

PART III – THE PARLIAMENT

I *Representative Democracy*

A *The Concept of Representative Democracy*

Cass and Rubenstein describe three notions of representation inherent in the idea of representative democracy:

- **Representation by government**
The ability to vote for representatives who will act in the interests of voters;
- **Representation in government**
The ability of any citizen to be elected into government; and
- **Diversity in representations of government**
Values and standards inherent in opinions, rules and law.

B *Australian Constitutional Features*

Representative democracy might well be described as a purely theoretical political ideal in light of Australia's *Constitution*. Certainly, representative democracy is inconsistent with the circumstances surrounding the drafting and adoption of the *Constitution*:¹

- Women were largely excluded from the constitutional conventions of 1891, 1897 and 1898; the representativeness of the drafting process is thereby undermined;
- The indigenous population and women were prevented from voting on whether to adopt the *Constitution*, with the exception of South Australia, which allowed women to vote since 1894;
- Women and indigenous people were unable to vote for Members of Parliament until 1902, when universal suffrage was granted in all states except Western Australia and Queensland, and with the notable exception of aborigines

It must therefore be doubtful whether representative democracy was intended to exist as a distinct constitutional doctrine in Australia. Contemporary ideals have changed. Two views exist about the relevance: first, the literalist view that it is inappropriate to transpose current political views about representation onto the text of the *Constitution* as it was intended to read in 1901. Second (and more popular) is the view that only the current legitimacy of representation — that is, participation today by all groups — is relevant and that the *Constitution* should be read by today's standards.

The issue then arises of how well contemporary representation is achieved. Women still occupy a dramatically smaller place in politics than their numbers would suggest; however, voting is now universal. Despite formal equality of voting, however, there may still be identified substantive barriers to participation: for example, the party system (and pre-selection) limits the success of independent or minor party candidates, who may better represent minority views. Various structural impediments or disincentives also exist, including the professional and familial kind.

¹ D Cass and K Rubenstein, 'Representation/s of Women in the Australian Constitutional System' (1995) 17 *Adelaide Law Review* 3, 28–35.

An idealised system of representation may encompass the following characteristics:

1 A right to vote

All adults with citizenship except:

- (i) Long term expatriates (but should long term residents be eligible?)
- (ii) Criminals currently serving a sentence for a serious crime (attracting incarceration of five years or greater)
- (iii) The mentally ill
- (iv) (Anyone who is taxed? Or just: any member of the community? Any human?)
- (v) (Homeless people? A practical problem with the current electoral system is that people with no fixed address are ineligible to vote; this includes many Aborigines)

2 Eligibility to stand for election

Anyone eligible to vote should be able to form a member of government

3 Regular elections

Members of government should have a limited term of representation

4 Equality of votes

Votes must be equally weighed, a sentiment commonly expressed in the maxim, 'one vote, one value'

5 Compulsory voting

This is arguably inconsistent with representative democracy

6 Informed voting

Information about candidacy, political parties and policies should be available

7 Secret ballots

Individuals should not be made to reveal or connect to them their vote

8 Independent choice

Voters should not be harassed at the polling booth, assaulted with propaganda or misleading promises by candidates, or (more controversially) exposed to taxpayer funded or inappropriate campaign advertising

9 Free speech

All members of the community should have the freedom to engage in communications about political issues, including discussions and critiques of current members or candidates

10 A clear voting system

Preferential, first past the post, etc

11 Accessible voting

Place, time, proxy votes, multiple languages, services for blindness or other disabilities, clear instructions

12 Accurate measurement

Votes should be recorded accurately and without bias or alteration of any kind; perhaps by computer (but with a measurable paper trail)

II Chapter I — The Parliament

A Introduction

The Chapter which establishes the federal Parliament and deals with its exercise of legislative power is the longest of any in the *Constitution*. Its provisions broadly embody the notions of federalism and representative democracy. As will be seen, these two principles are in conflict to a considerable degree.

Representative democracy entails that votes should be accorded equal value. However, this would have the effect of allowing more populous states to domineer smaller, less densely populated ones. To prevent this, the safeguard of an upper house (the Senate) is built into the *Constitution*, where representation is equal as among states (rather than voters, as in the House of Representatives). The *Constitution* thus requires departure from representative democracy to achieve a federal balance that was agreeable to the smaller states resisting federation.

B The Senate

The Senate's structure and composition is modelled more on the United States than the United Kingdom. Section 7 provides for equal representation between states:

Section 7 — The Senate:

The Senate shall be composed of senators for each state, directly chosen by the people of the State ...

Until the Parliament otherwise provides there shall be six senators for each Original State. The Parliament may make laws increasing or diminishing the number of senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six senators.

The senators shall be chosen for a term of six years ...

Summary of requirements:

- Equal numbers of senators between states existing at federation;
- Not fewer than six senators for those states;
- Parliament able to vary number subject to these requirements
- Senators sit for terms of six years but on a rotating basis (such that half the senate is elected at each federal election, every three years, and the other half at the following federal election)

Section 15 — Casual vacancies:

If the place of a senator becomes vacant before the expiration of his term of service, the Houses of Parliament of the state for which he was chosen, sitting and voting together ... shall choose a person to hold the place until the expiration of the term.

As a result of s 15, if a senator dies or retires mid-term, his or her replacement will be chosen by Parliament.

C The House of Representatives

The structure of the House of Representatives was formulated with a view to providing the colonies with an incentive to join as original states. To this end, original members of the federation are granted protected status in the House of Representatives:

Section 24 — Constitution of House of Representatives:

The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.

The number of members chosen in the several States shall be in proportion to the respective numbers of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner ...

But notwithstanding anything in this section, five members at least shall be chosen in each Original State.

Section 28 provides for a limited term of office (three years) and early dissolution by the Governor-General:

Section 28 — Duration of House of Representatives:

Every House of Representatives shall continue for three years from the first meeting of the House, and no longer, but may be sooner dissolved by the Governor-General.

This ensures that the executive is subject to renewal of its democratic mandate every three years, if not sooner. In this way, direct accountability is constitutionally guaranteed. Presumably, this provision also ensures that representation in government responds with sufficient promptness to changes in the composition or views of society (though soft political factors and a general desire by politicians to retain office may see such representativeness change even sooner).

The *Constitution* also clearly contemplates that Parliament may change the details of how elections are to be held. Provisions containing the phrase 'until the Parliament otherwise provides' confer power on Parliament to enact regulatory legislation. The head of power under which such laws are enacted is s 51(xxxvi) (matters to which this *Constitution* refers with the aforementioned statement).

D Voting and Elections

The *Constitution* permits only one vote per person when electing members of the Senate:

Section 8 — Qualification of Electors:

The qualification of electors of senators shall be in each State that which is prescribed by this *Constitution*, or by the Parliament, as the qualification for electors of members of the House of Representatives; but in the choosing of senators each elector shall vote only once.

Section 8 makes reference to the requirements for an elector of the House of Representatives. Similarly, an elector may vote only once for a member of the House of Representatives:

Section 30 — Qualification of Electors:

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

These provisions effectively protect the integrity of the vote without specifying any concrete requirements (eg, gender, race, property holdings). This flexibility has allowed expansion of the franchise beyond that which was contemplated during the Constitutional Conventions (21 years and over, no women or aborigines, white property owners, etc). The precise regulations governing eligibility are set by Parliament.

