why the Bills were withdrawn and re-introduced in the Senate, see Reid & Forrest, *ibid.*
50. Senate and House of Representatives, *Debates*, 10 April 1902, p. 1 1569.
51. *ibid.*, *Debates*, 23 April 1902, p. 1 1929.
52. Clause 5.
53. Section 41 reads 'No adult person who has or acquires the 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'.
54. Senate and House of Representatives, *Debates*, 4 April 1902, p. 11 450.
55. Senator O'Connor spoke of the need for a Commonwealth franchise law to secure a uniform franchise, given that State laws were disparate. *ibid.*, p. 11 450.
56. *ibid.*, 9 April 1902, p. 11 487.
57. *ibid.*, 4 April 1902, p. 11 452.
58. For example sections 25 and 127. Section 25 reads 'For the purposes of the last section [relating to the constitution of the House of Representatives], if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.' Before its repeal in 1967, section 127 read 'In reckoning the numbers of people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted'.
59. Sections 16 and 34 of the Constitution and the provisions of the Electoral Bill 1902.
60. Reid & Forrest, *op. cit.*, p. 87. See also Uhr, *op. cit.*, p. 6.
61. Uhr, *op. cit.*, p. 11.
62. Senator O'Connor, Senate and House of Representatives, *Debates*, 9 April 1902, p. 11 451.
63. The Second Reading of the Bill was passed by 29 votes to 6.
64. Senator Major Albert Gould (Free Trade, NSW), Senate and House of Representatives *Debates*, 4 April 1902, p. 11 476.
65. Sir Edward Braddon (Free Trade, Coventry), *ibid.*, 23 April 1902, p. 11 937.
66. South Australian women were enfranchised in 1894.

67. Senate and House of Representatives, *Debates*, 9 April 1902, p. 11 466.
68. Sir Edward Braddon, *ibid.*, 23 April 1902, p. 11 936.
69. Mr William Knox (Free Trade, Kooyong), *ibid.*, p. 11 941.
70. *ibid.*, 10 April 1902, p. 11 599.
71. For example, Senator Edward Harney, *ibid.*, 9 April 1902, p. 11 488.
72. For example, Senator Simon Fraser (Protectionist, Vic.) remarked 'I see that there is a very large majority in favour of the Bill, and I am not going to be obstructive.' *ibid.*, 10 April 1902, p. 11557.
73. See, for example, Mr William Wilks (Free Trade, Dalley), *ibid.*, 23 April 1902, p. 11 944.
74. *ibid.*, 9 April 1902, p. 11 452.
75. *ibid.*, 10 April 1902, p. 11 556.
76. *ibid.*, 9 April 1902, pp. 11 491–2.
77. *ibid.*, p. 11 499.
78. *ibid.*, 23 April 1902, p. 11 974. The Attorney-General said that the word 'adult' might be interpreted to exclude women unless they were expressly mentioned. He also thought it desirable to spell out that an adult was a person aged 21 years or more.
79. Legislation introduced by the Hawke Labor Government. See section 23 of the *Commonwealth Electoral Legislation Amendment Act 1983* which amended the relevant section—then numbered subsection 39(1)—of the *Commonwealth Electoral Act 1918*.
80. Senate and House of Representatives, *Debates*, 9 April 1902, p. 11 453.
81. *ibid.*, p. 11 453.
82. *ibid.*, p. 11 584.
83. Section 16 of the Constitution provides that 'The qualifications of a senator shall be the same as those of a member of the House of Representatives'. Section 34 sets out the qualifications of a member of the House of Representatives. These include, but are not limited to, a person who is 'an elector entitled to vote at the election of members of the House of Representatives, or a person qualified to become such elector ...'
84. The *Commonwealth Electoral Act 1902* provided that 'To entitle a person to be nominated as a Senator or Member of the House of Representatives he must be qualified under the Constitution to be elected as a Senator or Member of the House of Representatives' (section 95).
85. Senator Alexander Matheson (Free Trade, WA), Senate and House of Representatives, *Debates*, , 10 April 1902, p. 11 582.
86. *ibid.*, 9 April 1902, p. 11 496.
87. Mr Thomas Macdonald-Paterson (Free Trade, Brisbane), Senate and House of Representatives, *Debates*, 23 April 1903, p. 11 944.