Commonwealth Electoral Act 1918 (Cth) s 93:

- (1) Subject to sub-sections (7) and (8), all persons:
- (a) who have attained 18 years of age; and
 - (b) who are:
 - (i) Australian citizens; or
 - (ii) persons (other than Australian citizens) who would ... be British subjects ...
- shall be entitled to enrolment.
- (2) ... an elector whose name is on the Role ... is entitled to vote at elections of Members of the Senate for the State ... and at elections of Members of the House of Representatives
- (7) A person who is:
- (a) within the meaning of the *Migration Act 1958*, the holder of a temporary visa; or
 - (b) an unlawful non-citizen under that Act;
- is not entitled to enrolment ...

- (8) A person who:
- (a) by reason of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting; or
 - (b) is serving a sentence of 5 years or longer for an offence against the law of the Commonwealth or of a State or Territory; or
 - (c) has been convicted of treason or treachery and has not been pardoned;
- is not entitled to have his or her name placed on or retained on any Roll or to vote at any Senate election or House of Representatives election.

1 A right to vote?

The *Constitution* does not create any explicit right to vote (*R v Pearson; Ex parte Sipka*). That this is so is attested to by the validity of the legislative provisions above, which deny voting rights to non-citizens, criminals serving a long sentence, the mentally ill, and the treasonous or treacherous.

This is despite ss 7 and 24 of the *Constitution* speaking of members as being ‘directly chosen by the people’. It might be argued on the basis of these provisions that an implied right to vote is imported by the fact that a ‘choice’ by ‘people’ who engage in ‘voting’ is envisaged by those sections. In *McGinty v Western Australia*, Toohey J observed that

*according to today’s standards, a system which denied universal adult franchise would fall short of a basic requirement of representative democracy.*²

Justice Gaudron also stated:

*Notwithstanding the limited nature of the franchise in 1901, present circumstances would not, in my view, permit senators and members of the House of Representatives to be described as ‘chosen by the people’ within the meaning of those words in ss 7 and 24 of the Constitution if the franchise were to be denied to women or to members of a racial minority or to be made subject to a property or educational qualification.*³

These statements suggest that an attempt to deny franchise to a significant group of people would be constitutionally invalid. Although the exclusions outlined in s 93 above appear reasonable, some tension exists between those exclusions and the notion of representative democracy.

2 A right not to vote?

Section 245 of the *Commonwealth Electoral Act 1918* (Cth) establishes a system of compulsory voting and makes it an offence to fail to register a vote at the ballot box. It might be argued that, as other constitutional provisions (eg, s 116) provide for both freedoms to do and not to do an act, so too ss 7 and 24 provide for a right not to vote. There are two problems with this argument. First, it is unclear whether either section creates a right to vote. Second, as Blackshield and Williams note, s 245 does not require that a person make a choice (just that they present themselves at the polling booth and deposit a ballot).⁴

² *McGinty v Western Australia* (1996) 186 CLR 140, 201 (Toohey J).

³ *Ibid* 221–2 (Gaudron J).

⁴ Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (3rd ed, 2002) 412.

The *Constitution* itself does not mandate (nor preclude) compulsory voting. This is left as a question for the federal Parliament. Parliament may make such regulations as are necessary to maintain the electoral system, provided such measures permit 'a free choice among candidates for election', and, to the extent that they infringe political speech, that they are 'reasonably capable of being viewed as appropriate and adapted to furthering or enhancing the democratic process' (per Toohey and Gaudron JJ), a 'legitimate legislative purpose' (per Brennan CJ) (*Langer v Commonwealth*).

***Langer v Commonwealth* (1996) HCA:**

Facts

- Albert Langer urged voters to vote '1, 2, 3, 3' so as to place both major parties equal last
- The Electoral Commission responded that a formal vote must use each number only once and number every square
- Langer seeks an injunction to prevent the counter-publicity, arguing that s 240 of the *Commonwealth Electoral Act 1918* (Cth) (which prescribed the method of ordering candidates) was invalid because it was inconsistent with s 24 of the *Constitution*
- He also argued that s 329A, which made it an offence to promote his method of voting, infringed the implied constitutional freedom of political communication

Issue

- Is the prescription of a particular method of voting inconsistent with the Constitutional requirement that representatives be 'directly chosen by the people'?

Reasoning

- Brennan CJ:
 - 'Provided the prescribed method of voting permits a free choice among candidates for election, it is within the legislative power of the Parliament'
 - 'It is not to the point that, if a ballot paper were filled in otherwise than in accordance with s 240, the vote would better express the voter's political opinion'
 - 'In my view, if the impairment of [the implied freedom of political communication] is reasonably capable of being regarded as appropriate and adapted to the achieving of the legitimate legislative purpose and the impairment is merely incidental to the achievement of that purpose, the law is within power'
 - 'The restriction on freedom of speech imposed by s 329A is not imposed with a view to repressing freedom of political discussion; it is imposed as an incident to the protection of the s 240 method of voting'
- Toohey and Gaudron JJ:
 - Where 'curtailment [of the implied freedom] is reasonably capable of being viewed as appropriate and adapted to furthering or enhancing the democratic process' the law will not be invalid (at 334)
- Dawson J (dissenting):
 - '[Section 329A] is a law which is designed to keep from voters information which is required by them to enable them to exercise an informed choice'
 - 'The effect of s 329A in any practical sense, must, in my view, be to discourage, if not prevent, persons from imparting to eligible voters knowledge that the electoral system permits optional or selective preferential voting. It cannot, therefore, be a law which is reasonably and appropriately adapted to the achievement of an end which lies within the ambit of the relevant legislative power.'

Decision

- It is open to Parliament to choose how to regulate the voting system
- (6:0) Section 240 is valid
- (5:1) Section 329A is also valid
- Langer is imprisoned for 10 weeks; his promotion did impact on voting patterns: over 46 000 people voted according to his method in 1996, compared with 500% fewer people in 1993

3 *A state right to vote?*

Section 41 provides that a state right to vote entails a Commonwealth right to vote. This provision was likely inserted to protect citizens of a state from being denied a vote in Commonwealth elections on the basis of their state of origin:

Section 41 — Right of electors of 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.

However, any 'adult person' must still be on the Commonwealth electoral roll in order to vote. (Such a person 'has or acquires a right to vote' at state elections, but is arguably not prevented from voting by the Commonwealth electoral laws — rather, certain requirements are placed on the exercise of that right.)

Even if people were so prevented, s 41 has been held to operate only in relation to electors at the time of federation. This arose in the context of a declaration that the electoral rolls close some time prior to the holding of an election (*Zipper's Case*, where a group on the state, but not Commonwealth, roll challenged their exclusion from voting on the basis of s 41).

Essentially, s 41 is read as:

'No adult person who has *at the establishment of the federation ... or acquires, before the Commonwealth passes a universal franchise Act, ... a right to vote...*'

This demonstrates several things: first, that conservatives imply things into the *Constitution*, too! Second, that s 41 should not be read in isolation, but rather in light of the text as a whole, including ss 8 and 30 ('until the Parliament otherwise provides'), which suggest that much of the electoral regime established by the *Constitution* was intended only to operate until the Parliament does actually provide otherwise.

Several other reasons exist for this restrictive interpretation of s 41:

- **Administrative efficiency**
Practical issues of who is on the Roll on the day of the election might easily be resolved if the list was finalised and distributed to polling booths prior to an election;
- **Policy/federal reasons**
If states can confer upon their citizens a right to vote in federal elections, they may start

changing rules about voting to enable more people to vote; thus, some states could lower the voting age to allow more people to vote in those states; this would in turn be followed by other states doing the same, until the purpose of an election (informed decision-making) is completely undermined;

- This is a very significant reason for interpreting s 41 in this way
- The Framers would never have intended for uniform Commonwealth franchise to be undermined by construing s 41 on its terms

Since s 41 operated only at federation, there is no-one alive today who can have a right to vote under s 41. In this way, the High Court read in words so as to make the section completely inoperative. This serves as a reminder that the *Constitution* must be read in light of what courts say it means, rather than solely by reference to the text itself. It also illustrates how, effectively, silent judicial amendment can be effected.