88. Sir Edward Braddon (Free Trade, Tasmania), *ibid.*, p. 11 936.
89. Senator Edward Harney, *ibid.*, 9 April 1902, p. 11 488.
90. Mr Thomas Skene (Free Trade, Grampians), *ibid.*, 23 April 1902, p. 11 945.
91. *ibid.*, 10 April 1902, p. 11 582.
92. *ibid.*, p. 11 580.
93. *ibid.*, pp. 11 594–5.
94. *ibid.*, pp. 11 598–11 599.
95. By 27 votes to five, *ibid.*, 24 April 1902, p. 11 980.
96. *ibid.*, p. 11 977.
97. Sir Edward Braddon, *ibid.*, p. 11 977.
98. *ibid.*, p. 11 978.
99. *ibid.*
100. *ibid.*, p. 11 980.
101. *ibid.*, p. 11 979.
102. *ibid.*, p. 11 979.
103. *ibid.*, 29 May 1902, p. 13 002.
104. *ibid.*
105. *ibid.*, p. 13 003.
106. For example, Senator Miles Staniforth Smith (Free Trade, WA), *ibid.*
107. *ibid.*
108. *ibid.*, p. 13 006.
109. Mr George Edwards (Free Trade, South Sydney), *ibid.*, 23 April 1901, p. 11 951.
110. J. Summers, 'The Parliament of the Commonwealth of Australia and Indigenous Peoples 1901–1967', Department of the Parliamentary Library, *Research Paper* no. 10, 2000–01, p. 10.
111. For example, by Senator Albert Gardiner (Labor, NSW), Senate and House of Representatives, *Debates*, 19 November 1918, p. 8009. See also, p. 8010.
112. *ibid.*, during debate on the Commonwealth Electoral Bill 1918. During the debates, Senator Lt-Colonel James O'Loghlin (Labor, SA) remarked, 'Among the members of the Australian Imperial Force with whom I have come in contact, I can recall several aborigines and half-castes who were smart fellows, and had been well educated at mission stations in South Australia.' p. 8009. However, the majority of Senators seemed more concerned that Aboriginal votes could be manipulated. There were also concerns that the amendment would also enfranchise 'Asiatics', 'Africans and kanakas'—see Senators George Pearce (Labor, WA) and George Fairbairn (Nationalist, Victoria), p. 8010. Senator George Pearce remarked

that '... there are some constituencies where a little looseness on the part of an electoral official in enrolling aborigines might sway an election. Unfortunately, the aborigines, as a class, is susceptible to the sixpenny piece in a manner which does not ordinarily apply to the white man.', p. 8009.