4 Senators of territories

Because the Northern and Australian Capital Territories did not exist at federation, the *Constitution* does not provide for the existence of territory senators. After all, s 7 expressly states that senators will be elected 'for each state' by people of that 'state'. Once the territories were created they become mere entities or extensions of the Commonwealth. No voting rights or senate representatives were given to their inhabitants until 1974, when legislation provided that two senators would be elected for each territory.

However, s 7 and s 122 of the *Constitution* are in apparent conflict. Section 7 outlines procedures for election of the senate (the states' House), while s 122 provides that, in relation to new territories, the Parliament 'may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.' This is an extremely broad discretion relative to other provisions of the *Constitution*, and it is internally inconsistent with s 7 (which as noted above makes no reference so the possibility of territory representation).

This issue was subsequently litigated (twice) in the *Territory Senators* cases. The Commonwealth argued that s 122 should be read as having priority, so that the enabling legislation was valid; however, the existing states argued that s 7 should dominate such that the legislation was invalid.

Western Australia v Commonwealth (1975) HCA ('First Territory Senators Case')

Issue

- Is the federal Parliament's purported creation of senate representation for the territories constitutionally valid?

Reasoning

- Mason J:
 - Because the Framers contemplated representation one day, ss 7 and 24 should be read as subject to s 122
 - 'To the Framers of the *Constitution* in 1900 the existing condition of the territories was not such as to suggest the immediate likelihood of their securing representation in either House, but the possibility of such a development occurring in the future was undeniable. The prospect of its occurrence was foreseen and in my view it found expression in s 122.'
 - 'Understood in this light, ss 7 and 24 make exhaustive provision for the

- composition of each House until such time as Parliament might see fit to allow representation to a territory under s 122.'
- The states argued that if s 122 operates in this way, the Commonwealth could, for example, give the Northern Territory 500 senators by virtue of the fact that it can determine representation 'to the extent and on the terms which it thinks fit', all but relegating the states to a minority in what is supposed to be their House
 - His Honour adopts a 'textual' approach, noting that the senate won't pass a law that would see their influence reduced
 - 'The first [objection] is the grim spectre conjured up by the plaintiffs of a Parliament swamping the Senate with senators from the territories, thereby reducing the representation of the states disproportionately to that of an ineffective minority in the chamber. This exercise in imagination assumes the willing participation of the senators representing the states in such an enterprise, notwithstanding that it would hasten their journey into political oblivion. It disregards the assumption which the framers of the *Constitution* made, and which we should now make, that Parliament will act responsibly in the exercise of its powers.'
 - In practice, this may not always be the case:
 - There is a strong party system and voting usually proceeds along party lines
 - In Queensland, the upper house voted in 1922 to abolish itself entirely
 - The states' argument is further weakened by the fact that 'the Constitution provides no safeguard against the pursuit by Parliament of a similar course at the expense of the original states in allowing for the representation of new states in the Senate.'
 - This is because there is no equivalent of s 7 in relation to new states created under s 121
 - There is no safeguard against abuse of *that* power (the power to create new states), so it must likewise be assumed that Parliament will exercise their power responsibly
- Murphy J:
 - Section 122 prevails on the basis of principles of democracy and the importance of representing all people
 - Uses a historical analysis to determine the intention of the Framers, identifying a strong democratic theme in the *Constitution*
 - Barwick CJ (dissenting):
 - Uses the principle of federalism to treat s 7 as prevailing over s 122: the states' House should not be the House of the territories
 - 'Where it is intended that the Parliament should have control of a *Constitution* provision, the *Constitution* expressly and unambiguously so provides.'
 - '...by determining the "extent of representation", the numerical strength of the representation provided by the *Constitution* itself, may be determined by the Parliament at the point of, and as a term and condition of, the admission of the new state.'
 - 'Section 122 is dealing with a totally different matter, namely, the acceptance of new territories; that is to say, of new dependent territories. It is quite clear that those who reside in any such territory do not become people of the Commonwealth for the purposes of s 24'
 - His Honour also expresses concern about Parliament destroying the federal

- balance by providing for too many territorial senators
- ‘...the expression is “allow the representation of such territory in *either* House of the Parliament”. To speak of the representation of a territory in the House of Representatives is to my mind an indication against, rather than towards, the conclusion that representation by membership of the House of Representatives is contemplated. In that House the people of the Commonwealth are represented: states and territories, in my opinion, cannot be...’
 - The principles of federation dictate that in the event of inconsistency s 7 prevail over s 122:
 - ‘...the expression “allow representation” must be construed so as to be consonant with and indeed to preserve and not to endanger or destroy an essential feature of federation, namely the maintenance of the Senate as the state House.’
 - ‘In other words s 7 is relevantly a dominant provision and not subject to the exercise of the power given by s 122.’
 - ‘The interpretation which, in my opinion, is the correct interpretation is that s 122 would at most permit the Parliament to allow the representation of a territory in the Senate by a delegate who would not have the rights of a senator for a state, and who in any case, by whatever name designated, would not be entitled to be treated as a senator for a state or to vote on any questions before the Senate.’
 - Representation is possible only in a non-voting capacity; territory senators cannot interfere with states’ voting rights and the federal balance

Decision

- (4:3) The provision creating territory senators is valid

Shortly after the *First Territory Senators* case, McTiernan J (who was in the majority) retired. He was replaced by Aickin J, who was popularly thought to be sympathetic to the minority view. Consequently, the issue of territory senate representation was raised just two years later in the *Second Territory Senators Case*.

Queensland v Commonwealth (1977) HCA (‘Second Territory Senators Case’):

Decision

- (5:2) Although four of the justices thought the result was erroneous, two of those felt bound to follow precedent, thus enlarging the size of the majority!

E *One Vote, One Value*

The *Constitution* requires departure from the notion that all votes are to be accorded equal weight (*McKinley’s Case*; *McGinty’s Case*)

Attorney–General (Commonwealth); Ex rel McKinlay v Commonwealth

(1975) HCA ('McKinlay's Case'):Facts

- McKinlay argued that the 1974 election was invalid because it was premised on an electoral distribution disproportionate to the population of each electorate
- This was argued to infringe a principle of 'one vote, one value' purportedly enshrined by the *Constitution* so that the *Electoral Act* was invalid

Issue

- Does the *Constitution* imply that all votes are to be accorded equal value?

Reasoning

- Barwick CJ:
 - On constitutional interpretation
 - The problem is not to be solved by resort to slogans or to political catch-cries or to vague and imprecise expressions of political philosophy. The question of the validity of an Act ... is to be decided by the meaning of the relevant text of the *Constitution* having regard to the historical setting in which [it] was created'
 - 'The only true guide and the only course which can produce stability in constitutional law is to read the language of the *Constitution* itself, no doubt generously and not pedantically, but as a whole: and to find its meaning by legal reasoning. I respectfully agree with Sir Owen Dixon's opinion that "there is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism".'
 - On construing s 24 by reference to the *American Constitution*
 - No parallel can be drawn with the United States *Constitution*, as it grew out of political climate of 'revolt against British institutions and methods of government', whereas Australia's developed 'with [their] encouragement' (at 23–4)
 - Unlike the *American Constitution*, 'the *Australian Constitution* is built upon confidence in a system of parliamentary government with ministerial responsibility'
 - On s 19 of the *Electoral Act*
 - The criteria for electoral distributions ensure a reasonable approximation of equality
 - The legislation is therefore valid
- Gibbs J, and McTiernan and Jacobs JJ: agreed with Barwick CJ
- Stephen J: also agreed, but added the following:
 - The characteristics of representative democracy are not fixed and precise; the various permutations exists along a spectrum determined by no single requirement
 - 'Three great principles, representative democracy ..., direct popular election, and the national character of the lower House, may each be discerned in the opening words of s 24. Nothing however is aid as to the composition of electoral divisions. Only if some requirement as to their composition necessarily flows from one or other of these three principles can the plaintiffs' submissions be made good; and it can surely only be from the first'
 - '...the particular quality and character of the content of each one of these three ingredients of representative democracy, and there may well be others, **is not fixed and precise.**'

- ‘The electoral system, with its innumerable details including numbers and qualifications of representatives, single or multi-member electorates, voting methods and the various methods ... whereby the significance and outcome of the votes cast may be determined; in each there is scope for variety and **no one formula can pre-empt the field as alone consistent with representative democracy.**’
 - ‘...representative democracy is descriptive of a whole spectrum of political institutions, each differing in countless respects yet answering to that generic description. The spectrum has finite limits ... but at no one point within the range of the spectrum does there exist any single requirement so essential as to be determinative of the existence of representative democracy.’
 - Arguing that electoral divisions must have ‘as near as practicable equality of numbers’ ignores the historical fact that many democracies have not had equality of numbers
 - Section 24 embodies some aspects of representative government, but not all
 - Thus, there must be electors, a system of selection, and matters of which the Parliament can exercise power
 - However, the manner in which these aspects are characterised ‘is not fixed and precise’
 - Different suffrages have existed throughout Australian political history, as have different systems of election (which continue to evolve today)
 - There is not a single formula determining the nature of an election, and certainly not one that can be implied from a *Constitution* such as this
 - Thus, the *Constitution* does not *mandate* a female vote, etc
 - However, the spectrum of representativeness does have some limits: where an electoral system lacks qualities ‘so essential’ as to fall outside notions of representative democracy it will be invalid
 - However, this is a very wide spectrum
 - ‘It is no doubt true that something approaching numerical equality of electors within electorates is an important factor ... just as adult suffrage, free of discrimination on the grounds of race, sex, property or educational qualification will likewise aid in its attainment. But neither of these in absolute form is necessarily imported into the *Constitution* by ... representative democracy...’
 - This means that numeric equality is important, or something approaching it, but that absolute equality is not an ‘essential’ quality
 - Adult suffrage without discrimination is likewise important but not necessarily imported into the *Constitution*
 - His Honour’s judgment suggests that there is not even a requirement that distributions be as near as practicable to equal; a strict requirement of equality is also impossible
 - The *Constitution* leaves to legislatures the determination of which is the best variant of democratic election to be implemented: ss 24, 29, 30, 31, 34(i) and (ii)
 - ‘[T]he *Constitution* is in no way pretended to any perfect embodiment of some particular model of democratic principles; the federation of the colonies was an essentially practical and political affair, achieved after much negotiation and the outcome of extensive compromise.’
 - The *Electoral Act* is therefore valid
- Mason J: agreeing, adds the following:
 - ‘All that the paragraph in s 24 requires is that there should be a direct choice of the members by the people’
 - ‘It is perhaps conceivable that variations in the numbers of electors or people in single member electorates could become so grossly disproportionate as to raise

a question whether an election held on boundaries so drawn would produce a House of Representatives composed of members directly chosen by the people of the Commonwealth, but this is a matter quite removed from the proposition that s 24 insists upon a practical equality of people or electors in single member electorates.'

- Murphy J (dissenting): adopts a singularly unique approach rejected by the other justices
 - Section 24 should be interpreted broadly
 - The *Constitution* is framed in broad and general terms and intended to apply to varying conditions in the community
 - The Court should 'always lean to the broader interpretation unless there is something in the context or in the rest of the *Constitution* to indicate that the narrower interpretation will best carry out its object and purpose' (*Jumbunna Coal Mine NL v Victorian Coal Miners' Association*)
 - The Court should 'avoid pedantic and narrow constructions in dealing with an instrument of government' (*Australian National Airways Pty Ltd v Commonwealth* per Dixon J)
 - 'Any law of the Parliament which deprived persons of a right to representation or to vote on the ground of sex or lack of property would be incompatible with the command that the House of Representatives be directly "chosen by the people". It would contravene s 24 and be thus unconstitutional.'
 - The phrase 'chosen by the people' requires absolute equality
 - 'The phrase should be construed in the same way as it was by the United States Supreme Court but having as the standard of equality the alternatives of equal numbers of people and equal numbers of electors.'
 - The words must have some meaning or mandate because otherwise the *Constitution* would not require that the election be democratic
 - This meaning is arrived at by the 'obvious importance placed on the phrase by its positioning in the opening sentence of that part of the *Constitution*' and 'the fact that it is expressed in the language of command'
 - A further reason: 'The democratic theme of equal sharing of political power which pervades the *Constitution*'
 - Another is the 'absence of any other means of redress for those deprived of an equal share of representation, even where it is grossly unequal'
 - Finally, 'the phrase was taken directly from the United States *Constitution*'
 - Quoting Jefferson: 'Our peculiar security is the possession of a written *Constitution*. Let us not make it a blank paper by construction.'

Decision

- Majority: s 24 of the *Constitution* does not require equality of voting; the fact that unequal representation exists does not entail that members are not 'directly chosen'; what is important is that voting is *direct* (unlike the United States)
 - However, some outer bounds on the permissibility of disproportionate electoral sizes are set by Mason and Stephen JJ
- The plaintiffs failed in their challenge to the *Electoral Act* provisions
- However, they succeeded in relation to two points:
 - First, ss 3–4 of the *Representation Act* were invalid because they did not comply with the requirement that the calculation of electoral distributions be made 'whenever necessary' (it was too infrequent)
 - This meant that all federal elections since 1938 had been conducted on

- the basis of unconstitutional statutory provisions
- Were those elections invalid, such that all the laws passed by Parliament in that time were invalid?
 - Barwick CJ: no, no invalidation is possible
 - Gibbs J: just because the Act is partially invalid, it doesn't mean that electoral distributions have not been in their correct proportions; even if that was the case, the elections would still be valid because 'there is an overriding constitutional duty to hold elections in certain circumstances'
 - Second, s 12(a) of that Act had a loophole whereby redistribution of electoral divisions could be postponed indefinitely and so was invalid

Following the 'heyday' of constitutional implications in the early 1990s, *McGinty's Case* makes clear that implications must come specifically from the constitutional text or structure. Limitations cannot be secondarily derived from abstract embodiments such as 'representative government'.

McGinty v Western Australia (1996) HCA ('McGinty's Case')

Facts

- *McGinty's Case* considered the validity of state electoral divisions
- At the 1993 Western Australia state election, the population of electoral districts were very different between rural and metropolitan areas (eg, 26 580 vs 9135)
- Mr James McGinty, the leader of the opposition, challenged the electoral boundaries on the basis that a system of representative government (created by the both Commonwealth and state *Constitutions*) mandated equality of voting power

Issue

- Does the *Constitution* require all votes to have an equal value?