113. See Summers, *op. cit.*, p. 10.
114. Mr Harold Holt (Liberal, Fawkner), Senate and House of Representatives, *Debates*, 3 March 1949, p. 1449.
115. Mr Arthur Calwell, *ibid.*, p. 1456.
116. *ibid.*, p. 1456.
117. Mr Harold Holt, *ibid.*, p. 1449.
118. *ibid.*, p. 1533.
119. Section 3 of the *Commonwealth Electoral Act 1949* which amended section 39 of the *Commonwealth Electoral Act 1918*.
120. That is, those not otherwise enfranchised under State law or those who were or had been members of the defence forces. This Opposition proposal appears to have been symbolic, in that the disqualification provisions already in the *Commonwealth Electoral Act 1918* would have remained.
121. House of Representatives, *Debates*, 3 May 1961, p. 1397.
122. Mr Fred Chaney (Liberal, Pearce), *ibid.*, p. 1397. Mr Hasluck (Liberal, Curtin) explained that there were two implications to be drawn from the proposal to establish the Committee. The first was recognition that the present law was unsatisfactory and needed examination. The second was that '... the giving of a vote to aborigines, without any restriction at all, will be attended by some problems which need careful examination.' *ibid.*, p. 1399.
123. House of Representatives, *Report from the Select Committee on Voting Rights of Aborigines*, Commonwealth Government Printer, Canberra, 1961, p. 8. It also recommended that the Commonwealth Electoral Office should assist Aboriginal people who wished to enrol and that polling places should be established near significant Aboriginal settlements.
124. *ibid.*, p. 9.
125. Mr Gordon Freeth (Liberal, Forrest), Commonwealth Electoral Bill 1962, House of Representatives, *Debates*, 15 March 1962, p. 861.
126. Section 3 of the *Commonwealth Electoral Act 1962* which inserted section 42(5) into the *Commonwealth Electoral Act 1918*.
127. Sections 4, 5, 6 & 7 of the *Commonwealth Electoral Act 1962*.
128. The Opposition amendment was defeated 59 votes to 56 in the House of Representatives. House of Representatives *Debates*, 1 May 1962, pp. 1795–1792.
129. Section 2 of the *Commonwealth Electoral Act 1962*.
130. See section 3 of the *Commonwealth Electoral Act 1962*.

131. Section 28 of the *Commonwealth Electoral Legislation Amendment Act 1983* which deleted the relevant section of the *Commonwealth Electoral Act 1918*—then numbered section 42(5).
132. Sir William Lyne (Protectionist, Hume) Senate and House of Representatives, *Debates*, 24 April 1902, p. 11 984.
133. Nationalist Government (Hughes Ministry), 17 February 1917–10 January 1918.
134. Introduced by the Nationalist Government (Hughes Ministry), 10 January 1918–9 February 1923.
135. The definition of 'members of the Forces' included members of the naval and military forces enlisted or appointed for active service outside Australia or on a warship, munitions workers who had worked outside Australia and members of the nursing services who had been accepted or appointed for overseas service.
136. Senate and House of Representatives, *Debates*, 19 November 1918, p. 8008.
137. Subsection 39(2).
138. Senate and House of Representatives, *Debates*, 19 November 1918, p. 8008.
139. *ibid.*, p. 8009.
140. Although the issue does not appear to have been raised during the debates which preceded the passage of the *Commonwealth Electoral (War-time) Act 1940*—a statute directed only at making voting easier for members of the armed forces.
141. The amendments made by the *Commonwealth Electoral (Wartime) Act 1943* were repealed by the *Statute Law Revision Act 1950* and the *Commonwealth Electoral Act 1953*.
142. Senate and House of Representatives, *Debates*, 24 June 1943, p. 282.
143. *ibid.*, p. 287.
144. Section 4 of the 1943 Act which amended section 6 of the *Commonwealth Electoral Act 1918*.
145. Introduced by the Liberal-Country Party Government (Menzies Ministry).
146. House of Representatives, *Debates*, 21 September 1965, pp. 1098–1099.
147. *ibid.*, p 1101.
148. Senator Gerald McKellar (Country Party, NSW), Senate, *Debates*, 16 November 1965, p. 1546.
149. Section 3 of the *Commonwealth Electoral Act 1966* amended section 39A of the *Commonwealth Electoral Act 1918*.
150. See Joint Select Committee on Electoral Reform, *First Report*, AGPS, Canberra 1983, Chapter 1.
151. *Commonwealth Electoral Act 1973* which not only lowered the voting age by amending section 39 of the *Commonwealth Electoral Act 1918* but also lowered the age at which a

person could be elected to the Commonwealth Parliament. Re the latter see section 6 which amended section 69 of the *Commonwealth Electoral Act 1918*.

152. Section 27 of the *Commonwealth Electoral Legislation Amendment Act 1983* which inserted section 41A into the *Commonwealth Electoral Act 1918*. The legislation was introduced by the Hawke Labor Government.
153. *Senate Journals*, 26 June 1996, p. 401.
154. The adjective 'coloured' is used in this paper only to reflect terminology at the time of the debates.
155. In March 1902, a report on 'Coloured Immigrants admitted to the Commonwealth' was tabled in the federal Parliament. It showed that in the first two months of 1901 a total of 810 such immigrants were admitted to the Commonwealth. In the period following the passage of the *Immigration Restriction Act 1901*, 442 'coloured' migrants were admitted—many of these people had permits or were admitted as the result of agreement or previous residence. See *Printed Papers Presented to Parliament*, vol. II, 1901–2.
156. Senate and House of Representatives, *Debates*, 9 April 1902, p. 11 453, (Senator O'Connor).
157. *ibid.*, p. 11 486.
158. *ibid.*, 10 April 1902, pp. 11 594–11 595.
159. See Senator George Pearce (Labor, WA), *ibid.*, 9 April 1902, p. 11 496.
160. *ibid.*, pp. 11 495–11 496.
161. See, for example, Senators Alexander Matheson & George Pearce, *ibid.*, pp. 11 496–7.
162. *ibid.*, p. 11 467.
163. Senator Alexander Matheson, *ibid.*, p. 11 496. See also Senator George Pearce, *ibid.*, 9 April 1902, p. 11 896 and Senator Miles Staniforth Smith, *ibid.*, p. 11 486.
164. This was the amendment proposed by Senator Alexander Matheson on 10 April 1902 which read: 'No aboriginal native of Australia, Asia, Africa or the islands of the Pacific, or persons of the half blood shall be entitled to have his name placed on the electoral roll unless so entitled under section 41 of the Constitution,' *ibid.*, p. 11 580.
165. Senator Major Albert Gould, *ibid.*, 29 May 1902, p. 13 008.
166. Senator Richard O'Connor, *ibid.*, p. 13 010.
167. Senator James Styles (Protectionist, Vic), *ibid.*, p. 13 009.
168. *ibid.*, p. 13 010.
169. The wording was changed from '... or the Islands of the Pacific, except New Zealand, situated in the Pacific Ocean, beyond the Commonwealth ...' to '... or the Islands of the Pacific, except New Zealand ..' See *ibid.*, pp. 13 006–13 011.
170. *ibid.*, 30 May 1902, pp. 13 145–6.