Reasoning

- The *Commonwealth Constitution* does not filter down to the states
- Even if it did, it does not impose any requirement that votes be accorded precisely equal weight
- However, the state *Constitution* can require 'one vote, one value'; does it?
 - Majority: the same words don't have 'numerical equality' in the state *Constitution* (just like the Commonwealth equivalent)
 - Minority: agree that the *Commonwealth Constitution* does not compel states, but disagree that neither of them permit departure from voting equality
- Brennan CJ:
 - '[168] Implications are not devised by the judiciary; they exist in the text and structure of the *Constitution* and are revealed or uncovered by judicial exegesis. No implication can be drawn from the *Constitution* which is not based on the actual terms of the *Constitution*, or on its structure...'
 - 'The text of the *Constitution* can be illuminated by reference to representative democracy but the concept neither alters nor adds to the text...'
 - '[170] The constitutional question for determination in this case cannot be stated as though it asks whether the distribution of electoral districts ... is consistent with a general principle of representative democracy. ... The constitutional question is whether there is inconsistency with the text and structure of the *Constitution*.'
 - '[175] The structure of the *Constitution* is opposed to the notion that the

provisions of Ch I might affect the constitutions of the states to which Ch V is directed.'

- J'The purpose of [the electoral district] provision was not the creation of a new electoral regime; it was simply privative of the uncontrolled or partly-controlled power of constitutional amendment vested in the Parliament s 73(1).'
- '...it is impossible to find an implication other than the entrenchment of the system of electing members of the Council and the Assembly by direct popular vote. To find in s 73(2)(c) an implication that electoral power be equally distributed among the people of the state ... would be to find a legislative intention destructive of the means by which the enacting Parliament was elected.'
- Dawson J:
 - '[183] ...the form of representative government, including the type of electoral system, the adoption and size of electoral divisions, and the franchise are all left to Parliament by the *Constitution*'
 - '[184] There can be no implication that a particular electoral system, of the many available, is required by the *Constitution*. There is, of course, the requirement that whatever system is employed it must result in a direct choice by the people.'
 - '[185] Once it is recognised, as in my view it must be, that electorates of equal numeric size are not a necessary characteristic of representative government, the plaintiffs are driven in their argument find in the ... *Constitution* a requirement that there be, as nearly as practicable, electorates of equal size. But that requirement is nowhere to be found in any express provisions of the *Constitution* and this Court has denied in *McKinlay* that there is any basis for its implication.'
 - '...problems of communication and access in geographically large electorates outside a metropolitan area justify different numerical sizes in electoral divisions.'
 - '[188] It is fallacious reasoning to posit a system of representative government for which the *Constitution* does not provide and to read the requirements of that system into the *Constitution* implication.'
 - 'The *Constitution* does not, for these reasons, contain by implication the principle expressed in the words "one vote, one value", but the Parliament may, should it consider it desirable to do so, adopt that principle in exercising its power to provide for electoral divisions. Indeed, it has done so in accordance with its view of the practicalities in the *Commonwealth Electoral Act 1918* (Cth).'
 - '... in *McKinlay* McTiernan and Jacobs JJ suggested that ... at some point electoral inequality might be inconsistent with a choice by the people. They rejected, however, any requirement of absolute equality or nearly as practicable equality. ... In my view, both ... had in mind extreme situations markedly different from that which exists under the relevant Western Australian legislation.'
- McHugh J:
 - 'I cannot accept ... that a constitutional implication can arise from a particular doctrine that "underlies the *Constitution*". ... Top-down reasoning is not a legitimate method of interpreting the *Constitution*. ... it is the text and the implications to be drawn from the text and structure that contain the meaning of the *Constitution*.'
 - 'The plaintiffs seemed to accept that the principle [of representative democracy] was a free-standing constitutional provision somewhat similar to the hypothetical s 129'
- Toohey J (dissenting), Gaudron J (dissenting):
 - There is an implication in the *Commonwealth Constitution* that votes are to be accorded equal value
 - However, their Honours agree with the majority that this principle cannot

- influence state elections
 - Nevertheless, a similar implication may be drawn from s 73(2)(c)

Decision

- (5:2) The challenge is rejected
- The majority emphasises that constitutional implications ‘must be founded in the text or structure of the relevant *Constitution* and cannot be derived from any overarching concept of representative government.’ (Blackshield and Williams at 430)

As a result of *McGinty’s Case*, neither at the Commonwealth nor the state levels of government do the number of voters need be ‘as near as practicable’ equal in each electorate. Parliament can vary the electoral sizes. However, there *may* come a time when electoral sizes are so disproportionate that elections may no longer be described as ‘chosen directly by the people’. Such an election would be invalid. This is, however, quite unlikely to occur.

Mulholland v Commonwealth confirms that in determining the electoral process, the *Constitution* gives Parliament a wide range of choice. Although there is an overriding requirement that senators and members of the House of Representatives are to be ‘directly chosen by the people’, there is ‘substantial room’ for parliamentary choice about how to implement the details (per Gleeson CJ). Thus, the *Constitution* does not prescribe equality of individual voting power (*McKinlay, McGinty*) and the precise nature of representative government ‘is not fixed and precise’ (*McKinlay*). Rather, the concept of representative government is ‘descriptive of a whole spectrum of political institutions’, for which the *Constitution* permits considerable ‘scope for variety’ (per McHugh J). It does not mandate any particular electoral system.

***Mulholland v Commonwealth* (2004) HCA:**

Facts

- Following the 2001 federal election, the Electoral Commission sought to exercise new powers, which had been conferred upon it by the *Commonwealth Electoral Amendment Act (No 1) 2000* (Cth), by scrutinising the Democratic Labour Party (‘DLP’) and whether it had the requisite 500 members needed for it to be considered a political party
- ‘When the DLP refused to supply the names of its members, the Commission gave notice that it was considering the Party’s deregistration
- Thereupon Mr JV Mulholland, the Party’s registered officer and its principal Senate candidate at the 2004 election, sought review of the Commission’s decisions and conduct under the *Administrative Decisions (Judicial Review) Act 1977* (Cth)
- He also sought a writ of prohibition on the ground that the provisions purporting to authorise deregistration were invalid.’

Issue

- Can a limitation be implied from the words ‘chosen by the people’ to prevent the exercise of legislative power to regulate federal elections by restricting small parties from expressing their views?

Reasoning

- The DLP argued that *Figueroa v Canada (Attorney-General)* lent support to their arguments that the provisions were invalid
 - However, the Canadian requirement for registration was that a party have 50 or more nominated candidates
 - This is far more onerous than a requirement of 500 members, and can be

- distinguished on this ground
- Additionally, the constitutional principles arising under the Canadian *Charter of Rights and Freedoms* were very different from those arising under the *Australian Constitution*
 - Gleeson CJ:
 - **[585]** A notable feature of our system of representative and responsible government is how little of the detail of that system is to be found in the Constitution, and how much is left to be filled in by Parliament. In *Lange v Australian Broadcasting Corporation*, this Court said that ... the Constitution provides for “the fundamental features of representative government”.
 - ‘...[R]epresentative democracy takes many forms, and ... the terms of the *Constitution* are silent on many matters that are important to the form taken by representative democracy in Australia, at a federal or State level, from time to time.’
 - This has allowed for considerable flexibility in and changes to the electoral process over time
 - ‘For example, while, in common with most democracies, Australia now has universal adult suffrage, this was not always so. At the time of the Constitution, most women in Australia did not have the right to vote. Aboriginal Australians have only comprehensively had the vote since 1962. Unlike most democracies, Australia now has a system of compulsory voting, but this did not exist at Federation. Members of the House of Representatives are now elected by a system of preferential voting.’
 - ‘One of the most striking examples of the power given to Parliament to alter, by legislation, the form of our democracy concerns the composition of the Senate. There was a major change in the method of electing senators in 1948. For many years before then, the political party that dominated the House of Representatives usually controlled the Senate. With the introduction of proportional representation in 1948, there came to be a much larger non-government representation in the Senate [which] ... combined with the system of proportional representation, produced the result that it is now unusual for a major party to control the Senate. This is of large political and practical significance. It was the result of legislative, not constitutional, change.’
 - ‘The silence of the Constitution on many matters affecting our system of representative democracy and responsible government has some positive consequences. For example, if then current ideas as to the electoral franchise had been written into the *Constitution* in 1901, our system might now be at odds with our notions of democracy. The *Constitution* is, and was meant to be, difficult to amend. **Leaving it to Parliament, subject to certain fundamental requirements, to alter the electoral system in response to changing community standards of democracy is a democratic solution to the problem of reconciling the need for basic values with the requirement of flexibility.** As to responsible government, the deliberate lack of specificity on the part of the framers of the *Constitution* concerning the functioning of the Executive was seen, in *Re Patterson; Ex parte Taylor*, as an advantage. Constitutional arrangements on such matters need to be capable of development and adaptability.’
 - ‘Concepts such as representative democracy and responsible government no doubt have an irreducible minimum content, but community standards as to their most appropriate forms of expression change over time, and vary from place to place.’

- The provisions of the *Australian Constitution* may be contrasted with those of its United States counterpart:
 - Barwick CJ in *McKinlay*: the United States *Constitution* was drafted in a spirit of '[23] revolt against British institutions and methods of government', while the *Australian Constitution* 'developed not in antagonism to British methods of government but [24] in co-operation with and, to a great extent, with the encouragement of the British Government'
- The one vote, one value concept is necessarily departed from in the *Australian Constitution*:
 - 'Federalism itself influenced the form of our government in ways that might be thought by some to depart from "pure democracy", if there is such a [587] thing. Equal State representation in the Senate may be thought, and at the time of Federation was thought by some, to be inconsistent with a concept of voting equality throughout the Commonwealth. Voters in the smallest State (in terms of population) elect the same number of senators as voters in the largest State. In this respect, the "value" of votes is unequal. That inequality is one aspect of Australian democracy which, exceptionally, is enshrined in the *Constitution*. Where the *Constitution* contains an express provision for one form of inequality in the value of votes, it dictates at least some caution in formulating a general implication of equality on that subject ...'
 - '[T]he overriding requirement that senators and members of the House of Representatives are to be "directly chosen by the people" ... imposes a basic condition of democratic process, but leaves substantial room for parliamentary choice, and for change from time to time. The methods by which the present senators, and members of the House of Representatives, of the Australian Parliament are chosen are significantly different from the methods by which those in earlier Australian parliaments were chosen. Judicial opinion has been divided on the presently irrelevant question as to whether the *Constitution* guarantees universal suffrage.'
 - 'No one doubts, however, that Parliament had the power, as it did, to prescribe a minimum voting age, and, later, to reduce that age from 21 to 18. Whether Parliament would have the power to fix a maximum voting age is a question that has not yet arisen...'
- The phrase 'chosen directly by the people' entails that the people have a choice; this means that the style of the ballot paper and the form of the electoral process must conform to certain fundamental requirements
 - '...the choice required by the *Constitution* is a true choice with "an opportunity to gain an appreciation of the available alternatives". In the course of argument, examples were given of forms of ballot paper prescribed for use at elections which might not conform to that fundamental requirement. A ballot paper, for example, that had printed on it only one name, being that of the government candidate, requiring the name of any alternative candidate to be written in (a form not unknown in the past in some places), might so distort the process of choice as to fail to satisfy the test.'
 - 'Here, the rules in question preserve a **full and free choice** between the competing candidates for election. The electors are presented with a true choice. The available alternatives between candidates are set out on the ballot paper. The process of choice by electors is not impeded or impaired ...'
 - '...determining the electoral process in a representative democracy requires regulation of many matters, of major and minor significance,

and the **Constitution gives Parliament a wide range of choice**. In the context of a system of registration of political parties eligible to receive the privileges referred to earlier, the imposition of a requirement of some minimum level of support, the fixing of that level at 500 members, and the avoidance of abuse by the no overlap rule, are consistent with the constitutional concept of direct choice by the people and with representative government.'

- McHugh J:
 - '[600] [T]he *Constitution* prescribes only the irreducible minimum requirements for representative government, including the requirement that senators and members of the House of Representatives be "directly chosen by the people". The *Constitution* does not prescribe equality of individual voting power. Nor does it protect the secret ballot ... [In *McKinlay*], the Court recognised that the concept of representative government is inherent in the structure of the *Constitution*, but noted that "the particular quality and character of the content" of representative government was "not fixed and precise" [at 56]. Stephen J observed that the concept of representative government is "descriptive of a whole spectrum of political institutions". His Honour said that the Constitution permits "scope for variety" in the details of the electoral system [at 56–7].
 - '...the *Constitution* does not mandate any particular electoral system, and, beyond the limited constitutional requirements outlined above, the form of representative government ... is left to the Parliament. This includes "the type of electoral system, the adoption and size of electoral divisions, and the franchise" [Dawson J in *McGinty* at 183-84]. As a result, the Parliament may establish an electoral system that includes compulsory voting. It may specify a particular voting method — for example, preferential or proportional voting or first past the post voting [McGinty at 244]. It may provide for the election of an unopposed candidate and the election of a candidate on final preferences and may limit voters' ability to cast a formal vote and to vote against a candidate [Toohey and Gaudron JJ in *Langer v Commonwealth* at 333]'
 - '[601] The provisions of the Act that prescribe the "500 rule" and the "no-overlap rule" and confer power on the Commission to administer those rules are laws "with respect to" elections. ... a law which proscribes conduct that interferes with the electoral system that Parliament has chosen is a law with respect to elections'
 - '...voters could be misled by a party that is a "front" party or a "decoy" party – that is, a party established only for the purpose of capturing preferences and channelling them to other candidates – or a party that has a very low level of public support. The "500 rule" therefore protects the electoral process by requiring that, before a party name can be placed on the ballot-paper, its sponsors demonstrate a minimum verifiable level of public support. As a result, the "500 rule" minimises voter confusion and prevents voters from being misled by parties with no Parliamentary representation and no substantial membership.'
 - 'Without the challenged provisions, the electoral system is open to manipulation in the manner outlined above, particularly in the context of the Senate list system. The challenged provisions are therefore laws "with respect to" elections for the Senate and the House of Representatives because they have the legitimate objectives of preventing voter confusion or deception and assisting voters to make informed choices as to the person or party for whom they wish to vote'
 - 'While Parliament has power to select particular methods of voting and to enact laws to protect those methods of voting, such methods are valid only if they allow a "free choice" among the candidates for election and an "informed choice" [Langer at 317, 325]. A choice is not an informed choice "if it is made in

ignorance of a means of making the choice which is available and which a voter, if he or she knows of it, may wish to use in order to achieve a particular result” [Dawson J in *Langer* at 325]. The choice “must be a true choice ... a choice made with access to the available alternatives” [Dawson J in *Muldowney v South Australia* at 370]. Those alternatives include not only knowledge of a *means* of making a choice that is available and that the voter may wish to use in order to achieve a particular result but also *information* about the candidates among whom voters are required to choose ...’