171. The term used in the Parliamentary Debates—see, for example, the Second Reading Speech of Mr Charles Marr (Nationalist, Parkes), Electoral Bill, Senate and House of Representatives, *Debates*, 16 September 1925, pp. 2498–9.
172. See section 2, *Commonwealth Electoral Act 1925*.
173. Senator Pearce, Commonwealth Electoral Bill, Senate and House of Representatives, *Debates*, 2 July 1925, p. 617.
174. *ibid.*
175. See, for example, Senator Edward Needham (Labor, WA), *ibid.*, 3 July 1925, p. 690; Senator Walter Kingsmill (Nationalist, WA), *ibid.*, p. 690, Senator John Grant (Labor, NSW), *ibid.*, p. 691.
176. As amended by the Government in the House of Representatives.
177. For example, those who were naturalised before the passage of the *Commonwealth Franchise Act 1902* but who had failed to obtain State enrolment or who had not continuously retained their right to enrolment.
178. The Government estimated that there was a total of 266 'Asiatic' Australians—four Armenians, 238 Syrians and 24 Palestinians (Mr Charles Marr, Senate and House of Representatives, *Debates*, 16 September 1925, p. 2499).
179. Senator George Pearce, *ibid.*, 23 September 1925, p. 2603.
180. Section 4 of the *Commonwealth Franchise Act 1902* was renumbered when the *Commonwealth Electoral Act 1918* consolidated the *Commonwealth Franchise Act 1902* and the *Commonwealth Electoral Act 1902*.
181. See section 4 of the *Commonwealth Electoral Act 1961* which amended and replaced the relevant provision—then numbered subsection 39(5) of the *Commonwealth Electoral Act 1918*.
182. Mr Gordon Freeth, Second Reading Speech, 'Commonwealth Electoral Bill 1960', House of Representatives, *Debates*, 8 November 1960, p. 2549. The *Commonwealth Electoral Act 1961* was originally introduced as the Commonwealth Electoral Bill in November 1960. Parliament was prorogued and the Bill was re-introduced in essentially the same form in May 1961. However, the Second Reading Speech was not repeated.
183. Senate and House of Representatives, *Debates*, 10 April 1902, p. 11 579.
184. *ibid.*, pp. 11 579–80.
185. See estimate of Justice Action quoted in Joint Standing Committee on Electoral Matters, *The 1998 Federal Election. Report of the Inquiry into the Conduct of the 1998 Federal Election and Matters Related Thereto*, Canberra, June 2000, p. 89. It has been estimated that the restriction on the franchise contained in paragraph 93(8)(b) of the *Commonwealth Electoral Act 1918* affects between 6000 and 9000 Australians—see G. Orr, 'Ballotless and behind bars: the denial of the franchise to prisoners', *Federal Law Review*, vol. 26, no. 1, 1998, pp. 55–82.

186. Arguably, the *Commonwealth Electoral Act 1918* disenfranchises not only some serving prisoners but also other sentenced offenders—for example, those sentenced to periodic detention or home detention, those on parole and probation, and offenders with suspended sentences. See Orr, *ibid.*
187. That Act also reworded the disqualification relating to a person attainted of treason and replaced it with a disqualification for anyone 'convicted of treason or treachery' who remained unpardoned. Section 23, amending section 93 of the *Commonwealth Electoral Act 1918*.
188. *The Operation during the 1984 General Election of the 1983/84 Amendments to Commonwealth Electoral Legislation*, December 1986.
189. See Senate Journals, 21 December 1989, p. 2438. The amendment deleting the enfranchisement provisions was moved by Senator Chris Puplick (Liberal, NSW) and agreed to by the Senate without a division being called.
190. Electoral and Referendum Amendment Bill (no. 2) 1995.
191. Acting Prime Minister, 'Prisoner voting', *Press Release*, 10 July 1995.
192. Paragraph 93(8)(b), *Commonwealth Electoral Act 1918*—as amended by Item 5, Schedule 1, *Electoral and Referendum Amendment Act 1995*.
193. Joint Standing Committee on Electoral Matters, *The 1996 Federal Election. Report of the Inquiry into the Conduct of the 1996 Federal Election and Matters Related Thereto*, AGPS, Canberra, June 1997, p. 48.
194. Item 10 of Schedule 1, Electoral and Referendum Amendment Bill (No. 1) 1999 amending paragraph 93(8)(b) of the *Commonwealth Electoral Act 1918*.
195. Joint Standing Committee on Electoral Matters, *The 1998 Federal Election*, *op. cit.*, p. 90. Senator Andrew Murray (Australian Democrats, WA) in a minority report recommended that all prisoners should be enfranchised, except those convicted of treason or of unsound mind, pp. 169–170.
196. The Government's response also specifically rejected the Australian Democrats' recommendation that all persons in detention, except those convicted of treason or who are of unsound mind, should have the right to vote. See Senate, *Debates*, 1 March 2001, p. 22 370 and pp. 22 371–2.
197. Senator Richard O'Connor, Senate and House of Representatives, *Debates*, 10 April 1902, p. 11 574.
198. Senator Gregor McGregor (Labor, SA), *ibid.*, p. 11 575.
199. Senator Richard O'Connor, *ibid.*, 10 April 1902, p. 11 576.
200. Only Senator Norman Ewing (Free Trade, WA) rather presciently took the view that only a person adjudged by a court to be of 'unsound mind' should be excluded from exercising a vote—see *ibid.*, pp. 11 576–7.
201. Section 23 amending the relevant section of the *Commonwealth Electoral Act 1918* (then section 39).