- Mr Mulholland ‘contends that the restrictions deny voters important information by precluding the inclusion of the party name on the ballot-paper next to the name of a candidate endorsed by an unregistered party, that is, a political party which does not meet the “500 rule” and the “no-overlap rule” registration requirements.’
 - ‘The free choice of electors is not assisted by persons registering a single group of members multiple times with eye-catching “single issue” party names for the purpose of channelling preferences to other candidates. The *Constitution* accommodates the dynamic nature of the institution of representative government “by authorising the legislature to make appropriate provision from time to time” [Gummow J in *McGinty* at 280-81].’
 - ‘It is also open to the Parliament to hold the view that, important though party identification may be, the free choice of electors will be impaired and not improved by party identification of those parties which cannot or will not comply with the challenged provisions.’
 - ‘...the *Constitution* prescribes only the irreducible minimum requirements for representative government, the “500 rule” and the “no overlap rule” fall within the scope of the legislative power of the Commonwealth with respect to elections. They do not infringe the true choice or fully informed choice requirements of the *Constitution*.’

- Gummow and Hayne JJ pointed out with some irony that the precise targets of the constitutional challenge had to be chosen with care: the party needed to strike out those provisions under which it might lose its registration, while leaving intact those provisions which gave it the benefits of registration. “[620] Were the appellant to succeed on the case put as to invalidity, a real question would arise as to whether that would be but a pyrrhic victory. It would be a substantial victory only if the application of the principles of severance left standing sufficient of Pt XI of the Act to preserve the registration of the DLP and the advantages it presently obtains by registration.”

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Decision

- The provisions are valid and the appeal is dismissed; prohibition is denied

F *Elected Representatives*

Several limits are placed on the types of people who may stand for election. These qualifications have two sources:

- 1 **Constitutional limitations** (ss 34 and 44)
- 2 **Statutory limitations** (supported by s 51(xxxvi), coupled with ss 34 and 44)

An example of a statutory limitation is s 163 of the *Commonwealth Electoral Act 1918* (Cth), which imposes several requirements. To be eligible for election, a person must be:

- An Australian citizen;
- Aged more than 18 years;
- Entitled to vote; and
- Able to pay the registration fee (around \$350 for the House of Representatives and \$700 for the Senate)

The *Constitution* confers broad legislative power to regulate the qualifications of elected representatives. This power is constrained by other constitutional provisions, such as s 44, which prevents persons (otherwise eligible) from standing for election:

Section 44 — Disqualification:

Any person who —

- (i) Is under any acknowledgement of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power: or
- (ii) Is attainted of treason, or has been convicted and is 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: or
- (iii) Is an undischarged bankrupt or insolvent: or
- (iv) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth: or
- (v) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons:

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

But sub-section (iv) does not apply to the office of any of the Queen's Ministers of State for the Commonwealth [or a state], or to the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth whose services are not wholly employed by the Commonwealth.

The reasons for these disqualifying provisions are plain and are now discussed in turn.

1 '[C]itizen[s] of a foreign power'

A member cannot be expected to discharge their oath of allegiance to the Commonwealth if they hold loyalties to another country.

Sykes v Cleary (1992) HCA:

Facts

- Because Cleary's own appointment as a member for the seat of Wills was void (see below), replacement candidates had to be found; the election could not be recounted and had to be conducted afresh
- Mr Kardamitsis and Mr Delacretaz were both likely to be candidates, so the Court described their eligibility for election in some detail
- Second respondent
 - The second respondent, a Mr Delacretaz, was a Swiss national (and thus a Swiss citizen)
 - Having migrated to Australia and gained Australian citizenship in 1960, he renounced all allegiance to any sovereign or state and took an oath to 'be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, her heirs and successors according to law' and 'faithfully [to] observe the laws of Australia and fulfil [his] duties as an Australian Citizen'
 - Mr Delacretaz never relinquished his Swiss citizenship, though he only holds an Australian passport
 - The law of Switzerland provides that a Swiss citizen will be released from citizenship upon demand if he or she lives elsewhere, but Mr Delacretaz did not do this
- Third respondent
 - Mr Kardamitsis, a Greek national and citizen, migrated to Australia and became an Australian citizen taking a similar oath of allegiance
 - He also failed to make an application to discharge his Greek citizenship
 - He surrendered a Greek passport and did not travel out of Australia for several years
 - He was later issued an Australian passport and travelled to Greece for a holiday and later for family events
 - Mr Kardamitsis never voted in Greece and has never stood for office there
 - He has not made any statement that would place him under any acknowledgement of allegiance, obedience or adherence to Greece or any other foreign power
 - Greek law states that a citizen will have their nationality discharged if he or she lives elsewhere and has obtained the permission of the designated Greek Minister; discharge is effective as of the granting of permission
 - Mr Kardamitsis has made no attempt to discharge his citizenship and so is still a Greek national

Issue

- Are either of these candidates eligible for election or are they 'under any acknowledgement of allegiance, obedience or adherence to a foreign power' within the meaning of s 44(i) of the *Constitution*?

Reasoning

- Mason CJ, Toohey and McHugh JJ:
 - 'It would be wrong to interpret [s 44(i)] in such a way as to disbar an Australian citizen who had taken all reasonable steps to divest himself for herself of any conflicting allegiance.'
 - The provision intended to provide 'that members of parliament did not have a split allegiance and where not, as far as possible, subject to any improper influence from foreign governments.'
 - In a social context where many Australians were themselves migrants with dual nationality, 'it could scarcely have been intended to disqualify an Australian citizen for election to parliament on account of his or her continuing to possess a foreign nationality, notwithstanding that he or she had taken reasonable steps to renounce that nationality.'

- Second respondent:
 - He has not attempt to renounce his Swiss citizenship; had he done so, this would have been granted unconditionally (having lived in Australia for 32 years)
 - In failing to do so, Mr Delacretaz has not ‘taken reasonable steps to divest himself of Swiss citizenship and the rights and privileges of such a citizen.’
- Third respondent:
 - He failed to seek approval of the Greek Minister; it is not clear whether the Minister’s decision would be discretionary or automatically
 - In either case, failing to apply for exercise of the discretion constitutes a lack of reasonable steps
- Gaudron J (dissenting):
 - Because both respondents had been through a naturalisation ceremony in which they renounced ‘all other allegiance’, whether or not their home countries had accepted that renunciation is irrelevant

Decision

- Majority: both respondents are ineligible for election until they take reasonable steps to divest themselves of their foreign citizenships and the rights and privileges they entail
- For now, they are prima facie disqualified

Sykes v Cleary suggests that the relevant order of enquiry is as follows:

- Determine whether person X is a citizen according to the foreign country’s laws
- However, do not give absolute effect to those laws
 - Otherwise, foreign countries could effectively disqualify electors by deeming certain members of the public citizens
 - Further, some countries do not let their citizens renounce their nationality
- Person X must simply take reasonable steps to renounce their citizenship
 - What comprises reasonable steps depends on the extent of their connection with their home country; and
 - What the relevant renunciation requirements are (it must be reasonable to attempt to meet them)

The rationale for these disqualification criterion seems clear enough: if a citizen has allegiance — even a merely formal allegiance — to another nation state, a conflict of interest arises between their duty as citizen of that nation state and their duty to their electorate and to Her Majesty the Queen as Australian citizen. Such a member would not be able to properly exercise their functions as representative and could lead to the implausible (though highly impracticable) result where a person is a member of two countries’ respective parliaments.