202. Joint Select Committee, First Report, op. cit., p. 105.
203. Section 41 of the *Electoral and Referendum Amendment Act 1989* inserting new Part IX into the *Commonwealth Electoral Act 1918*. This matter was also dealt with in by the Joint Select Committee on Electoral Reform in its *Report no.2. The Operation During the 1984 General Election of the 1983/84 Amendments to Commonwealth Electoral Legislation*, December 1986.
204. Senator Alexander McLachlan (Nationalist, SA), Second Reading Speech, Crimes Bill 1932, Senate and House of Representatives, *Debates*, 5 May 1932, p. 370. Legislation introduced by the United Australia Party Government (Lyons Ministry).
205. *ibid.*
206. By the *Crimes Act 1973*, the *Jurisdiction of Courts (Miscellaneous Amendments) Act 1979* and the *Crimes Amendment Act 1982*.
207. Human Rights Commission, *Review of Crimes Act 1914 and Other Crimes Legislation of the Commonwealth, Report No. 5*, AGPS, 1983, p. 7.
208. (1992) 177 CLR 106.
209. *ibid.*, p. 132.
210. Joint Standing Committee on Electoral Matters, *Who Pays the Piper Calls the Tune, Minimising the Risks of Funding Political Campaigns Inquiry into the Conduct of the 1987 Federal Election and 1988 Reporting*, AGPS, Report no. 4, June 1989, p. 88.
211. *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at p. 227 per McHugh J.
212. *Langer v Commonwealth* (1996) 186 CLR 302 p. 325 per Dawson J.
213. See Orr, op. cit.
214. (1975) 135 CLR 1.
215. *ibid.*, p. 36.
216. (1996) 186 CLR 140 at p. 201.
217. *ibid.*, pp. 221–2 ('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').
218. *ibid.*, p. 287.
219. *ibid.*, p. 183.
220. (1996) 186 CLR 302.
221. *ibid.*, at p. 342. Compare *McGinty v Western Australia* (1996) 186 CLR 140 at p. 243 per McHugh J.

222. For the debate in the federal Parliament on this point, see Senate and House of Representatives, *Debates*, 24 April 1902, pp. 1 1975–1 1980; *ibid.*, 29 May 1902, p. 13 002–13 011.
223. The Commonwealth Government came to the view that section 41 only protected the voting rights of Indigenous peoples who had acquired a constitutional right to vote at the 1901 election. 'The Electoral Commission, relying on ... advice [from Sir Robert Garran], consistently denied federal enrolment to any person not entitled to vote in a State election before 1902.'—see T. Blackshield & G. Williams, *Australian Constitutional Law & Theory. Commentary & Materials*, 2nd ed., Federation Press, Sydney, p. 161. A later interpretation by Garran (in 1912) narrowed the Commonwealth's view even further so that unless an Aboriginal person had actually had their name on a Commonwealth Electoral Roll, the mere fact that they had been enrolled to vote in NSW, South Australia, Tasmania or Victoria before 1902 did not protect their right to vote at Commonwealth elections.
224. Allowing for the temporary enfranchisement of some service personnel during wartime and immediately after the end of hostilities.
225. Those British subjects who were on a Commonwealth of Australia electoral roll on 25 January 1984.
226. An eligible overseas elector is a person enrolled to vote who has ceased living in Australia but who intends to return to Australia within six years. See section 94, *Commonwealth Electoral Act 1918*. See also <http://www.southern-cross-group.org/sys-tmpl/door/>