It is, however, at least arguable that it is inappropriate to apply this exception so strictly today. In light of the fact that dual citizenship is an extremely common practice, and given the multicultural nature of Australian society, it may well be the expectation of electors that their representatives have foreign connections. Certainly, a foreign passport or citizenship is no longer a prima facie indication of allegiance, though it does usually confer certain rights and privileges. For now, though, the High Court shows no sign of altering its interpretation of s 44(i)

Note that since *Sue v Hill* at least, the United Kingdom is a foreign power for purposes of s 44(i).

2 *The treasonous and incarcerated*

It would be inappropriate for one ideologically opposed to the success of the Commonwealth to hold public office within it. Thus, persons convicted of treason are permanently barred from election.

In the case of a convicted prisoner, it would be impractical for them to attend Parliament while incarcerated. However, the disqualification lasts only so long as the prisoner 'is under sentence' and is not a permanent ban on election.

3 *Bankrupts*

It is presumed that bankrupt individuals have a tendency for corruption or mismanagement, and reasoned that it would therefore be inappropriate to appoint them to public office.

4 *'[O]ffice of profit under the Crown'*

Section 44(iv) is normally the most problematic for would-be representatives.

Sykes v Cleary (1992) HCA:

Facts

- Clear was a secondary school teacher under the employment of the Victorian Education Department
- He had been on leave largely without pay for two years
- In 1992, he nominated for election
- He was still on leave on the day of the election, 11 April 1992
- By 16 April 1992, it became clear that he would win, and so Cleary resigned from his teaching position
- The official result was announced on 23 April 1992, at which point Cleary tried to take office but Sykes, the runner up, sought to have the result overturned

Issue

- Was Cleary the holder of an 'office of profit under the Crown' within the meaning of s 44(iv) of the *Constitution*?
 - Sykes argues that s 44(iv) extends to holders of pecuniary interests conferred by the Crown through employment

Reasoning

- Although Cleary was on leave without pay, he was still permanently employed by the Crown
 - Thus, even though on leave, he held an 'office of profit'
- Cleary resigned when it seemed clear that he would win
 - Cleary argues that the declaration of the winner is the point at which a candidate must no longer hold the office, and that at such a point he no longer held the office
 - However, the Court treats the whole process of being chosen as longer than mere announcement of the winner
 - The process starts at nomination so no office could be held even at that

- early point
 - This is because it should not be possible to vote for someone who *may* not resign, and hence might not be able to sit in Parliament
 - This would be a wasted seat (the state would make the appointment) and the election might misfire
 - Therefore, although it might be hard on some individuals, the rule that no office of profit may be held must be enforced strictly
- This is an arguably unfair (or at least inconvenient) result of government employees, who as a result of this decision now have to resign their employment *before* commencing their campaign

Decision

- (7:0) Yes, Cleary was the holder of an office of profit
- (6:1) He is therefore incapable of being chosen or of sitting as a member of the House of Representatives
 - Majority: the Court must consider the whole election period

Importantly, s 44(iv) does not apply to Ministers of the state or the Commonwealth (who would otherwise need to resign before running for re-election), or the military forces. However, the *Electoral Act* does prohibit people from being dual members (ie, members of both Commonwealth and state Parliaments simultaneously). The exception does apply to public servants.

It might well be argued that this selective exclusion reflects unexpressed normative criteria. I do not pursue such an argument here.

5 *[D]irect or indirect pecuniary interest'*

Section 44(v) is phrased so as to exclude shareholders in large publicly listed companies, which may enter into contracts with the Crown. Importantly, however, this provision applies even when a representative is already elected; it prevents them from sitting if they hold such an interest as a result of s 45 of the *Constitution*, which provides for vacancy on disqualification.

In re Webster (1975) HCA:

Facts

- Between 1973 and 1974, Senator Webster was the managing director of JJ Webster Pty Ltd, a small family timber company which had entered into a number of supply contracts with the Commonwealth

Issue

- Does Senator Webster have 'any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth' within the meaning of s 44(v)?

Reasoning

- Barwick CJ (deciding alone — no interpretive authority):
 - The requirement of 'something more than a "casual or transient" contract in order to found a disqualification, springs out of the purpose of the statute, in this case the *Constitution*, creating the disqualification.'
 - '...the agreement[,] to fall within the scope of s 44(v)[,] must have a currency for a substantial period of time, and must be one under which the Crown could

- conceivably influence the contractor in relation to parliamentary affairs.’
- The application of s 44(v) should be narrowly confined: only contracts of a permanent or lasting character should be included within its scope
 - That is, ‘any agreement’ really means ‘any agreement of a permanent or continuing nature’
 - Ordinarily, the purpose of this provision would be to stop the executive from rewarding its own
 - The executive shouldn’t give preferential government contracts to members of either House
 - It also protects parliament from being illegitimately influenced by the executive

Decision

- The supply contract is insufficient to disqualify Webster from representation in the Senate
- The contracts did not create a contravention of s 44(v)

Webster has not since been the subject of challenge, though subsequent justices might well regard the implication of Barwick CJ’s qualification as improper, especially given the current government tender climate and the concern for a ‘level playing field’.

G *Hypothetical*

Issue: can Ned challenge the Act?

- 3 Is there a head of power? Yes, ss 51(xxxvi) and 30
 - (a) If so, what is its scope
 - (b) Refer to cases to determine its breadth
 - (c) Here clearly within power

- 4 Are there any express limits on the power?
 - (a) Section 51: ‘subject to this *Constitution*’ (ie, another section’s express limit)
 - (b) Section 41: judicial interpretation renders inoperative: s 41 only operates for so long as the Commonwealth does not have its own franchise Act, with respect to the people who had a vote in the first Commonwealth election in 1901 (or acquired a vote before the uniform Commonwealth franchise)
 - (c) Ned acquired his right to vote in 2002 (presumably), so s 41 does not apply to him
 - (d) Section 41 will therefore not overturn the Act’s validity

- 5 Are there any implied limits on the power?
 - (a) Limit on providing for qualifications on Parliament’s ability to determine the franchise
 - (i) Derived from ‘directly chosen by the people’ (ss 7 and 24)
 - (ii) Obiter comments: not by property ownership, education, gender, race (discriminatory limits)
 - (iii) Age not mentioned, even in obiter: but *Mullholland* (maximum age?)

- (b) An originalist could argue that 21 was the age of franchise in 1901 and that it was not contemplated that it would be further reduced
 - (i) However, flexibility is important for parliamentary regulation of the electoral system, and, after all, what Parliament can do, it can undo
 - (ii) Current conception of 'the people' is 'adults', which translates to 18 years and over or a combination of criteria
- (c) Similar to electoral sizes: the point at which a provision goes too far is difficult to identify because there is a spectrum of allowable discretion (Stephen J, Mason J)
 - (i) Is s 25 beyond that limit? No guidance is provided by the judges in *McKinlay's Case*
 - (ii) It would have to be a kind of 'manifest abuse' (though that term is not specifically adopted in the case law)
 - (iii) This may be compared with the reasons for parliament legislating electoral boundaries: the Court doesn't evaluate the reasons for a law (it is sufficient that the *Constitution* doesn't prohibit the law)

6 Conclusion

- (a) Difficult to know how the Court would approach this
- (b) It wouldn't just assess the normative worth of the legislation
- (c) It would consider the text and structure of the *Constitution* to discern limits on legitimate parliamentary control over the electoral system — some point at which members can no longer be said to be 'directly chosen by the people' such that the exercise of power no longer falls within the scope of s 51(xxxvi) and is indeed contrary to ss 7 and 24